courts use it appropriately and with due respect for the draconian conditions prescribed in *CILFIT*. Presumably, the Italian Supreme Court in *Traghetti* availed itself of this exception to the letter of Article 234 EC when it refused to make a reference on the interpretation of the relevant EC Competition Law provisions. On the basis of the *Traghetti* judgment, it is now evident that member states can be made liable in damages when their supreme courts give or endorse a manifestly incorrect interpretation of EC Law. It is therefore to be expected that this very real threat will increase the willingness of these courts to refer unless there is an unmistakably clear precedent in the case law, something likely to be a rare occurrence given the generally complex factual and legal backgrounds of competition cases. Once more, the Court has construed the principle of State liability not only as a vehicle to protect individual rights but also as the ultimate indirect mechanism to secure Member States' compliance with their Community obligations.

ALBERTINA ALBORS-LLORENS

THAWING OUT? THE EUROPEAN COURTS AND THE FREEZING OF TERRORIST ASSETS

AFTER the attack on the World Trade Center, the United Nations Security Council adopted Resolution 1373 (2001) laying down strategies to combat terrorism. Paragraph 1(c) of that resolution provides, *inter alia*, that all States must freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.

The European Union implemented that Resolution by setting up a system where a list is maintained of "persons, groups and entities involved in terrorist acts" as determined by a "competent authority". The EC Member States are then to ensure that the funds and other financial assets or economic resources of those listed are frozen and that funds, financial assets or economic resources or financial or other related services will not be made available for their benefit. The list is reviewed at least once every six months to check whether grounds remain for keeping the relevant people and organisations on it.

Unsurprisingly, these measures have been the subject of legal challenges seeking to argue that a name had been placed on the list

in error. The important cases of *Yusuf* (Case T-306/01, [2005] E.C.R. II-3533) and *Kadi* (Case T-315/01, [2005] E.C.R. II-3639) have been discussed previously in this journal (Garde [2006] C.L.J. 281): they raised the prospect of EC regulations implementing UN Security Council Resolutions being effectively unreviewable in EC law (assuming that the EC had the internal competence to adopt such regulations), even in the face of fundamental rights objections. The Charter of the UN was held to prevail over any inconsistent "domestic" rules and it would thus have been inappropriate to subject the obligations imposed by the UN Resolution to review against domestic fundamental rights standards. This was because the implementation of the Resolution left no discretion to the EC: in these cases, the lists were created at the level of the UN Security Council's Sanctions Committee and the EC's action served as a mere conduit to give them effect within the EC legal order.

However, the more recent Court of First Instance ("CFI") judgment in Case T-228/02 *OMPI* v. *Council of the European Union* (18 December 2006) suggests that, where some EC discretion does exist, the CFI will scrutinise EC action more intensively: under Security Council Resolution 1373, the obligation on UN member states is to secure the freezing of those assets, *but* it is up to those states themselves (or, here, the EU, through its Council) to specify those who go on the relevant list. Thus, the CFI annulled the Council's decision to add the Organisation des Modjahedines du peuple d'Iran ("OMPI") to that list because the Council had failed to communicate to the OMPI the reasons for adding it to the list contemporaneously with the decision to do so: this failed to provide OMPI with the means to ensure its right to a fair hearing and also breached the Article 253 EC requirement that reasons be given for the adoption of EC acts. This judgment is a welcome acknowledgment of the need for the availability of judicial review in such cases, but it also contains some more worrying elements. First, since the Council had considerable discretion in deciding to place a name on the list, judicial review would be very limited (covering only procedure, the accuracy of material facts and misuse of power) (at [159]). This does not bode well for arguments based upon the right to quiet enjoyment of one's possessions (under Article 1 of the First Protocol to the ECHR). Second, even after the pleadings and the oral hearing, the CFI still found that it was "not in a position to review the lawfulness of the contested decision" due to the Council's inability to provide coherent information as to which was the relevant decision of the "competent authority" which led to the listing of the OMPI ([166]-[172]). This is a damning indictment of the way in which the listing system operates in practice.

Case C-229/05 *PKK and KNK* v. *Council of the European Union* (18 January 2007) involved the PKK (the Kurdish Workers' Party), which had been placed on the list on 2 May 2002. However, the Congress of the PKK had decided that all activities under the name of "PKK" would cease as of 4 April 2002. Instead, a new group called KADEK (Kurdistan Freedom and Democracy Congress) was set up to pursue Kurdish political objectives. An umbrella organisation called the KNK (Kurdistan National Congress) had also long existed, counting the PKK among its members. Before the CFI, both applications (one on behalf of the PKK and the other on behalf of the KNK) were rejected as inadmissible. On appeal, the European Court of Justice ("ECJ") remitted the PKK application to the CFI to rule upon its substance, since it was clear on the evidence that the PKK continued to exist under the name KADEK and thus was an appropriate applicant. With regard to the KNK application, however, the very strict standing requirements under Article 230 EC were fatal: "[i]f the KNK runs the risk of having its funds frozen, that is by virtue of an objectively defined prohibition which applies in the same way to all persons subject to Community law" (at [73]). Thus, the test for individual concern laid down in *Plaumann* (Case 25/62, [1963] E.C.R. 95) and confirmed in *UPA* (Case C-50/00 P, [2002] E.C.R. I-6677) was not satisfied. The ECJ also rapidly dismissed the applicant's subsequent argument that the application of this test for *locus standi* would not respect the KNK's fundamental rights under the ECHR (at [75]ff.). The KNK complained that it might *become* a "victim" for the purposes of the ECHR were its assets frozen due to its links with the PKK or KADEK, but since the KNK itself did not feature on the relevant list, it was not a victim and so could not claim to assert ECHR rights. The ECJ's approach is interesting, since it explicitly went on to examine whether or not any incompatibility could be established between the criteria for *locus standi* under Article 230 EC and the requirements of the ECHR, rather than side-stepping the issue as in *UPA*. Yet one wonders whether this point would have received such emphasis had the ECJ's analysis meant that it was likely to conclude that a breach of the ECHR would have resulted.

These relatively new instruments clearly have great potential to choke off the supply of funds to terrorists, but they have also been shown to be capable of having far-reaching implications for fundamental rights and for the integrity of the EC (and, indeed, EU) legal order. The ECJ's judgment on the appeal in *Yusuf* and *Kadi* is expected during 2007. The possibility remains that a national court may, in order to protect fundamental rights, be willing to exercise tighter jurisdictional control than the Community courts over EU measures taken to implement UN Security Council Resolutions. This

may itself have implications for the delicate constitutional balance between the EC legal order and its application at the national level.

ANGUS JOHNSTON

SAFE UNTIL PROVEN HARMFUL? RISK REGULATION IN SITUATIONS OF SCIENTIFIC UNCERTAINTY: THE GMO CASE

IN 2003, the USA, Canada and Argentina requested consultations with the European Communities ("EC") concerning certain measures taken by the EC and its Member States. They asserted that the moratorium applied by the EC on the approval of genetically modified organisms ("GMOs") had restricted imports of agricultural and food products. They also claimed that a number of EC Member States (Austria, Germany, France, Italy, Greece and Luxembourg) maintained national marketing and import bans on biotech products even though those products had already been approved by the EC itself. The focal point of the discussion exposed the major difference in approach between the USA and the EC as to the proper regulation of GMOs. After the consultations failed, the World Trade Organisation Dispute Settlement Body established a Panel in August 2003.

The completion of the reports was several times delayed, in part to allow the Panel to seek scientific and technical expert advice, but on 29 September 2006, the WTO circulated its decision in excess of 1,000 pages in the "*European Communities — Measures affecting the approval and marketing of biotech products*" case (WT/DS291, WT/DS292, WT/DS293), ruling against the EC. The Panel reports were adopted by the Dispute Settlement Body in November 2006 in the absence of an appeal. The EC declared in the press that it would not appeal against the decision because it had resumed the approval of GMOs in 2004 and, therefore, most of the Panel's findings had "become theoretical" and did not in any way "affect the EU's current regulatory provisions".

The major part of the reports centered around the allegation that the EC measures violated several WTO covered agreements, more precisely certain provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), the General Agreement on Tariffs and Trade ("GATT"), the Agreement on Technical Barriers to Trade ("TBT Agreement") and the Agriculture Agreement.

The crucial preliminary issue was whether the EC procedures on the approval of GMOs (as set out in EC Directives 90/220 and 2001/18 and Regulation 258/97) could be regarded as SPS measures. This was important as the SPS Agreement, which controls the ability of States