Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 July 2023 [1]

Case C-431/22

Scuola europea di Varese
v
PD, as person exercising parental responsibility over NG,
LC, as person exercising parental responsibility over NG

(Request for a preliminary ruling
from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Convention defining the Statute of the European Schools – Decision not to promote a pupil to the next year of study, adopted by the Class Council – Disputed by the parents – Jurisdiction of the national courts or exclusive jurisdiction of the Complaints Board of the European Schools – Effective judicial protection)

I. Introduction

1. The representatives of the six Member States of the European Coal and Steel Community (ECSC) met on several occasions in 1954 to discuss the establishment of a European school. In the course of those meetings, it was decided that those representatives would form the Council of Administration, which would assume responsibility for that school and determine the principles of its organisation. The first European School thus opened on 12 October 1954 in Luxembourg. [2] Other European Schools were subsequently established. [3] At present there are 13 European Schools with approximately 28 750 pupils.

2. One of the features of the European Schools is that they constitute a *sui generis* system having its basis in both EU law and international law. That dual nature is at the origin, inter alia, of certain questions relating to the allocation of jurisdiction between the national courts and the Complaints Board of the European Schools ('the Complaints Board') established by the Convention defining the Statute of the European Schools [4] ('the CSEE'). The present request for a preliminary ruling relates specifically to the interpretation of Article 27(2) of that convention.

1 Original language: French.

2 On the history of European Schools, see, in particular, Gruber, J., 'European Schools: A Subject of International Law Integrated into the European Law', *International Organizations Law Review*, 2011, No 8, pp. 175 to 196.

3 In Brussels (Belgium) in 1958, 1974, 1999 and 2007; in Mol (Belgium) in 1960; in Varese (Italy) in 1960; in Karlsruhe, Munich and Frankfurt (Germany) in 1962, 1977 and 2002 respectively; in Bergen (Netherlands) in 1963; in Culham (United Kingdom) in 1978; in Alicante (Spain) in 2002; and in Luxembourg (Luxembourg) in 2004. The Culham school closed permanently on 31 August 2017.

4 Convention concluded at Luxembourg on 21 June 1994 between the Member States and the European Communities (OJ 1994 L 212, p. 3).

3. The request has been made in proceedings between the Scuola europea di Varese (European School, Varese, Italy) and PD and LC, acting as legal representatives of their minor son NG ('NG's parents' or 'the parents') concerning the jurisdiction of the Italian courts to hear an action for annulment of a decision of the Class Council not to authorise NG, who was then a secondary-school pupil at that school, to be promoted to the next year.

4. The present reference for a preliminary ruling provides the Court with the opportunity to rule, first, on the extent of the jurisdiction of the Complaints Board, which is a body of an international organisation, as regards those decisions and, second, on the obligation of that board to apply the principle of effective judicial protection when interpreting the CSEE and the implementing texts to which that convention refers.

II. Legal context

A. The Vienna Convention on the Law of Treaties

5. Article 1 of the Vienna Convention on the Law of Treaties,[5] of 23 May 1969 ('the Vienna Convention'), entitled 'Scope of the present Convention', provides that that convention is to apply to treaties between States.

6. Article 3 of that convention, entitled 'International agreements not within the scope of the present Convention', provides:

'The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

…

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

…'

7. In the words of Article 31 of that convention, entitled 'General rule of interpretation':

'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[5] *United Nations Treaty Series*, Vol. 1155, p. 331.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

…'

B. The CSEE

8. The second paragraph of Article 1 of the CSEE provides that 'the purpose of the Schools is to educate together children of the staff of the European Communities'.

9. In the words of Article 27 of the CSEE:

'1. A Complaints Board is hereby established.

2. The Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction.

The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools.

3. The members of the Complaints Board shall be persons whose independence is beyond doubt and who are recognised as being competent in law.

Only persons on a list to be compiled by the Court of Justice of the European Communities shall be eligible for membership of the Complaints Board.

4. The [Statute] of the Complaints Board shall be adopted by the Board of Governors, acting unanimously.

The Statute of the Complaints Board shall determine the number of members of the Board, the procedure for their appointment by the Board of Governors, the duration of their term of office and the financial arrangements applicable to them. The Statute shall specify the manner in which the Board is to operate.

5. The Complaints Board shall adopt its rules of procedure, which shall contain such provisions as are necessary for applying the Statute.

The rules of procedure shall require the unanimous approval of the Board of Governors.

6. The judgments of the Complaints Board shall be binding on the parties and, should the latter fail to implement them, rendered enforceable by the relevant authorities of the Member States in accordance with their respective national laws.

7. Other disputes to which the Schools are party shall fall within national jurisdiction. In particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article.'

C. The General Rules of the European Schools

10. Article 61(1) of the General Rules of the European Schools, in version No 2014-03-D-14-en-11, which is applicable to the facts of the dispute in the main proceedings ('the 2014 Rules'), provides that, in the secondary school, decisions on promotion to the year above are to be taken at the end of the school year by the relevant Class Council.

11. In the words of Article 62 of the 2014 Rules, entitled 'Appeals against decisions on repeating a year':

'1. Pupils' legal representatives shall have no right of appeal against Class Council decisions except in cases of procedural irregularity or recognition of new facts by the Secretary-General, on the basis of a file provided by the school and the pupil's legal representatives.

Procedural irregularity means any infringement of a rule of law pertaining to the procedure to be followed for promotion to the year above, such that if it had not been committed, the Class Council's decision would have been different.

Failure to provide assistance in the form of the pupil's integration into the Educational Support programme shall not constitute a procedural irregularity, unless it can be demonstrated that the pupil or his/her legal representatives sought such assistance and that it was improperly refused by the school.

It shall be the schools' responsibility to make practical organisational arrangements for examinations and the said arrangements cannot be regarded as a procedural irregularity.

New fact means any element which might not have been brought to the Class Council's attention because it was unknown to all – teachers, parents, pupil – at the time of its deliberation and which might have influenced the purport of its decision. A fact of which the parents were aware but which was not brought to the Class Council's attention cannot be described as a new element as meant by this provision.

The Class Council shall have sole discretionary power in respect of assessments of pupils' abilities, the award of a mark for an examination, test or a piece of work done during the school year and assessment of the particular circumstances referred to in Article 61.B-5. Appeals may not be lodged against these assessments.

2. The deadline set for the lodging of an appeal with the Secretary-General shall be seven calendar days after the end of the school year. …

…

The Secretary-General (or, by delegation, the Deputy Secretary-General) must give a ruling on the appeal by 31 August. Articles 66 and 67 of these Rules shall be applicable. Should the appeal be deemed admissible and well founded, the Class Council shall reconsider the case.

An administrative appeal may also be lodged with the Secretary-General against the new decision …'

12. Article 66 of the 2014 Rules, entitled 'Administrative appeals', provides:

'1. The decisions referred to in [Article 62] may be the subject of an administrative appeal under the conditions laid down in [that article]. …

…

5. The decision of the Secretary-General, ruling on an administrative appeal, shall be notified to the applicant(s) …'

13. Article 67 of the 2014 Rules, entitled 'Contentious appeals', provides:

'1. Explicit or implicit administrative decisions taken on the appeals referred to in the previous article may be the subject of a contentious appeal by pupils' legal representatives, directly affected by the disputed decision, before the Complaints Board provided for in Article 27 of the [CSEE].

…

4. On pain of being declared inadmissible, all contentious appeals must be lodged within two weeks of notification or publication of the disputed decision …

5. The appeals provided for in this article shall be investigated and judged in the conditions laid down by the Rules of Procedure of the Complaints Board.

6. The Complaints Board is required to give a ruling within six months of receipt of an appeal, without prejudice to application of Articles 16, 34 and 35 of the Rules of Procedure of the Complaints Board of the European Schools, which provide for the possibility of lodging an appeal in summary proceedings.'

D. Italian law

14. In the words of Article 41 of the codice di procedura civile (Code of Civil Procedure):

'While the case has not been determined as to its substance at first instance, any party may request the Combined Chambers of the Court of Cassation to settle questions of jurisdiction …'

III. The dispute in the main proceedings

15. On 25 June 2020, the parents of NG, who was then a secondary-school pupil at the European School of Varese, were notified of the decision of the relevant Class Council not to authorise NG to be promoted to the year above.

16. On 20 July 2020, NG's parents brought an action before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) for annulment of that decision.

17. By order of 9 September 2020, that court declared that it had jurisdiction to hear that action, granted the application for interim measures made to it 'for the purposes of the conditional admission [of NG] to the year above' and adjourned consideration of the substance of the case to a hearing on 19 October 2021.

18. On 13 October 2021, the European School of Varese submitted an application to the Combined Chambers of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), on the basis of Article 41 of the Code of Civil Procedure, for a preliminary ruling on the question of jurisdiction, seeking a declaration that the Italian courts had no jurisdiction to determine the dispute in question. The school maintained that the Complaints Board has exclusive jurisdiction in that respect, under Article 27 of the CSEE in conjunction with Article 67(1) of the 2014 Rules.

19. The parents and the public prosecutor contend, on the other hand, that the Italian courts have jurisdiction to determine the dispute in question, since, in particular, pursuant to Article 27 of the CSEE, the exclusive jurisdiction of the Complaints Board is limited to acts having an adverse effect adopted by the Board of Governors of the European Schools ('the Board of Governors') or by the Administrative Board of the school. In their submission, in those circumstances, an extension of the jurisdiction of the Complaints Board to acts adopted by a Class Council constitutes an amendment of the CSEE, which can be carried out only in accordance with the procedure laid down in Article 31(4) of that convention. They maintain that the possibility of lodging a contentious appeal before the Complaints Board, provided for in Article 67(1) of the 2014 Rules, therefore establishes a mere *option*, for the pupil's legal representatives, to choose an administrative appeal, which may be followed by a judicial appeal before that board. They claim that the Complaints Board's jurisdiction is not exclusive, however, as the legal representatives also remain free to institute proceedings directly before the relevant national courts.

20. Called upon to rule on the preliminary issue of the jurisdiction of the Italian courts raised by the European School of Varese, the Corte suprema di cassazione (Supreme Court of Cassation) observes, first of all, that it follows from the case-law of the Court of Justice that the latter has jurisdiction to give a preliminary ruling on the interpretation of the CSEE and of the acts adopted on the basis of that convention. [6]

21. The referring court states, moreover, that it has already ruled, in a judgment of 15 March 1999, [7] in favour of the jurisdiction of the Italian courts, in circumstances comparable to those that characterise the dispute now pending before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy). In that judgment, it held that the second paragraph of Article 6 and Article 27(1), (2) and (7) of the CSEE provide that the Complaints Board is to have jurisdiction not in respect of acts adopted by a Class Council but only in respect of acts having an adverse effect adopted by the Class Council or the Administrative Board of a European School.

22. The referring court observes, however, that, at the time when it delivered that judgment, the 1996 Rules [8] then in force provided, in Article 68a(3), for only a limited possibility of an internal appeal, of a purely administrative nature, against decisions adopted by a Class Council and made no provision for the possibility of lodging a contentious appeal before the Complaints Board.

6 Judgment of 11 March 2015, *Oberto and O'Leary* (C-464/13 and C-465/13, 'the judgment in *Oberto and O'Leary*', EU:C:2015:163).

7 IT:CASS:1999:138 CIV.

8 General Rules of the European Schools No 96-D-19, September 1996 ('the 1996 Rules').

23. The fact that the possibility of such a judicial appeal has in the meantime been established by the 2005 Rules [9] and subsequently confirmed in Article 67 of the 2014 Rules might be such as to justify the Complaints Board now being recognised as having exclusive jurisdiction to determine disputes of that type.

24. According to the referring court, such a solution may find decisive support in the lessons drawn from the judgment in *Oberto and O'Leary*,[10] in which the Court has already accepted, relying on the rules of the Vienna Convention, that the Complaints Board had been entitled to confer on itself exclusive jurisdiction to hear appeals against an act of the Headteacher of a European School that adversely affected a teacher at that school. The referring court considers, moreover, that the same applies to the order of the General Court of the European Union in *JT* v. *Secrétaire général des écoles européennes and Chambre de recours des écoles européennes* [11] as regards appeals that may be brought against decisions on repeating a year adopted by a Class Council.

25. According to the referring court, it may also be relevant in this context that the Rules are adopted by the Complaints Board and that the Secretary-General of the European Schools ('the Secretary-General'), who is called upon to rule on administrative appeals against decisions on repeating a year adopted by a Class Council, is a body common to all European Schools who is authorised, inter alia, to represent the Complaints Board. The same applies to various documents produced by the European School of Varese and, in particular, to the 'activity report of the Complaints Board for 2007' referring to the new contentious appeals against decisions relating to promotion to the year above introduced by the 2005 Rules and to the judicial practice resulting from numerous decisions of the Complaints Board, delivered between 2007 and 2017, ruling on appeals against such decisions.

26. The referring court observes, however, that the judgment in *Oberto and O'Leary* [12] relates to an act adopted by the Headteacher of a European School concerning the limitation of the duration of the employment relationship in the contract of employment concluded between a European School and a part-time teacher and that the jurisdiction of the Complaints Board derived in that case not from the Rules but from the Conditions of Employment for Part-time Teachers. It follows, in the referring court's view, that the factual differences that thus exist between the case that gave rise to that judgment and the present case do not permit the conclusion that an interpretation of the first subparagraph of Article 27(2) of the CSEE is so obvious in the present case that it leaves no room for any reasonable doubt.

[9] General Rules of the European Schools No°2004-D-6010-en-5, entered into force on 2 February 2005 ('the 2005 Rules').

[10] Paragraph 76 and operative part of that judgment.

[11] Order of 18 June 2020 (T-42/20, not published, EU:T:2020:278).

[12] Paragraphs 22 and 63 of that judgment.

IV. The question referred for a preliminary ruling and the procedure before the Court

27. In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation), by decision of 6 June 2022, received at the Court on 28 June 2022, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the first sentence of the first subparagraph of Article 27(2) of the [CSEE] to be interpreted as meaning that the Complaints Board referred to therein is to have sole jurisdiction in the first and final instance, once all administrative channels provided for in the General Rules have been exhausted, in any dispute concerning a decision on repeating a year adopted in relation to a secondary-school pupil by the Class Council?'

28. Written observations were submitted by PD and LC, by the European School of Varese and also by the European Commission. Those parties submitted oral argument at the hearing on 4 May 2023.

V. Analysis

29. Before addressing the question referred by the referring court (Section B), I consider it useful to present, briefly, some preliminary remarks on the Court's jurisdiction (Section A).

A. Preliminary remarks on the Court's jurisdiction

30. The Court's jurisdiction is not disputed by the parties and clearly does not give rise to any objection that must be raised of the Court's own motion.

31. That said, I must point out that, at the hearing, the parents expressed doubts as to the Court's jurisdiction, referring to Article 26 of the CSEE and, in particular, to the fact that the dispute in the main proceedings is not between Contracting Parties, as stated in that provision, but between the European School and the parents.

32. According to Article 26 of the CSEE, '[the Court] shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors'. That provision thus provides for an arbitration clause under which an *action seeking the interpretation and/or application* of that convention may be brought before the Court. [13]

33. Admittedly, Article 26 of the CSEE refers to 'disputes between Contracting Parties', namely the Member States of the European Union. Contrary to the parents' claims at the hearing, however, it cannot be inferred from that provision that the Court has jurisdiction to interpret that convention only on the basis of that provision. [14]

[13] Concerning an action under Article 26 of the CSEE, see judgment of 2 February 2012, *Commission* v *United Kingdom* (C-545/09, EU:C:2012:52, paragraphs 2, 27, 33 and 106). That case concerned the interpretation and application of Article 12(4)(a) and Article 25(1) of the CSEE and related, first, to the right to remuneration of teachers seconded to the European Schools and, second, to the exclusion, during their secondment, from adjustments in salary granted to teachers employed in the national schools.

[14] In any event, that provision confers on the Court jurisdiction to rule on the interpretation and/or the application of the CSEE but does not limit its jurisdiction to give a preliminary ruling on the interpretation of that convention.

34. It is sufficient to point out, in that regard, that, in accordance with Article 267 TFEU, the Court has jurisdiction to interpret the acts of the institutions, bodies, offices or agencies of the European Union.[15] However, it has already held that an international agreement, *such as the CSEE*, which was concluded on the basis of Article 235 EC (which became Article 308 EC, itself now Article 352 TFEU) by the European Communities, which were authorised to that effect by Decision 94/557/EC,[16] constitutes, as far as the European Union is concerned, *an act of an institution of the European Union*, within the meaning of point (b) of the first paragraph of Article 267 TFEU, that the provisions of that convention form an integral part, as from its entry into force, of the legal order of the European Union and that, in the context of that legal order, the Court has jurisdiction to give a preliminary ruling on the interpretation of that convention and on the acts adopted on the basis thereof.[17]

35. Consequently, there is no doubt that the Court has jurisdiction to answer the question referred by the referring court.

B. The question referred for a preliminary ruling

36. By its single question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in essence, whether Article 27(2) of the CSEE, read in conjunction with Articles 61, 62, 66 and 67 of the 2014 Rules, must be interpreted as meaning that the Complaints Board has exclusive jurisdiction in first and final instance to adjudicate, after the administrative channels before the Secretary-General have been exhausted, on any dispute relating to the decision of the Class Council of a European School not to authorise a pupil to be promoted to the year above in the secondary school.[18]

37. The parties' viewpoints differ as to the answer to be given to the question submitted by the referring court.

38. The European School of Varese and the Commission are agreed that the Complaints Board has exclusive jurisdiction to rule on appeals against decisions on repeating a year adopted by a European School. That position is based, in particular, on the interpretation of Article 27(2) of

[15] In the interest of clarity, it is useful to bear in mind that in the past the Court has held that it did not have jurisdiction to give a preliminary ruling on the interpretation of the Statute of the European School, signed at Luxembourg on 12 April 1957 (*United Nations Treaty Series*, Vol. 443, p. 129), or of the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962 (*United Nations Treaty Series*, Vol. 752, p. 267), or on the obligations which arise for the Member States under those measures, since, notwithstanding the links between those conventions and the Community and the functioning of its institutions, those conventions were international agreements concluded between the six Member States at the origin of the European Communities and that those agreements did not form an integral part of Community law. See, to that effect, judgment of 15 January 1986, *Hurd* (44/84, EU:C:1986:2, paragraph 20). See also Opinion of Advocate General Slynn in *Hurd* (44/84, not published, EU:C:1985:222). In the context of the procedure laid down in Article 226 EC for a declaration that a Member State has failed to fulfil its obligations under the EC Treaty, see judgment of 5 April 1990, *Commission* v *Belgium* (C-6/89, EU:C:1990:166, paragraphs 44 and 45). That situation changed, however, as we know, with the entry into force of the CSEE on 1 October 2002. Article 34 of that convention provides that 'this Convention cancels and replaces the Statute of 12 April 1957 and the Protocol thereto of 13 April 1962'.

[16] Council Decision Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1). The third recital of that decision states: 'whereas the participation of the Communities in the implementation of [the CSEE] is necessary in order to ensure the attainment of the objectives of [the Communities].'

[17] See, to that effect, judgment in *Oberto and O'Leary* (paragraphs 29, 30 and 31). See also Opinion of Advocate General Mengozzi in Joined Cases *Oberto and O'Leary* (C-464/13 and C-465/13, EU:C:2014:2169, points 7 to 16).

[18] In view of the importance of Articles 61, 62, 66 and 67 of the 2014 Rules for the Court's examination of the question, the question should be reformulated to include those provisions. See, in that regard, point 57 of this Opinion.

the CSEE and of Articles 62, 66 and 67 of the 2014 Rules, in the light of the rules on interpretation set out in Article 31 of the Vienna Convention and the case-law of the Court of Justice. [19]

39. The parents support the opposite view, namely that the provisions at issue are compatible with the allocation of jurisdiction expressly provided for in Article 27(2) and (7) of the CSEE between the Complaints Board and the national courts, in such a way that neither those provisions nor the decisions of the Complaints Board are capable of establishing a change in practice by the High Contracting Parties to the CSEE regarding the interpretation of that convention, within the meaning of Article 31 of the Vienna Convention.

40. In order to provide a useful answer to that question, it is necessary, first of all, to present some general considerations on the particular features of the European Schools system and the dispute settlement machinery established by the CSEE (Section 1), before going on to examine the scope of the Complaints Board's jurisdiction (Section 2). In case it is established that the Complaints Board has exclusive jurisdiction in the area of decisions on repeating a year, I shall address, last, the doubts expressed by PD relating to the extent of the power of review conferred on the Complaints Board by the 2014 Rules and the obligation to comply with the general principle of effective judicial protection in the context of the interpretation of the CSEE and the acts adopted in application of that convention (Section 3).

1. General considerations

(a) The specific features of the European Schools system

41. In the interest of brevity, I shall confine myself here to setting out the guidance to interpretation that emerges from the Court's case-law relating to the European Schools system and the CSEE. [20]

42. It should be observed, first of all, that the European Schools system is a *sui generis* system which brings about, by means of an international agreement, namely the CSEE, a form of cooperation, first between the Member States and, second, between the Member States and the European Union. [21] The European Schools constitute an international organisation which is formally separate from the European Union and from its Member States. [22] As I have already observed, although the CSEE constitutes, as far as the European Union is concerned, an act of one of the institutions of the European Union, within the meaning of point (b) of the first paragraph of Article 267 TFEU, that convention is also governed by international law and, more specifically, as regards its interpretation, by the international law of treaties, namely, in essence, by the Vienna Convention. [23]

[19] Judgments of 14 June 2011, *Miles and Others* (C-196/09, 'the judgment in *Miles and Others*', EU:C:2011:388), and in *Oberto and O'Leary*.

[20] See judgment in *Oberto and O'Leary* (paragraphs 32 to 38 and the case-law cited). See also Opinions of Advocate General Mengozzi in Joined Cases *Europäische Schule München* (C-464/13 and C-465/13, EU:C:2014:2169), and in *Commission* v *United Kingdom* (C-545/09, EU:C:2011:461), and Opinion of Advocate General Sharpston in *Miles and Others* (C-196/09, EU:C:2010:777).

[21] The third recital of the CSEE states: 'considering that the European School system is "*sui generis*"; considering that it constitutes a form of cooperation between the Member States and between them and the European Communities while fully acknowledging the Member States' responsibility for the content of teaching and the organisation of their educational system, and for their cultural and linguistic diversity'.

[22] In spite of the functional links which that international organisation has with the European Union. Judgment in *Oberto and O'Leary* (paragraph 33).

[23] Judgment in *Oberto and O'Leary* (paragraph 34). See also point 34 of this Opinion.

43. It should be borne in mind, next, that the rules contained in the Vienna Convention apply to an agreement concluded between the Member States and an international organisation 'in so far as the rules are an expression of general international customary law'.[24] As the Court has already emphasised, 'the [CSEE] must be interpreted in accordance with those rules'.[25] It should be borne in mind that the rule set out in Article 31 of the Vienna Convention, which expresses customary international law, provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of that treaty in their context and in the light of its object and purpose'.[26]

44. It must be emphasised, last, that, in accordance with Article 31(3)(b) of the Vienna Convention, 'account must be taken, when interpreting a treaty, of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[27]

45. I shall return to those important points of interpretation.[28]

(b) The machinery for settling disputes between the persons covered by the CSEE and the European Schools

46. In the present case the question arises whether the action which the parents of a pupil have brought, as in this instance, before the national courts for annulment of the Class Council's decision on repeating a year comes within the jurisdiction of those courts or whether the Complaints Board has exclusive jurisdiction to hear an action of that type.

47. As regards the exclusive jurisdiction of the Complaints Board, it follows from the first subparagraph of Article 27(2) of the CSEE that that jurisdiction extends, in the first and final instance and once all administrative channels have been exhausted, to 'any dispute concerning the application of [that] Convention to all persons covered by it … and regarding the legality of any act based on [that Convention] or rules made under it, adversely affecting such persons on the part of the Board of Governors or the Administrative Board of a school in the exercise of their powers as specified by [that] Convention'.

[24] This relates to the idea of the 'parallel personalities, in international law', of the European Union, on the one hand, and of the Member States, on the other hand. See, in that regard, Malenovský, J., 'À la recherche d'une solution intersystémique aux rapports du droit international au droit de l'Union européenne', *Annuaire français de droit international*, LXV, 2019, CNRS Éditions, Paris, pp. 3 to 36, in particular p. 32. That idea comes from the judgment of 25 February 2010, *Brita* (C-386/08, EU:C:2010:91, paragraph 42), where the Court held that, 'even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order'.

[25] Judgment in *Oberto and O'Leary* (paragraph 36). Admittedly, Article 1 of the Vienna Convention provides that that convention 'applies to treaties between States'. It must be borne in mind, however, that, in accordance with Article 3(b) of that convention, 'the fact that [it] does not apply to international agreements concluded between States and other subjects of international law … shall not affect … the application to them of any of the rules set forth in [that convention] to which they would be subject under international law independently of the Convention'.

[26] Judgment in *Oberto and O'Leary* (paragraph 37).

[27] Judgment in *Oberto and O'Leary* (paragraph 38).

[28] See points 64, 65, 68 to 71, 74 and 97 of this Opinion. On the definition of 'practice subsequently followed', see also footnote 50 to this Opinion.

48. As regards the jurisdiction of the national courts, it follows from Article 27(7) of the CSEE that their jurisdiction is to apply to 'other disputes to which the Schools are party'. [29] Those 'other disputes' are therefore disputes which do not come within the exclusive and strictly defined jurisdiction of the Complaints Board.

49. It follows from *those provisions* that the settlement of disputes between persons covered by the CSEE and the European Schools is entrusted to two different bodies, namely the Complaints Board and the national courts. For a better understanding of that dispute settlement machinery and the allocation of jurisdiction between those two bodies, I shall briefly set out its genesis in what follows.

(1) The genesis of the dispute settlement machinery

50. It should be observed, out the outset, that the 1957 Statute did not provide for any specific machinery for settling disputes between the persons covered by that statute and the European Schools. [30] Until the entry into force of the CSEE, the 'old' Complaints Board had jurisdiction solely in respect of actions brought by the teaching staff. [31] The CSEE established, in Article 27(1), a new *Complaints Board* and conferred on it 'strictly limited jurisdiction' in order to provide 'adequate legal protection against acts of the Board of Governors or the Administrative Boards … to the teaching staff as well as other persons covered by [the 1957 Statute]'. [32]

51. As regards, in the first place, the scope *ratione personae* of the CSEE, I note that the first subparagraph of Article 27(2) of that convention *extended* the jurisdiction of the old Complaints Board to actions brought by '*all persons covered by [that convention]* with the exception of administrative and ancillary staff' (emphasis added). The jurisdiction *ratione personae* of the new Complaints Board established by the CSEE thus includes disputes involving, among others, the parents of pupils acting as legal representatives of a minor pupil and also adult pupils.

52. As regards, in the second place, jurisdiction *ratione materiae*, I note that the first subparagraph of Article 27(2) of the CSEE states that the sole jurisdiction of the Complaints Board in the first and final instance in any dispute concerning the application of that convention applies to 'the legality of any act based on [that] Convention or rules made under it, adversely affecting such persons on the part of the *Board of Governors* or the *Administrative Board* of a school in the exercise of their powers as specified by [that] Convention'.

53. It seems to me to be useful to point out, in the third place, that the second subparagraph of Article 27(2) of the CSEE provides that 'the conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate [inter alia] by the *General Rules of the Schools*'. [33] As I shall explain, it was in order to ensure judicial protection for all the persons covered by the CSEE that those rules gradually opened new channels for remedies before the Complaints Board to the persons concerned.

[29] That provision states that, 'in particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article'.

[30] See, in that regard, Opinion of Advocate General Mengozzi in Joined Cases *Oberto and O'Leary* (C-464/13 and C-465/13, EU:C:2014:2169, point 17).

[31] That jurisdiction was based on Article 80 of the Regulations for members of the seconded staff of the European Schools. See annual activity report of the Complaints Board for the year 2007, Board of Governors of the European Schools, 21, 22 and 23 January 2008, p. 3.

[32] See the fifth indent of the fourth recital of the CSEE.

[33] Emphasis added.

(2) The amendments introduced by the successive versions of the General Rules: the new remedies

54. I note, in the first place, that the extension of the scope *ratione personae* of the jurisdiction of the Complaints Board introduced by the first subparagraph of Article 27(2) of the CSEE to *actions brought by, among others, pupils' parents acting as legal representatives of a minor pupil*, as is the case here, came about, in application of the second subparagraph of Article 27(2) of that convention, gradually, with the amendments made to the 2014 *Rules by the Board of Governors* in the successive versions of 1996, 2005 and 2014.

55. As regards the remedies provided for in the successive versions of the rules, I would point out, in the second place, that a first amendment was introduced by the Board of Governors in the 1996 Rules. Those rules provided, in the event of a negative opinion of the Class Council for the purpose of the promotion of the pupil, for *only an administrative appeal internal* to the European School concerned against decisions on repeating a year adopted by a *Class Council* and did not envisage the possibility of lodging a contentious appeal before the Complaints Board. [34] The Board of Governors then introduced a new amendment by the 2005 Rules. It established the possibility of lodging a *contentious appeal* following the rejection, by the Secretary-General, of the administrative appeal open before him or her against such decisions on repeating a year. [35] That possibility was finally confirmed by Article 67 of the 2014 Rules.

56. Having presented the evolution of remedies in the machinery for the settlement of disputes between the persons covered by the CSEE and the European Schools, I shall explain, in the interest of clarity, the system of appeals, as established by the 2014 Rules, applicable to the dispute in the main proceedings.

(3) The system of appeals provided for in the 2014 Rules

57. It should be observed that Article 61(1) of the 2014 Rules provides that, in the secondary school, decisions on promotion to the year above are to be taken at the end of the school year by the relevant *Class Council*. If a *decision on repeating a year* is taken by the Class Council, it follows from Article 62(1) of those rules that pupils' legal representatives are to have a right of appeal only in the event of a procedural irregularity or a new fact. [36] According to the fourth and fifth subparagraphs of Article 62(2) of those rules, 'the Secretary-General … must give a ruling on the appeal … by 31 August [of the school year]'. Should *the appeal against the decision on repeating a year* 'be deemed admissible and well founded, the Class Council shall then *reconsider* the case' and 'an *administrative appeal* may also be lodged with the Secretary-General against the new decision'. [37]

[34] In that regard, the third paragraph of Article 68(a) of the 1996 Rules provided that 'the parent or guardian shall have no right of appeal against the [Class Council's] decisions unless defect of form can be shown or new facts come to light [and] an enquiry by the Representative of the Board of Governors establishes that defect of form or new facts exist …'. See point 22 of this Opinion. The European School of Varese submits, in its written observations, that under that version of the rules, a challenge against the decision on repeating a year was internal to the administration of the European Schools. It gave rise to an enquiry by the Representative of the Board of Governors which could at most result in that representative requesting the Class Council to reconsider the decision on repeating a year that was initially adopted.

[35] See Article 67 of the 2005 Rules.

[36] This concerns an 'appeal against decisions on repeating a year', which must be lodged within *seven calendar days* after the end of the school year (Article 62(2) of the 2014 Rules).

[37] Emphasis added.

58. The possibility of lodging a judicial appeal was made available to, among others, pupils' parents, acting as the pupil's legal representatives, by Article 67 of the 2014 Rules. According to that provision, decisions taken on the administrative appeals referred to in Article 66 of those rules may be the subject of a *contentious appeal* by pupils' legal representatives, directly affected by the disputed decision, before the Complaints Board provided for in Article 27 of the CSEE. [38]

59. That, therefore, is the evolutive context in which the scope of the exclusive jurisdiction of the Complaints Board must be examined.

2. Examination of the scope of the exclusive jurisdiction of the Complaints Board

60. It follows from the preceding points that the possibility of a judicial appeal before the Complaints Board involving consideration of the decisions of the Secretary-General ruling on an appeal lodged against the decision of the Class Council on repeating a year was introduced into the procedure before the Complaints Board by the successive versions of the 2005 and 2014 Rules. As I have already emphasised, however, the wording of the first subparagraph of Article 27(2) of the CSEE limits that exclusive jurisdiction to acts having an adverse effect adopted by the *Board of Governors* or the *Administrative Board* of a school.

61. The question therefore arises whether those amendments are confined to specifying the 'conditions and the detailed rules' relative to the proceedings that must be followed before the Complaints Board in cases which already come within the jurisdiction of that board, in accordance with the second subparagraph of Article 27(2) of the CSEE, or whether, on the contrary, they have led to an extension of its exclusive jurisdiction.

62. I agree that the successive versions of the 2005 and 2014 Rules have indeed led to an extension of the exclusive jurisdiction of the Complaints Board with regard to appeals against decisions on repeating a year. I must nonetheless observe that that extension is correctly based on the CSEE, *as interpreted in application of the rules of the Vienna Convention*, in so far as those rules are the expression of general international customary law. I recall, in that regard, that the Court has declared that the CSEE must therefore be interpreted in accordance with those rules. [39] In what follows I shall therefore interpret the CSEE accordingly.

63. In the first place, I recall that the Court, in reliance on the rules in the Vienna Convention, has already held, in the judgment in *Oberto and O'Leary*, that a dispute relating to the legality of an agreement on limiting the duration of the employment relationship included in the employment contract concluded between a part-time teacher and the headteacher of a European School comes within the exclusive jurisdiction of the Complaints Board. [40] In particular, it held that the mere fact

[38] I must make clear at the outset that, contrary to the parents' contention, the correct interpretation of Article 67(1) of the 2014 Rules does not in any way lead to the 'possibility' of lodging the contentious appeal provided for in that article ('may be the subject of a contentious appeal') being understood as meaning that pupils' legal representatives may choose between the Complaints Board and the national courts. I would point out, in that regard, that, under Article 31(1) of the Vienna Convention, both the provisions of the CSEE and, in particular, Article 6 of the 2014 Rules must be interpreted in good faith.

[39] Judgment in *Oberto and O'Leary* (paragraph 36). See also point 43 of this Opinion.

[40] Paragraph 76 and operative part of that judgment. That case was between the Europäische Schule München and two part-time teachers, Ms Oberto and Ms O'Leary, concerning the jurisdiction of the German judicial order to hear an action for review of the validity of the fixed-term nature of the employment contracts of the parties concerned. Although the factual context is different from that of the present case, to my mind it is possible to draw lessons that will be of assistance in my analysis.

that the acts at issue, namely the 'acts of the headteacher' of the school concerned, were not expressly mentioned in the first sentence of the first subparagraph of Article 27(2) of the CSEE cannot have the effect of excluding them from the scope of that provision. [41]

64. In the second place, having regard to the particular features of the system of European Schools, [42] the CSEE must be interpreted, in accordance with Article 31(1) of the Vienna Convention, in accordance with the ordinary meaning to be given to the terms of that convention in their context and in the light of its object and purpose. [43]

65. Therefore, in order to determine, in the present case, the scope of the *terms* 'act … on the part of the Board of Governors or the Administrative Board of a school' in the first sentence of the first subparagraph of Article 27(2) of the CSEE, it is necessary to refer to any relevant rule of international law, applicable in the relations between the High Contracting Parties to any subsequent practice in the application of that convention [44] and to any subsequent agreement between those parties regarding its application. [45]

66. I note, first, that in this instance the extension of the exclusive jurisdiction of the Complaints Board with respect to the decision at issue taken by the Class Council not to authorise a pupil's promotion to the year above *issues directly from the Board of Governors*, which, pursuant to point 1 of the first subparagraph of Article 7 and Article 8(1)(a) of the CSEE, is one of the organs common to all the European Schools, within which the High Contracting Parties to that convention are represented. More specifically, the Board of Governors is composed of, among others, the representative or representatives at ministerial level of each of the Member States and a member of the Commission. [46]

67. Second, that interpretation is supported by the *context* of the relevant provisions of both the CSEE and the 2014 Rules. In that regard, I observe, first, that Article 11(3) of that convention confers on the Board of Governors the task of '[determining] rules for the promotion of pupils to the next year of study or to the secondary school'. Second, it should also be pointed out that, according to the first and second paragraphs of Article 10 of that convention, the Board of Governors is to ensure the application of that convention and is to *lay down the General Rules*. [47] In that regard, I must point out that the exclusive jurisdiction of the Complaints Board, which is strictly limited to the disputes mentioned in the CSEE and to the persons referred to therein, with the exception of the administrative and ancillary staff, must be exercised on the conditions and according to the procedures determined by the texts to which that convention refers, such as the 2014 Rules, which provide, in Articles 66 and 67, for *the different remedies open to those persons*.

41 Judgment in *Oberto and O'Leary* (paragraph 58).

42 See point 42 et seq. of this Opinion.

43 See, to that effect, judgment in *Oberto and O'Leary* (paragraph 37).

44 Article 31(3)(b) and (c) of the Vienna Convention.

45 Article 31(3)(a) of the Vienna Convention.

46 I must also point out that Article 14 of the CSEE provides that 'the Secretary-General shall represent the Board of Governors and direct the Secretariat in accordance with the Service Regulations for the Secretary-General provided for in Article 12(1). He shall represent the Schools in legal proceedings. He shall be responsible to the Board of Governors'.

47 Article 10 of the CSEE provides that 'the Board of Governors shall supervise the implementation of this Convention; for this purpose, it shall have the necessary decision-making powers in educational, budgetary and administrative matters … The Board of Governors shall lay down the General Rules of the Schools'. See also the second subparagraph of Article 27(2) of the CSEE and point 53 of this Opinion.

68. It follows, as the Commission correctly submits in its observations, that, in accordance with Article 31(3)(a) of the Vienna Convention, *the subsequent agreement of the Contracting Parties* regarding that application of the 2014 Rules and, accordingly, that extension of the jurisdiction of the Complaints Board in relation to the new remedies is explicit since those parties participate directly, within the Board of Governors, in the adoption of the rules. [48]

69. To my mind that interpretation is also supported by the case-law of the Complaints Board, according to which it has been possible to lodge appeals challenging the lawfulness of decisions of the Secretary-General relating to decisions on repeating a year adopted by the Class Councils since 2005. [49]

70. That case-law is regarded by the Court as a *subsequent practice* in application of Article 27(2) of the CSEE, within the meaning of Article 31(3)(b) of the Vienna Convention, in so far as that practice has never been challenged by the Parties to the CSEE. [50] The absence of any challenge by those parties must be regarded as reflecting their tacit agreement to such a practice. [51]

71. Therefore, and taking into account of what I have just said, [52] although the case-law of the Complaints Board relating to new remedies against the decisions of the Secretary-General concerning decisions on repeating a year adopted by the Class Councils, based on Articles 61, 62, 66 and 67 of the 2014 Rules does not come under the definition of 'subsequent practice', within the meaning of Article 31(3)(b) of the Vienna Convention, it may nonetheless be regarded as conduct that is 'relevant when assessing the subsequent practice of parties' to the CSEE concerning the interpretation of Article 27(2) of the CSEE. It follows that that case-law of the Complaints Board is capable of clarifying the latter provision, which must therefore be read as not precluding the decisions on repeating a year adopted by the Class Council from being considered, in principle, to come within that provision. [53]

72. In the third place, I note that, as the European School of Varese and the Commission have asserted, the General Court has recently endorsed the exclusive jurisdiction of the Complaints Board in the case that gave rise to the order in *JT* v. *Secrétaire général des écoles européennes and Chambre de recours des écoles européennes*, [54] in which a pupil of a European School challenged the

[48] It will be recalled that paragraph 1 of Conclusion 4 of Resolution No 73/202, adopted by the United Nations General Assembly on 20 December 2018 in its 62nd plenary meeting, states that 'a subsequent agreement as an authentic means of interpretation in Article 31, paragraph 3(a), is an agreement *between the parties*, *reached after the conclusion of a treaty*, regarding the interpretation of the treaty or the application of its provisions'. Emphasis added.

[49] As regards appeals lodged on the basis of Articles 61 to 67 of the 2014 Rules, the Complaints Board has ruled on a number of occasions on appeals against decisions on repeating a year adopted by the Class Councils of certain European Schools, see decisions 07/48R of 5 September 2007; 08/40 of 29 December 2008; 08/43 of 30 January 2009; 15/49 of 10 October 2015; 15/57 of 10 February 2016; and 16/62 of 14 March 2017. As regards decisions delivered between 2018 and 2022, see, in particular, decisions 20/65 of 16 October 2020 and 22/53 of 6 September 2022.

[50] See, by analogy, judgment in *Oberto and O'Leary* (paragraph 66). Even if, as I have just said in points 63 to 68 of this Opinion, the interpretation set out in the previous points is supported by the case law of the Complaints Board, I have doubts that the case law of that Board as subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention. Indeed, I note that conclusion 4, paragraph 2, of Resolution No. 73/202, cited above, states that '[a] subsequent practice as a means of authentic interpretation article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, *which establishes the agreement of the parties* regarding the interpretation of the treaty'. I also note that paragraph 2 of Conclusion 5 of that resolution specifies that '[o]ther conduct … does not constitute subsequent practice under [those articles]. The second sentence of that paragraph states however that '*other conduct, including by non-State actors, may, however, be relevant when assessing the subsequent practice of parties …*' (emphasis added). It is therefore in the context of the latter paragraph that, in my view, the case-law of the Complaints Board lies. In other words, its case-law supports the interpretation recommended in points 63 to 68 of this Opinion, not as a 'subsequent practice', but as conduct relevant for the assessment of the subsequent practice of the parties.

[51] See judgment in *Oberto and O'Leary* (paragraph 66).

[52] See my considerations in footnote 50 to this Opinion.

[53] See, by analogy, judgment in *Oberto and O'Leary* (paragraph 67).

[54] Order of 18 June 2020 (T-42/20, not published, EU:T:2020:278).

decision of the examination board for the 2019 European Baccalaureate not to confer the baccalaureate on her. Although it dismissed the action on the ground of manifest lack of jurisdiction, the General Court held that the challenge against the first contested decision *could be brought, after all administrative channels had been exhausted, only before the Complaints Board*, as the Complaints Board was a court adjudicating in first and final instance in a case like that at issue in that case, in accordance with Article 27(2) of the CSEE. [55]

73. In the fourth and last place, I would observe that the extension of the exclusive jurisdiction of the Complaints Board to appeals against decisions on repeating a year is also supported by the objective and the purpose of the CSEE. It follows from both its preamble and Article 1 that that convention is intended to ensure the 'education together of children of the staff of the European Communities' in order to ensure the proper functioning of the European institutions. In that regard, I would emphasise that, as the European School of Varese maintains, first, the objective of ensuring that the children concerned receive education together, in a uniform manner and at the same level, could be achieved only by conferring on a single judicial body exclusive jurisdiction to rule on disputes relating to decisions on repeating a year and that, second, such educational uniformity could not be ensured if such disputes came within the jurisdiction of the national courts.

74. Consequently, it follows clearly from the preceding points that all the arguments converge towards the conclusion that, under Article 27(2) of the CSEE, interpreted in the light of Article 31 of the Vienna Convention, and in accordance with the case-law of the Court, Article 27(2) includes decisions of the Secretary-General ruling on an appeal against the decision on repeating a year adopted by the Class Council. In other words, it must be held that the Complaints Board has exclusive jurisdiction in any dispute relating to the decision of the Class Council on repeating a year at issue and that, consequently, that type of dispute does not come within the jurisdiction of the national courts, under Article 27(7) of the CSEE.

75. Any other interpretation of Article 27(2) of the CSEE would run counter to the *sui generis* nature of the system of European Schools and, as the Commission and the European School of Varese have maintained, to the need to ensure the autonomy of that system as an international organisation and also to the coherence of its decisions in relation to education and educational methodology.

3. The doubts expressed by PD in relation to the extent of the power of review conferred on the Complaints Board

76. The interpretation which I have provided of the relevant provisions of the CSEE and of the 2014 Rules, read in the light of the provisions of the Vienna Convention, allows me to conclude that the Complaints Board has exclusive jurisdiction to adjudicate in a dispute such as that at issue in the main proceedings.

77. That having been established, the parents claim, in their written and oral observations, that recognition of such exclusive jurisdiction of the Complaints Board would be such as to reduce the level of judicial protection hitherto guaranteed to pupils and their legal representatives.

[55] It may be inferred from the order for reference that the parents *did not exhaust the administrative channels* provided for in Article 66 of the 2014 Rules, which is the prerequisite for lodging a contentious appeal before the Complaints Board referred to in Article 27(2) of the CSEE, on the basis of Article 67 of those rules. See points 15 and 16 of this Opinion.

78. The doubts thus expressed by the parents, which relate to the margin of the power of review conferred on the Complaints Board by the 2014 Rules, lead me to examine, first, the question of the extent of that power of review, before proceeding to address the extent to which the principle of effective judicial protection is applicable in the context of the judicial appeal made available before the Complaints Board by Article 67 of the 2014 Rules as regards decisions of a Class Council on repeating a year.

(a) The extent of the power of review conferred on the Complaints Board by the 2014 Rules as regards decisions refusing to authorise a pupil to be promoted to the year above

79. PD maintains in his written observations, inter alia, that an appeal before the Secretary-General and the Complaints Board can be lodged, as is clear from Article 62(1) of the 2014 Rules, only in the case of 'procedural irregularity or recognition of new facts by the Secretary-General', while appeals before the Italian administrative courts would offer a wider range of grounds of challenge, such as breach of the law, misuse of powers and lack of powers, in accordance with Italian law.

80. I observe, first of all, that Article 62(1) of the 2014 Rules provides that pupils' legal representatives are to have no right of appeal against Class Council decisions except in cases of procedural irregularity or recognition of new facts by the Secretary-General, on the basis of a file provided by the school and the pupil's legal representatives.

81. In that regard, contrary to PD's contention, and as the Commission submitted at the hearing, first, that provision gives a sufficiently broad definition of the terms 'procedural irregularity' and 'new fact'. According to that provision, 'procedural irregularity' means any infringement of a rule of law pertaining to the procedure to be followed for promotion to the year above, such that if it had not been committed, the Class Council's decision would have been different, and 'new fact' means any element which might not have been brought to the Class Council's attention because it was unknown to all – teachers, parents, pupil – at the time of its deliberation and which might have influenced the purport of its decision. [56]

82. Second, the Commission stated that the Complaints Board had already ruled on decisions vitiated by a serious defect in the reasoning. The Complaints Board therefore recognised that it had jurisdiction to review Class Council decisions from the aspect of a manifest error of

[56] It should also be noted that, according to the sixth subparagraph of Article 62(2) of the 2014 Rules, 'the Class Council shall have sole discretionary power in respect of assessments of pupils' abilities, the award of a mark for an examination, test or a piece of work done during the school year and assessment of the particular circumstances referred to in Article 61.B-5' and 'appeals may not be lodged against these assessments'. See, in that regard, the Complaints Board's decisions 15/49 of 10 October 2015, paragraphs 4, 10 and 11, and 16/62 of 14 March 2017, paragraph 12.

assessment, which limits the technical scope for manoeuvre otherwise recognised to the Class Council.[57] The Complaints Board demonstrated that when it examines decisions of the Class Council it may exercise its unlimited jurisdiction on matters of fact and of law.[58]

83. Next, I consider it important to point out that it follows from the fourth recital of the CSEE that the Complaints Board was established by Article 27(1) of that convention with the objective of ensuring adequate legal protection against acts of the Board of Governors for the persons covered by that convention and, in particular, as in the present case, to a pupil's parents, in their capacity as persons exercising parental responsibility over him or her.

84. In that regard, I note that it follows from certain decisions of the Complaints Board that it has interpreted the fourth recital of the CSEE as being the expression of effective judicial protection in the framework of that convention.[59]

85. More specifically, it follows from decision 10/02 of 22 July 2010,[60] delivered in plenary session, that although its jurisdiction, for the purposes of Article 27(2) of the CSEE, should normally be exercised in the conditions and according to the procedures determined by the implementing texts to which that convention refers, 'in the absence of provisions specifically laid down for that purpose, it is appropriate to ascertain whether it is possible, in order to respect the general principle of the right to effective judicial protection, to transpose by analogy the procedural rules laid down for comparable appeals'.[61]

[57] On the other hand, Advocate General Mengozzi considered, in his Opinion in Joined Cases *Oberto and O'Leary* (C-464/13 and C-465/13, EU:C:2014:2169, points 59 and 60), that although the Complaints Board had stated that it was prepared to accept that the fundamental principles were capable of being used as a point of reference to guide the actions of the bodies of the European Schools over and above the rules of law peculiar to them, nonetheless the discretion thus reserved to itself by the Complaints Board for determining the rules and principles stemming in particular from EU law did not guarantee to the persons involved in that case, namely the part-time teachers, observance of the general prohibition on abuse of rights, to which specific expression is given as regards employment relationships within the European Union in Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43). See, in that regard, footnote 68 to this Opinion.

[58] As regards, in particular, a contentious appeal seeking annulment of a decision of the Class Council of the European School of Varese and of the decision of the Deputy Secretary-General, see decision 14/44 of 24 September 2014, paragraphs 22 to 24. On the substance, the Complaints Board found that 'the contested decision … which dismissed the applicants' administrative appeal is based on defective reasoning in so far as, as the applicants maintain and the [European Schools] accept, the marks which are supposed to be those of the applicants' son are incorrect, which constitutes both a *defect in the reasoning and an error of fact*' (emphasis added). The Complaints Board concluded that 'although [it] does not have jurisdiction to review the substance of the educational assessment made by the Class Council, the [European Schools] must draw the necessary inferences following the annulment of the decision not to promote the applicants' son to the year above'.

[59] Although it is apparent from certain decisions of the Complaints Board delivered since 2010 that the interpretation of the provisions of the 2005 Rules and the 2014 Rules in application of the principle of effective judicial protection is not absent, other decisions seem less clear in that respect: see, in particular, decision 16/62 of 14 March 2017, paragraphs 13 and 14: '… It is only if it is shown that the *infringement of a relevant rule* could influence such an assessment that the assessment can be subject to *judicial review*. If it were otherwise it would be sufficient to find that the assessment made by the Class Council on the inability of … to be promoted to the year above cannot, in any event, in the light of the material in the file and the contested decision, which was adopted virtually unanimously and which is clearly reasoned, be considered to be vitiated by a manifest error'. Emphasis added.

[60] The dispute that gave rise to that decision was between an association of parents of pupils at the European School in question. The Board of Governors had reduced the voting rights of associations of parents of pupils and of the staff to a single vote in the Administrative Boards, in breach of Articles 19, 20 and 23 of the CSEE. However, Articles 66 and 67 of that convention did not lay down a procedure allowing a pupil's parent or a parents' association to challenge directly the legality of a decision of the Board of Governors such as that at issue in the dispute.

[61] I consider it important to point out that the Complaints Board had considered, in that decision (paragraph 26), that 'where a decision of the Board of Governors, even where it is general or regulatory in scope, directly affects a right or a prerogative which the [CSEE] confers on a person or a category of persons which is clearly identified and which is distinct from all the other persons concerned, without it being certain that that person or category is capable of lodging an appeal against an individual decision adopted on the basis of such a decision, that decision must be regarded as constituting an act adversely affecting that person or that category within the meaning of Article 27(2) of the [CSEE]. The Board therefore, in principle, *has jurisdiction to hear an appeal against such an act*'. Emphasis added.

86. In its case-law subsequent to that decision, the Complaints Board 'acknowledges that it is necessary to determine the precise scope of the contested decision and to ascertain whether its lack of jurisdiction to annul that decision because of the absence of remedies provided for in the texts implementing the [CSEE] would be capable of undermining the principle of the right to an effective remedy. The right to effective judicial protection is not only acknowledged by [that convention] but is also among the fundamental rights recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms and among the general principles of [EU] law'. [62]

87. It is therefore apparent that, in principle, since 2010, the Complaints Board has exercised judicial review by applying the principle of effective judicial protection and, accordingly, Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, as is clear from the consistent case-law of this Court, constitutes 'a reaffirmation of [that principle]'. [63]

88. Last, it follows, in principle, having regard to that interpretation by the Complaints Board of the provisions of the 2014 Rules in the light of Article 47 of the Charter, that the Complaints Board seems to consider that it has jurisdiction to exercise effective judicial review and, accordingly, the principle of effective judicial protection cannot in principle be breached in situations comparable to that at issue in the main proceedings.

89. That having been established, it seems relevant to me, however, to examine briefly the scope of the Complaints Board's obligation to interpret the CSEE and the acts adopted in application of that convention, notably the 2014 Rules, taking into account my preceding considerations. [64]

(b) The obligation of the Complaints Board to apply the principle of effective judicial protection when interpreting the CSEE and the 2014 Rules

90. I recall, at the outset, that the nature of the Complaints Board established by Article 27(1) of the CSEE has already been clarified by the Court in its judgment in *Miles and Others*. [65]

91. In that judgment, the Court held that the Complaints Board satisfied all the criteria that enabled it to be assessed as having the nature of a 'court or tribunal' within the meaning of Article 267 TFEU, in particular that it was established by law, it was permanent, its jurisdiction was compulsory, its procedure was *inter partes*, it applied rules of law and it was independent, apart from the fact that it was not a court or tribunal of a Member State. [66]

[62] See, in particular, decision 22/62 of the Complaints Board of 2 December 2022, paragraph 8: 'This Board has already had the opportunity to state that the absence of remedies in the texts does not preclude an appeal being lodged before it or preclude a decision rejecting a request – in this instance a request to change an option – being the subject of judicial review … Thus, the Complaints Board has considered … that a decision which profoundly affects the fundamental link between the school and the pupil and his or her right to education recognised by Article 14 of the Charter of Fundamental Rights of the European Union may be subject to judicial review in application of the principles applicable in a State subject to the rule of law (Article 47 of that Charter).' See also decisions 15/38 of 11 February 2016, paragraph 12, and 19/35 of 29 August 2019, paragraph 10.

[63] See, in particular, judgments of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 37); of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 45); and of 12 January 2023, *Nemzeti Adatvédelmi és Információszabadság Hatóság* (C-132/21, EU:C:2023:2, paragraph 50).

[64] See, in that regard, paragraph 41 et seq. of this Opinion.

[65] It will be recalled that the case that gave rise to that judgment was between 137 teachers on secondment from the United Kingdom of Great Britain and Northern Ireland to European Schools and those schools concerning, first, the schools' refusal to adjust the teachers' remuneration in respect of the period prior to 1 July 2008 following the depreciation of the pound sterling and, second, the method of calculation applicable since that date for the adjustment of remuneration in line with fluctuations in exchange rates for currencies other than the euro.

[66] Judgments in *Miles and Other*s (paragraphs 37 to 39), and in *Oberto and O'Leary* (paragraph 72).

92. Consequently, even though the Complaints Board must be classified as a 'court or tribunal' within the meaning of EU law, the Court held that, in so far as that board is not of a Member State but of the European Schools, for the purposes of Article 267 TFEU, the Court has no jurisdiction to rule on a request for a preliminary ruling from that board. [67]

93. In that regard, I would add that, even though, as the Court has itself observed in its case-law, a reform enabling the Complaints Board to refer questions to the Court under Article 267 TFEU would be desirable, [68] it cannot to my mind be asserted that the principle of effective judicial protection and other general principles of EU law are not applicable in the context of an appeal lodged before that board, for the following reasons.

94. In the first place, as I observed in my general considerations, [69] the Complaints Board comes within the remit of the European Schools, which constitute a *sui generis* system achieving, by means of the CSEE, which is an international agreement, a form of cooperation, first, between the Member States and, second, between the Member States and the European Union, in order to ensure, in the interest of the proper functioning of the European institutions, the education together of the children of the staff of those institutions. [70]

95. Therefore, since the CSEE constitutes, as far as the European Union is concerned, an act of an institution of the European Union, within the meaning of point (b) of the first paragraph of Article 267 TFEU, and since the provisions of that convention form an integral part of the legal order of the European Union, [71] that convention forms part of the hierarchy of norms of the EU legal order, at the summit of which are the Treaty, the Charter and the general principles of EU law as sources of EU law. [72]

96. Consequently, in accordance with the principle of the hierarchy of norms, if an international agreement, such as the CSEE, is contrary to, in particular, a general principle of EU law, that agreement is incompatible with EU law. [73] The CSEE and the 2014 Rules must therefore be compatible with the Treaties, the Charter and the general principles of EU law. In other words, as the Commission rightly observed at the hearing, it is inconceivable that the European Union and its Member States could fail to fulfil the obligations imposed by primary law and the general

[67] See, to that effect, judgment in *Miles and Others* (paragraphs 45 and 46). As the Court held in paragraph 41 of that judgment, the Complaints Board is not a court common to a number of Member States, comparable to the Benelux Court of Justice.

[68] The Court accepted, in paragraphs 44 and 45 of the judgment in *Miles and Others*, and also in paragraph 74 of the judgment in *Oberto and O'Leary*, that 'the possibility, or indeed the obligation, which the Complaints Board has of referring a question to the Court of Justice in the course of … a dispute [between a European School and the persons covered by the CSEE]', *in which the general principles of EU law must be applied*, could indeed be envisaged, but that 'it [was] for the Member States to reform the system of judicial protection established by the [CSEE] currently in force'. Emphasis added. Although I agree with the Court's reasoning, in my view it cannot be denied that the fact that the Complaints Board is unable to refer questions to the Court for a preliminary ruling is capable, in some cases, of undermining the uniformity and coherence of EU law. On that aspect, see Opinion of Advocate General Sharpston in *Miles and Others* (C-196/09, EU:C:2010:777, points 72, 73 and 76). In particular, it is clear on reading the Opinion of Advocate General Mengozzi in Joined Cases *Oberto and O'Leary* (C-464/13 and C-465/13, EU:C:2014:2169, point 62) that, in spite of the level of judicial protection guaranteed by the Complaints Board to the persons covered by the CSEE, from the point of view of *EU substantive law*, such a reform is necessary. See, in that regard, footnote 57 to this Opinion.

[69] See points 42 and 43 of this Opinion.

[70] Judgment in *Miles and Others* (paragraph 38). See also the first and third recitals of the CSEE. See point 42 of this Opinion.

[71] See point 34 of this Opinion.

[72] It will be recalled that the Court has already held that the primacy over acts of secondary law which international agreements have under EU law does not extend to primary law and, in particular, to the general principles of which fundamental rights form part. See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 308).

[73] The conclusion of an international agreement in breach of the Treaties can be annulled by the Court. See, in particular, judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94). See also, by analogy, judgment of 26 February 2015, *H* v *Court of Justice* (C-221/14 P, not published, EU:C:2015:126, paragraph 41 and the case-law cited).

principles of EU law by concluding an international agreement, such as the CSEE. They are therefore required to respect and implement those obligations in compliance, in particular, with Articles 2 and 21 TEU and the general principles of EU law.[74]

97. In the second place, I must add that Article 31(3)(c) of the Vienna Convention[75] provides that, in the interpretation of an international agreement, 'any relevant rules of international law applicable in the relations between the [High Contracting Parties]' must be taken into account. Consequently, having regard to the specific nature of the CSEE as an international agreement the Contracting Parties to which are the European Union and all of its Member States, that provision allows the general principles of EU law to be regarded also as rules of international law applicable to the parties to that convention and allows those principles to be taken into account in the interpretation of that convention 'together with the context' of the convention.[76]

98. In the third place, I recall that the obligation of the Complaints Board to apply the general principles of EU law where a dispute is brought before it has already been confirmed by the Court in the judgment in *Miles and Others*.[77]

99. It follows that the CSEE and the 2014 Rules must be interpreted as meaning that they require the Complaints Board to respect and apply the general principles of EU law in the context of the system of appeals provided for in Article 27(2) of that convention and also, in particular, in Articles 61, 62, 66 and 67 of those rules.

100. In particular, as regards, in the fourth and last place, the principle of effective judicial protection, I note, first of all, that the Court has already held, in the judgment in *Oberto and O'Leary*,[78] that, under Article 47 of the Charter, the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal.

101. Accordingly, it must be considered that the obligation for parents, after they have exhausted the administrative channels before the Secretary-General, to bring their dispute relating to the legality of the decision of the Class Council of the European School of Varese not to authorise the promotion of a pupil to the year above in the secondary school before the Complaints Board, which adjudicates in first and final instance, does not infringe their right to effective judicial protection.

102. Consequently, as is clear from my analysis, Article 27(2) of the CSEE and Articles 61, 62, 66 and 67 of the 2014 Rules must be interpreted in accordance with the principle of effective judicial protection referred to in Article 47 of the Charter.[79]

[74] Tridimas, T., *The General Principles of EU Law*, Oxford EC Law Library, Oxford, 2009, p. 51.

[75] See points 7 and 66 of this Opinion.

[76] See point 7 of this Opinion. In any event, as the Commission stated in answer to a question put by the Court, international law cannot justify a breach of the general principle of effective protection. See, in that regard, judgment of 7 May 2020, *Rina* (C-641/18, EU:C:2020:349, paragraphs 57 to 60), and my Opinion in that case (C-641/18, EU:C:2020:3, point 129).

[77] Paragraph 43.

[78] Paragraph 73.

[79] Of which the Complaints Board cannot fail to be aware, in view of its case-law. See points 84 to 86 of this Opinion.

VI. Conclusion

103. In the light of all of the foregoing considerations, I propose that the Court answer the question for a preliminary ruling referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

The first sentence of the first subparagraph of Article 27(2) of the Convention defining the Statute of the European Schools concluded at Luxembourg on 21 June 1994 between the Member States and the European Communities, read in conjunction with Articles 61, 62, 66 and 67 of the General Rules of the European Schools of 2014, in the version No 2014-03-D-14-en-11,

must be interpreted as meaning that the Complaints Board referred to therein has exclusive jurisdiction in first and final instance to rule, after all administrative channels before the Secretary-General of the European Schools provided for in the General Rules of the European Schools have been exhausted, in any dispute concerning the decision on repeating a year adopted in relation to a secondary-school pupil by the Class Council.