OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 May 1990 *

Mr President,
Members of the Court,

1. By two orders for reference made by the Tribunal administratif (Administrative Court), Papeete, in French Polynesia, the Court of Justice is for the first time requested to give a preliminary ruling by a court of an overseas territory associated with the Community.

2. It is also called upon to interpret for the first time Articles 132(5) and 135 of the Treaty and Article 176 of Council Decision 86/283/EEC of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community, adopted in pursuance of Article 136 of the Treaty (Official Journal 1986 L 175, p. 1).

3. It is true that, in its judgment in Case 65/77 *Razanatsimba* [1977] ECR 2229, the Court has already interpreted Article 62 of the Convention entered into between the African, Caribbean and Pacific States, on the one hand, and the European Economic Community, on the other hand, signed in Lomé on 28 February 1975 and published as an annex to Council Regulation (EEC) No 199/76 of 30 January 1976 (Official Journal 1976 L 25, p. 1).

4. Article 62 is to the Lomé Convention what Article 176 is to Council Decision 86/283, but the two provisions are not identical in scope. Moreover, the main question raised in the present case was not dealt with in the abovementioned case.

5. As regards the facts underlying the main proceedings, it is sufficient to recall that Mr Peter Kaefer, a German national (Case C-100/89), entered French Polynesia as a tourist and would have liked to obtain a residence permit. The competent administrative authorities refused to grant him such a permit, relying on a provision pursuant to which a visa issued for the purpose of tourism may not be converted into a residence permit locally. Mr Kaefer therefore brought an action before the Papeete administrative court claiming essentially that Article 176 of Council Decision 86/283 gave him the right to establish himself in that territory.

6. Mr Andréa Procacci (Case C-101/89) arrived on Polynesian territory holding a Swiss passport. After the expiry of his tourist's visa he made no application to regularize his situation. He maintains that he has carried on various activities in Polynesia, in particular as a sign-writer. He was questioned in connection with road traffic offences, and charged with several other offences, in particular for unauthorized residence, failure to possess a trading licence and to enter his name in the commercial register. The High Commissioner of the Republic ordered his deportation from the territory and Mr

* Original language: French.

Procacci applied to the administrative court, claiming also to have Italian nationality and relying on Community law.

7. Before examining the substance of the question submitted by the Papeete administrative court, which is identical in both cases, I must consider whether the Court has jurisdiction to reply to it.

The jurisdiction of the Court

8. The United Kingdom maintains that the administrative court in Papeete is not a 'court or tribunal of a Member State' to which Article 177 of the EEC Treaty might apply and that, accordingly, the Court of Justice does not have jurisdiction to give a preliminary ruling in this case.

9. The United Kingdom submits in this connection that the provisions of Article 227(3), which relate to the overseas countries and territories, should be contrasted with the provisions of Article 227(2), which relate to the French overseas departments. In the former case, there is no general application of the provisions of the EEC Treaty and its secondary law, as there is in the latter case. [1] Article 227(3) in fact provides that

'the special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex IV to this Treaty'.

10. In the United Kingdom's view, it is also clear from the terms of both Article 227(3) and Articles 131 to 136 *bis* of the EEC Treaty that Part Four of the EEC Treaty constitutes a *lex specialis* which is applicable to the overseas countries and territories, to the exclusion of the other provisions of the Treaty, except where such provisions are incorporated by reference (such as, for example, the chapter on establishment incorporated by reference in a qualified way by the terms of Article 132(5)). It is therefore clear, in the United Kingdom's view, that Article 177 does not apply to the courts of overseas countries and territories.

11. Like the Commission, I acknowledge that one may doubt whether a court of an overseas country or territory may refer questions for a preliminary ruling to the Court, particularly since Article 227(2) expressly provides that, with regard to overseas departments, 'the general and particular provisions of this Treaty relating to . . . the institutions', shall appply, whereas no such provision is to be found in paragraph 3, which deals with overseas countries and territories.

But, on the other hand, it must be noted that this did not prevent the authors of the Treaty from conferring competences on the Council and the Commission, both in Part Four of the Treaty and in the implementing convention annexed thereto. This is true in particular of the second paragraph of Article 136, which provides that, before the expiry of the implementing convention annexed to the Treaty, which determines for an initial period of five years the details of and procedure for the association of the overseas countries and territories with the Community,

'the *Council* shall, acting unanimously, lay down provisions for a further period, on the

1 — See the judgment in Case 148/77 *Hansen* [1978] ECR 1787.

basis of the experience acquired and of the principles set out in this Treaty'.

12. If the authors of the Treaty had really set out from the principle that the provisions of the Treaty relating to the institutions were totally inapplicable as regards the 'special arrangements for association' in the case of overseas countries and territories, they would have stipulated that the measures referred to in the second paragraph of Article 136 were to be implemented by way of a new Treaty or protocol to be negotiated by the Member States and ratified by the national parliaments.

13. Moreover, it should be noted that, as the Court held in its judgments in Case 181/73 *Haegeman* v *Belgium* [1974] ECR 449 and Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719, and more particularly at p. 3750,

'an agreement concluded by the Council under Articles 228 and 238 of the Treaty is, as far as the Community is concerned, *an act of one of the institutions of the Community* within the meaning of Article 177(b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.'

14. Now, this must apply *a fortiori* in the case of a decision adopted unilaterally by the Council in pursuance of a provision of the Treaty, in this case Article 136.

15. The preliminary question must also be raised by a 'court or tribunal of a Member State' (second paragraph of Article 177). A court of a non-member country, for example a signatory State of the Lomé Convention, could clearly not raise such a question. In the present case, it has not, however, been disputed that the administrative court in Papeete is such a court under the French legal system. This is clear, in particular from Articles 2, 72 and 74 of the Constitution of the French Republic and from the Law of 6 September 1984 regulating the status of the territory of French Polynesia,[2] Article 1 of which provides that

'... the territory of French Polynesia constitutes ... an overseas territory having internal autonomy within the framework of the Republic'.

By virtue of Article 3 of that law, the French State retains competence in the administration of justice and judicial organization. Finally, that law establishes an administrative court for French Polynesia based in Papeete[3] whose status is similar to that of an administrative court located in metropolitan France.[4] In actions alleging a misuse of powers an appeal must be brought before the Council of State, in other actions, before the Administrative Court of Appeal in Paris.

16. I also agree with the Commission that it is indeed necessary that the court in question should be a 'court or tribunal of a Member State', but that this factor

2 — Law No 84-820 of 6 September 1984 regulating the status of the territory of French Polynesia (*Journal officiel de la République française*, 7.9.1984, p. 2831.

3 — Articles 98 to 102 of the Law of 6 September 1984, cited above.

4 — See R. Chapus: *Droit du contentieux administratif*, Paris, éd. Montchrestien, 1982, pp. 16 to 20 and P. Schultz: *Contentieux administratif français d'outre-mer*, Juris-Classeur administratif d'outre-mer, fascicule 780, updated in 1989.

'is not sufficient in itself to establish the jurisdiction of the Court of Justice. In fact, the concept of court of a Member State, within the meaning of the second and third paragraphs of Article 177 of the Treaty, must be interpreted in the light of its structure and purpose. To this end it can only refer to a court deciding a case arising in a part of the territory of a Member State covered by the provisions of Community law. ... Although the totality of the substantive EEC Treaty provisions are not applicable to overseas countries and territories, that does not preclude the latter from being governed by the Treaty as regards the specific arrangements for their association with the Community'.

17. The court making the reference has in fact referred to the Court of Justice a question concerning the interpretation of some of the provisions governing the special arrangements for association, namely Article 176 of Council Decision 86/283 of 30 June 1986 and, secondarily, Articles 132(5) and 135 of the EEC Treaty.

18. For all those reasons, I consider that the Court of Justice does have jurisdiction to rule upon the question referred to it by the Administrative Court in Papeete.

The substance

19. Before the Administrative Court, Mr Kaefer and Mr Procacci maintained that the decisions refusing to grant a residence permit to the former and ordering the deportation of the latter were adopted in disregard of the provisions of Community law and, in particular, of Article 176 of the abovementioned Council Decision.

20. In both cases the Administrative Court therefore referred to the Court of Justice the same question, namely:

'Must the scope of Article 176 of the Decision of 30 June 1976 of the Council of the European Communities [5] be considered, having regard in particular to the stipulations in Articles 132(5) and 135 of the Treaty of 25 March 1957 establishing the European Economic Community, to extend to decisions of any kind which the State authorities having exclusive competence may take on matters concerning the entry into and residence in the territory of French Polynesia of aliens who are nationals of the Member States of the European Economic Community and, if so, are the nature, arrangement and terms of the provisions or stipulations in question such as to be capable of producing direct effect in relations between addressees of the act and third parties?'

21. I will examine the two limbs of this question in turn.

A — *The scope* ratione materiae *of Article 176*

22. The first limb of the question seeks in essence to ascertain whether the competent French authorities may, *vis-à-vis* nationals of other Member States, still adopt measures such as a refusal to grant a residence permit or deportation, regard being had to the provisions of Articles 132(5) and 135 of the Treaty establishing

5 — It is clear from the preceding paragraph of the judgment that Article 176 is meant.

the EEC, and the provisions of Article 176 of Council Decision 86/283.

23. As to the reply to be given to this question, I entirely share the point of view expressed by the United Kingdom, the French Government and the Commission.

24. Article 135 of the Treaty provides that:

'Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States.'

25. Since it is common ground that no agreement of this kind has been entered into, nationals of the Member States may not rely on Community law to claim the right to enter into and stay in an overseas country or territory in order to take up and carry on salaried employment there.

26. Article 132(5) of the Treaty provides that:

'In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 136.'

27. At the time of the facts underlying the main proceedings, 'special provisions laid down pursuant to Article 136' were in force. Those provisions are contained in Article 176 of Council Decision 86/283, which provides as follows:

'As regards the arrangements that may be applied in matters of establishment and provision of services, the relevant authorities of the countries and territories shall treat nationals and companies or firms of Member States on a non-discriminatory basis. However, if, for a given activity, a Member State is unable to provide similar treatment for nationals or companies or firms of the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands or the United Kingdom of Great Britain and Northern Ireland, established in a country or territory, or for companies, or firms subject to the laws of the country or territory concerned and established therein, the relevant authorities of that country or territory shall not be bound to accord such treatment.'

28. It is clear from those provisions considered together that in overseas countries and territories a right of entry and residence may be claimed by nationals of other Member States only for the purpose of engaging in a self-employed activity, if the conditions provided for in the article which I have just quoted are satisfied.

29. The only obligation on the competent authorities of the countries and territories is to treat nationals and companies or firms of other Member States 'on a non-discriminatory basis', that is to say to apply to them the same conditions as they apply to persons and companies which have the nationality of

the State with which those countries and territories maintain special relations.

30. The competent authorities are therefore entitled to require nationals of other Member States to possess all the professional qualifications, in particular diplomas, which are required of nationals who wish to carry on the same self-employed activity or engage in the same supply of services. Moreover, if in a country or territory access by citizens from mainland France to certain occupations or to the provision of services is subject to special restrictions, or even prohibited, those same restrictions or prohibitions may be applied to nationals of other Member States. One of those restrictions might be the requirement to be in possession of a settler's permit before setting foot on the territory in question.

31. The right of nationals of other Member States to establish themselves in the country or territory, or to provide services there, is, moreover, subject to the condition of reciprocity which is referred to at the end of Article 176 and to which I shall return later on.

32. It is therefore clear from all the foregoing that Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973 L 172, p. 14) does not apply in the overseas countries and territories.

33. I propose therefore that the Court reply as follows to the first limb of the question:

'Neither Articles 132(5) and 135 of the Treaty nor Article 176 of Council Decision 86/283 of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community may be considered to extend to decisions of any kind which the relevant authorities may take on matters concerning entry into and residence in an overseas territory of nationals of other Member States. In overseas countries and territories, a right of entry and of residence can be claimed by nationals of other Member States only for the purpose of carrying on a self-employed activity, subject to the conditions provided for in the abovementioned Article 176.'

B — *Is Article 176 of such a nature as to confer rights on individuals which they may invoke before the courts?*

34. Although the second limb of the question is asked only in the event that the Court should reply in the affirmative to the first question, it seems to me appropriate to reply to it, given that one of the applicants has claimed that he wishes to carry on a self-employed activity in French Polynesia.

35. According to the United Kingdom, it is clear from the judgment in Case 26/62 *Van Gend and Loos* [1963] ECR 3, in particular at p. 12, that the concept of direct effect in Community law is based on the Treaty objective of ensuring economic integration in a common market; yet no similar basis is to be found in the objectives of Part Four of the Treaty. Therefore, that part and Council

Decision 86/283 do not have direct effect before the courts of French Polynesia.

36. I agree that the judgment in *Van Gend and Loos* does follow the reasoning indicated by the United Kingdom and recalled in greater detail in the Report for the Hearing.

37. Nevertheless, since the time of that judgment the Court has held, with regard to the association agreement signed in 1963 by the European Economic Community and Turkey, that:

'A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.' [6]

38. Yet, even if that agreement seeks to establish in due course a customs union between the EEC and Turkey, it cannot be said to have the purpose of establishing, in the words of the judgment of *Van Gend and Loos*,

'a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.

6 — Judgment in Case 12/86 *Demirel*, mentioned above at p. 3752, paragraph 14.

39. Moreover, in the judgment in *Razanatsimba* mentioned above, which related to the Lomé Convention, that is to say an agreement with non-member countries not intended to create a customs union, the Court held that Article 62 of that Convention did not give a national of an ACP State the right to establish himself in the territory of a Member State of the EEC, without any condition as to nationality, in so far as the right to practice professions reserved by the legislation of that State to its own nationals was concerned.

40. The Court thus examined the actual scope of the article relied on by the applicant in the main proceedings, and it did not itself rule out the possibility that the Lomé Convention could confer on individuals (even nationals of an ACP country) rights which have to be upheld by the courts.

41. It may therefore be concluded that the judgment in *Van Gend and Loos* must be placed in its proper context. It was the first affirmation of the principle of direct effect and concerned a Treaty provision. Since then the Court has had the opportunity of examining the question of direct effect in relation to agreements concluded by the Community with non-member countries. It has gone on to acknowledge that rights enuring to the benefit of individuals may also arise from certain obligations imposed on Member States by an agreement which does not establish a new legal order. This applies *a fortiori* when the instrument concerned is not an agreement concluded with non-member countries but, as in the present case, a Council decision.

42. I may therefore examine the terms of Article 176 to see whether that article satisfies the criteria laid down in particular in the judgment in *Demirel*.

43. In this connection, the French Government and the Commission refer to the numerous judgments in which the Court has held that to have direct effect the provision must be clear, sufficiently precise and unconditional. They claim that the obligation imposed by Article 176 on the competent authorities of the overseas countries and territories is not unconditional since it is made subject to a condition of reciprocity.

44. For my part, however, I am of the view that, in using the term 'unconditional provision' the Court was referring to provisions which leave no margin of appreciation to the authorities charged with their application, enabling the latter to impose conditions on, or to restrict, their scope.

45. The first sentence of Article 176 of the Council Decision confers on its addressees, namely the competent authorities in the overseas countries and territories, no margin of appreciation as to the application of the principle of non-discrimination once the conditions laid down by that article are satisfied. As regards the condition of reciprocity, it is not open to those same authorities to avail themselves of it. It is satisfied, or not satisfied, as the case may be, by the other Member States.

46. In other words, I consider that the derogation from the rule of non-discrimination, which may arise from the non-fulfilment of the condition as to reciprocity, has only a 'contingent' nature which is not capable of calling in question the direct effect of the rule itself. By way of analogy I refer to the judgment of the Court in Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino* [1989] ECR 3233, paragraph 32, in which the Court considered that that was also true of the exception, provided for in the second subparagraph of Article 4(5) of the Sixth Directive on VAT, to the rule that activities carried on by public-law bodies in their public capacity are not chargeable to VAT, in cases where treatment as non-taxable persons would lead to significant distortions of competition.

47. In the case now before us a Netherlands national for example must, in my view, be allowed to argue before the relevant authorities or courts of French Polynesia that a person originating in that territory is entitled to carry on in the Netherlands the same self-employed occupation as that which the national in question would like to carry on in Polynesia, provided that that person satisfies all the requirements demanded of Netherlands citizens (save, of course, for nationality).

48. The burden of proving that matter rests on the applicant. He may discharge it for example by producing a document from a competent authority in the Netherlands or by placing reliance on a Community directive on the mutual recognition of diplomas regarding the occupation in question, where that directive — as always seems to be the case — draws no distinction between nationals of other Member States on the basis of whether they originate in the metropolitan territory of a Member State or in an overseas country or territory which is a dependency of that Member State.

49. The Commission has in fact brought infringement proceedings against France (Case C-263/88 [1990] ECR I-4611) because that Member State had not adopted the measures necessary in order to enable

nationals of another Member State, who hold the relevant French diploma required to establish themselves or to provide services as a doctor, nurse responsible for general care, midwife or dental and veterinary practitioner in the overseas territory of French Polynesia, following the adoption of Community directives providing for the mutual recognition of diplomas, certificates and other qualifications in those five occupations. The Commission does not maintain that those directives are applicable in that territory, but that it is to be inferred from them that the other Member States are required, in accordance with the relevant substantive and formal conditions laid down, to recognize French diplomas, in the same way as those issued by another Member State, held by a national of the French Republic, without being entitled to attach thereto any condition as to the place of establishment of that national.

50. In my Opinion delivered today in Case C-263/88, I have proposed that the Commission's application should be allowed.

51. I would recall once again that Article 132(5) of the EEC Treaty provides that:

'In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 136.'

52. The special provisions adopted in pursuance of Article 136 relate solely to the situation of a national of a Member State who is desirous of establishing himself in an overseas country or territory. That is precisely the purpose of Article 176 in issue in this case.

53. Article 132(5) remains to this day the only provision which deals with the problem of freedom of establishment as between the overseas countries and territories and the Community. Since that article refers to the provisions and procedures of the chapter relating to the right of establishment, I consider myself entitled to conclude that the directives which have been adopted on that basis, which do not exclude from their scope persons thitherto established in an overseas country or territory, may be relied upon by such persons.

54. Provided that such a directive has been adopted, a French citizen from Polynesia is therefore entitled to establish himself in all the other Member States by producing a French diploma. That applies *a fortiori* if he is the holder of the diploma provided for by the legislation of the country in which he wishes to establish himself. (Since Article 132(5) refers to the Chapter on freedom of establishment, it may even be inquired whether, in the last-mentioned situation, he has not already acquired the right of establishment since the end of the transitional period, on the basis of the judgment in Case 2/74 *Reyners* [1974] ECR 631. If that were the case, the condition of reciprocity, which did not feature in Article 8 of the Implementing Convention on the Association of Overseas Countries and Territories annexed to the EEC Treaty, was inserted into Article 176 by inadvertence, probably merely in order to establish a certain parallelism with the Yaoundé and Lomé Conventions, whereas in those agreements it has a quite different scope, as

may be seen from the aforementioned judgment in *Razanatsimba*. But it is not necessary to go into that question here.)

55. On the other hand, as I have already pointed out, a national of another Member State may claim a right of establishment in an overseas country or territory that is a dependency of, for example, France, only if he holds a French qualification.

56. Contrary to the submission of the French Government, the right of French nationals established in an overseas country or territory to establish themselves in the territory of the other Member States is therefore no longer at the discretion of the latter once a directive has been adopted. In particular, that right may not vary over time, according to the will of those Member States.

57. In sum, I therefore consider that a national of a Member State must be entitled to demonstrate to the relevant authorities or the courts of an overseas country or territory that the condition of reciprocity is complied with as regards the Member State whose nationality he holds and, consequently, to rely on the non-discrimination rule contained in Article 176 of Council Decision 86/283.

Conclusion

58. For all the reasons set out above, I propose that the Court should reply as follows to the question posed by the Papeete Administrative Court:[7]

'(1) Neither Articles 132(5) and 135 of the Treaty nor Article 176 of Council Decision 86/283/EEC of 30 June 1976 on the association of overseas countries and territories with the EEC may be regarded as extending to decisions of any kind which may be taken by the competent authorities as regards the entry and residence of nationals of other Member States in an overseas territory. In the overseas countries and territories, the right to enter and reside may be claimed only by the nationals of other Member States for the purpose of carrying on an activity as a self-employed person under the conditions provided for in Article 176 mentioned above.

(2) Article 176 of Council Decision 86/283/EEC of 30 June 1986 on the association of overseas countries and territories to the EEC must be interpreted as meaning that the non-discrimination rule which it lays down may be relied upon before the competent authorities of a country or territory by a national

7 — Since the main dispute concerns individuals and not companies, I have not dealt with this aspect of Article 176.

of a Member State other than that with which that country or territory maintains special relations, who wishes to carry on there a specific activity as a self-employed person, or to go there to provide services of a specific type, and that a request to that effect must be granted, if the person in question satisfies all the conditions required to be fulfilled, as regards the self-employed activity or the provision of services by nationals of the Member State with which the country or territory maintains special relations who are not established in that country or territory, and if it is undisputed that in the Member State of which that person is a national the same treatment is provided to persons thitherto established in the country or territory in question and having the nationality of the Member State with which that country or territory maintains special relations.'