Comments on *Gottardo* (Case C-55/00 of 15 January 2002), *Finalarte* (Case C-49/98 of 25 October 2001) and *Portugaias Construçoes* (Case C-164/99 of 24 January 2002)

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A. Application of the Principle of Equal Treatment in Bilateral Conventions Concluded by Member States with Third Countries

Case C-55/00, *E. Gottardo*, 15 January 2002

*EC law provisions interpreted:* Article 39 EC

**Facts:** Mrs Gottardo is an Italian national by birth who had to renounce that nationality in favour of French nationality following her marriage to a French national. She worked successively in Italy, Switzerland and France and was in receipt of Swiss and French old-age pensions, which were granted to her without any need for aggregation of periods of insurance. In Italy, the aggregation of periods completed in Italy and France, in accordance with Regulation 1408/71, on social security for migrant workers, did not enable her to achieve the minimum period of contributions required under the relevant legislation. Italy refused to take into account the Swiss period on the ground that she was a French national and that the Italo-Swiss bilateral convention therefore did not apply to her.

**Questions:** Does the principle of equal treatment entitle Mrs Gottardo to invoke the application of that bilateral convention even if she is no longer an Italian citizen?

**Judgment:** “The competent social security authorities of one Member State are required, pursuant to their Community obligations under Article 39 EC, to take into account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that

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Member State and the non-member country”.

Comments: The conclusion reached by the Court had already been heralded by its judgment given in Case C-307/97, Saint-Gobain ([1999] ECR I-6161), in which it ruled that the national treatment principle requires the Member State which is party to a bilateral international treaty concluded with a third country for the avoidance of double taxation to grant to permanent establishments of companies resident in another Member State the advantages provided for by the agreement on the same conditions as those which apply to companies resident in the Member State concerned.

Relying on that precedent, the Court states (para. 33) that “when giving to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligations is of no relevance in this respect”.¹

It was clear that such a conclusion reached in the case of companies was also to be applied in the case of natural persons. The judgment is nevertheless noteworthy.

Indeed, the facts in Gottardo were strikingly similar to those in Grana-Novoa ([1993] ECR I-4505). In that case, a German court had sent two requests for preliminary rulings. The first one asked whether a bilateral convention is to be regarded as a “legislation” within the meaning of Regulation 1408/71. The second one, to be answered only in case of a positive reply to the first one, as to whether Article 7 EEC (now 12 EC) and Article 3 of that Regulation (which embodies the principle of equal treatment in the Regulation) allow migrant workers to invoke the benefit of a bilateral convention between the host Member State and a third country. The full Court replied, negatively, only to the first question, so that it did not feel obliged to examine the second question.

In Gottardo, the Court overrules Grana-Novoa, for the sole reason that “the question submitted in the present case is based on application of the principles flowing directly from the provisions of the Treaty” (para. 29). Such an explanation sheds light, one more time,² on the necessity for national courts to draft carefully their requests for preliminary rulings. However, as

¹ In this regard, it can be noted that after the entry into force on 1 June 2002 of the agreement concluded by the Community with Switzerland in the area of free movement of persons, the problem encountered by Mrs Gottardo will not arise anymore (OJ L 114 of 30.4.2002, p. 480).
² See my comments on the Hocsman case in EJML 2001, pp. 257 and 270 on a very similar problem.