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## Effects of International Agreements in European Community Law: Are the Dice Cast?

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# EFFECTS OF INTERNATIONAL AGREEMENTS IN EUROPEAN COMMUNITY LAW: ARE THE DICE CAST?†

Jacques H.J. Bourgeois\*

## INTRODUCTION

One of Eric Stein's outstanding qualities, both as a scholar and as a teacher, is his skillful use of the comparative method, for which he can rely on an extensive knowledge of, and insight into, different legal systems. Quite a few years ago I had the privilege of participating, as a visiting professor, in the conduct of his course on European Community Law at the University of Michigan Law School. One of the sessions dealt with *van Gend & Loos*<sup>1</sup> and *Costa v. ENEL*.<sup>2</sup> In those two leading cases, the Court of Justice of the European Communities expounded its doctrine concerning the "direct effect" of certain provisions of the EEC Treaty — i.e., that where provisions impose upon the Member States clear and unconditional obligations and the implementation or effectiveness of the provisions is not dependent on any further act of any State, such provisions create individual rights enforceable in the courts of the Member States.

To stimulate the discussion and test his students' understanding, Eric Stein submitted to them the question whether these cases could be seen as an elaboration of Justice Marshall's opinion in *Foster and Elam v. Neilson*,<sup>3</sup> generally considered the source of the theory of self-executing treaties. Prompted by Professor Stein's incisive queries, the discussion revealed that the similarity between "self-executing treaties" à la Marshall and the "direct effect" of the EEC Treaty was only apparent. The Court of Justice's underlying theory of the relationship between the EEC Treaty and the legal systems of the Member States appeared to constitute a radical departure from Justice Marshall's analysis of the relationship between an international treaty, declared by the Constitution to be "the law of the land. . . . equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision[s],"<sup>4</sup> and domestic U.S. law. *Van Gend*

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† The views expressed are those of the author in his personal capacity.

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1. *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Netherlands Inland Revenue Administration) (Case No. 26/62), 1963 E. Comm. Ct. J. Rep. 1 (Preliminary Ruling).

2. (Case No. 6/64), 1964 E. Comm. Ct. J. Rep. 585 (Preliminary Ruling).

3. 27 U.S. (2 Pet.) 253 (1829).

4. 27 U.S. (2 Pet.) at 314.

& *Loos* and *Costa v. ENEL* emerged as construing the EEC Treaty not as an international agreement but as a constitutional instrument, and as treating the enforceability of the EEC Treaty by private individuals as if it were a question of domestic constitutional law in a federal system.<sup>5</sup> If a comparison to American constitutional law were at all possible, it should be made not with *Foster and Elam v. Neilson* but rather with a case such as *McCulloch v. Maryland*,<sup>6</sup> in which the plaintiff relied on the federal Constitution to challenge the validity of an act of a state legislature.

The Court of Justice was faced with a *Foster and Elam* issue only nine years later, when, in *International Fruit*,<sup>7</sup> it was asked to rule on the enforceability by importers of certain provisions of the General Agreement on Tariffs and Trade (GATT). Except for the case law on GATT, now well-established due to the three judgments of March 16, 1983,<sup>8</sup> the law as to the direct effect of other international agreements does not appear settled, although *Kupferberg*<sup>9</sup> comes to grips with some of the basic questions.

The purpose of this contribution is to explore the extent to which the "direct effect" doctrine, developed within the Community legal system for the purpose of the relations between Community law and the Member States' law, has spilled over into the field of the relations between international law and Community law,<sup>10</sup> or, to use a somewhat daring comparison, to what extent the doctrine of *McCulloch v. Maryland* has been applied in a *Foster and Elam* situation.

## I. GENERAL REMARKS

Some general remarks seem unavoidable. They will, I hope, even be helpful. After a cursory look at the previous case law of the Court of Jus-

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5. See Stein, *Towards Supremacy of Treaty Constitution by Judicial Fiat in the European Economic Community*, 48 RIV. DIR. INTERN. 3 (1965). There is a body of opinion that questions the nature and the extent of the distinction, with respect to enforceability and supremacy, between Community law and international law. See, e.g., de Witte, *Retour à Costa. La primauté du droit communautaire au service du droit international*, EUROPEAN UNIVERSITY INSTITUTE WORKING PAPER No. 49 (Apr. 1983). For a convincing rebuttal, see Tomuschat, *Zur Rechtswirkung der von der Europäischen Gemeinschaft abgeschlossenen Verträge in der Gemeinschaftsrechtsordnung*, in RECHTSVERGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION, GEDÄCHTNISSCHRIFT FÜR L.J. CONSTANTINESCO 801, 803 (G. Lüke, G. Ress & M. Will eds. 1983).

6. 17 U.S. (4 Wheat.) 316 (1819).

7. *International Fruit Co. v. Produktschap voor Groenten en Fruit* (Nos. 21-24/72), 1972 E. Comm. Ct. J. Rep. 1219 (Preliminary Ruling).

8. *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze* (Case No. 266/81), 1983 E. Comm. Ct. J. Rep. 731 (Preliminary Ruling); *Amministrazione dello Stato v. Società Petrolifera Italiana (SPI)* (Nos. 267-69/81), 1983 E. Comm. Ct. J. Rep. 801 (Preliminary Ruling); *Compagnia Singer v. Amministrazione delle Finanze dello Stato* (Nos. 291-291/81), 1983 E. Comm. Ct. J. Rep. 847 (Preliminary Ruling); see also Petersmann, *Applications of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397-437 (1983) (published too late to be taken into account in this contribution).

9. *Hauptzollamt Mainz v. C.A. Kupferberg & Cie* (Case No. 104/81), 1982 E. Comm. Ct. J. Rep. 3641 (Preliminary Ruling).

10. See Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 COMMON MKT. L. REV. 35-73 (1983); Bebr, *Gemeinschaftsabkommen und ihre mögliche unmittelbare Wirksamkeit*, 18 EuR 128 (1983).

tice, an attempt will be made to place the issue of the direct enforceability of international agreements by individuals into the broader framework of the status of international agreements in the Community legal system.

#### A. *Direct Enforceability of International Agreements in Previous Case Law*

Although the Court of Justice has considered international agreements relevant in one way or another to its decisions in a number of instances,<sup>11</sup> opinions dealing with the issue of whether an international agreement binding on the Community is enforceable by private individuals are rather scarce. In five instances — *International Fruit, Schlüter*,<sup>12</sup> and the three judgments of March 16, 1983<sup>13</sup> — the Court has denied that GATT provisions are “capable of creating rights of which interested parties may avail themselves in a court of law.”<sup>14</sup>

In *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*,<sup>15</sup> however, the Court held that a provision of the Association Convention of Yaoundé of 1963 with the African States and Madagascar, which prohibited charges having an effect equivalent to a customs duty, was “capable of conferring on those subject to Community law the right to rely on it before the courts.”<sup>16</sup> In *Pabst & Richarz v. Hauptzollamt Oldenburg*,<sup>17</sup> a clause of the Association Agreement with Greece, providing that no party could impose, directly or indirectly, on the products of the other party any internal taxation in excess of that imposed directly or indirectly on similar domestic products, was held to be “directly effective.”<sup>18</sup> Finally, in *Hauptzollamt Mainz v. Kupferberg*, a clause of the free-trade agreement with Portugal, whereby the parties agreed to refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination “between products of one Contracting Party and like products originating in the territory of the other Contracting Party,”<sup>19</sup> was held to be “directly applicable and capable of conferring on individual traders rights which the courts must protect.”<sup>20</sup>

What is surprising is not that this issue arose at all, but that it has not

11. Pescatore, *Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen*, in *VÖLKERRECHT ALS RECHTSORDNUNG INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE — Festschrift für Hermann Mosler* 661-69 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Vol. 81, 1983) (listing 41 decisions, but excluding decisions which refer to the 1950 Brussels Convention on Customs Nomenclature).

12. *Schlüter v. Hauptzollamt Lörrach* (Case No. 9/73), 1973 E. Comm. Ct. J. Rep. 1135 (Preliminary Ruling).

13. *SPI*, 1983 E. Comm. Ct. J. Rep. at 801; *SIOT*, 1983 E. Comm. Ct. J. Rep. at 731; *Singer*, 1983 E. Comm. Ct. J. Rep. at 847.

14. *Schlüter*, 1973 E. Comm. Ct. J. Rep. at 1157 (ground 27).

15. (Case No. 87/75), 1976 E. Comm. Ct. J. Rep. 129 (Preliminary Ruling).

16. 1976 E. Comm. Ct. J. Rep. at 142 (ground 25).

17. (Case No. 17/81), 1982 E. Comm. Ct. J. Rep. 1331 (Preliminary Ruling).

18. 1982 E. Comm. Ct. J. Rep. at 1350 (ground 27).

19. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3660 (quoting article 21 of the Agreement of July 22, 1972, between the EEC and the Portuguese Republic).

20. 1982 E. Comm. Ct. J. Rep. at 3666 (ground 27).

arisen more often, or at least that the Court of Justice has ruled on it in so few cases. Article 210 of the EEC Treaty grants the Community legal personality and the capacity to conclude international agreements.<sup>21</sup> Powers to conclude such agreements are conferred on the Community either expressly or implicitly by the EEC Treaty.<sup>22</sup> Under these powers the Communities had, as of July 1, 1983, concluded 231 bilateral agreements with 118 countries and had become party to 19 multilateral agreements. Moreover, although no formal legal consequences have been drawn from this development, the transfer of powers from the Member States to the Community which has occurred in the field of external trade has in practice been recognized by the other contracting parties in GATT: the Community participates in the administration of the GATT, and negotiates and enters into GATT implementing and side agreements. As John Jackson pointed out, the Community had by 1969 already acquired the status of a distinct entity in GATT.<sup>23</sup>

The majority of these agreements concern, wholly or in part, trade with non-member countries. In 1982, imports from and exports to third countries accounted respectively for 13.33% and 11.88% of the GDP of the Community as a whole. In the same year, intra-Community imports and exports accounted for approximately 13% of the GDP of the Community as a whole. In light of this, the considerable imbalance between the well-established case law on the Community's "interstate commerce clauses" and the scarce case law recognizing the right of individuals to rely on such international Community agreements is rather surprising.

Part of the explanation lies in the apparent reluctance of the Court of Justice to face this issue. A case in point is *Polydor Ltd. v. Harlequin Record Shops Ltd.*<sup>24</sup> RSO Records Inc. and Polydor Ltd., respectively the U.K. owner and the exclusive U.K. licensee of the copyright of a sound recording entitled "Spirits Having Flown" and featuring The Bee Gees, had brought an action before U.K. courts against Harlequin Record Shops Ltd., a retailer. The retailer sold in the United Kingdom records reproducing the same song by the same group; these records had been produced and marketed in Portugal by two Portuguese licensees of RSO, the U.K. copyright owner. Simons Records Shops Ltd., importer and wholesaler of the same records, was subsequently, at its own request, added as a defendant to the proceedings.

As was established during the proceedings, Simons and Harlequin, respectively the importer-wholesaler and the retailer of the Portuguese records, had by their acts infringed section 16(2) of the U.K. Copyright Act

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21. See, e.g., Opinion given pursuant to article 228(1) of the EEC Treaty, Advisory Opinion No. 1/76, 1977 E. Comm. Ct. J. Rep. 741; Kramer and others (Nos. 3-4, 6/76), 1976 E. Comm. Ct. J. Rep. 1279 (Preliminary Ruling); Commission of the Eur. Communities v. Council of the Eur. Communities (Case No. 22/70), 1971 E. Comm. Ct. J. Rep. 263.

22. For the most recent literature, see DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS (C. Timmermans & E. Voelker eds. 1981). See also van Houtte, *International Law and Community Treaty-Making Power*, 3 NW. J. INTL. L. & BUS. 621-39 (1981).

23. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 102 (1969).

24. (Case No. 270/80), 1982 E. Comm. Ct. J. Rep. 329 (Preliminary Ruling).

of 1956.<sup>25</sup> That provision, which implements the territoriality principle of the protection of copyrights, provides that a copyright is infringed by any person who, without the license of the owner of the copyright, imports an article into the United Kingdom, if to his knowledge the making of that article constituted an infringement of that copyright, or would have constituted such an infringement if the article had been made in the place into which it was so imported.

Harlequin and Simons claimed, however, that under Community law Polydor was not entitled to enforce the rights conferred upon it by section 16(2) of the Copyright Act. To that purpose they relied on the 1972 Free-Trade agreement between the EEC and Portugal and in particular on two provisions thereof — articles 14(2) and 23 — on elimination of restrictions on trade between the two parties.<sup>26</sup> These provisions are expressed in terms similar to those of the EEC Treaty on the abolition of restrictions on trade within the Community (articles 30 and 36).

There is no doubt that if the records had, as in this case, been lawfully produced and marketed by a licensee in one of the Community Member States instead of Portugal, the EEC Treaty provisions as interpreted by the Court of Justice would have prevented the enforcement by RSO Records and Polydor of their U.K. copyrights.<sup>27</sup>

The Court of Appeal stayed the proceedings and asked the Court of Justice, under article 177 of the EEC Treaty, to give a preliminary ruling on the question whether the Free-Trade Agreement with Portugal was directly enforceable by individuals within the Community and on the question of how the relevant provisions of that Agreement were to be interpreted.

One would have expected the Court of Justice to deal with these two questions in that sequence. Indeed, how the Agreement should be interpreted, with the possible consequence that it would prevail over section 16(2) of the U.K. Copyright Act, is a question which becomes relevant only once it is established that the Agreement is enforceable by individuals. Instead of this, the Court of Justice first interpreted the Agreement and found that the prohibition against importing a product from Portugal based on the exercise of a copyright was, under the circumstances, justified under article 23 of the Agreement and did not constitute a restriction within the meaning

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25. U.K. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 16(2).

26. Council Regulation 2844/72/EEC Concluding an Agreement between the European Economic Community and the Portuguese Republic, [Special Edition 1972] O.J. EUR. COMM. (No. L 301/164) 166 (Dec. 19, 1972).

27. In a series of decisions involving industrial and commercial property rights, the Court of Justice developed the doctrine of "exhaustion of rights." Article 36 of the EEC Treaty, which permits restrictions in intra-Community trade where such restrictions are justified to protect industrial and commercial property rights, does not cover the right under national law to prevent importation from another Member State of products protected by an industrial or commercial property right in the importing Member State, if these products have been lawfully made and sold in the exporting Member State by the holder of the right or with his permission. See, with respect to copyrights, *Dansk Supermarked A/S v. A/S Imerco* (Case No. 58/80), 1981 E. Comm. Ct. J. Rep. 181 (Preliminary Ruling); *Musik-Vertrieb Membran GmbH v. GEMA — Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (Nos. 55, 57/80), 1981 E. Comm. Ct. J. Rep. 147 (Preliminary Ruling); *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte & Co.* (Case No. 78/70), 1971 E. Comm. Ct. J. Rep. 487 (Preliminary Ruling).

of article 14 of the agreement. As to the question of direct enforceability, the Court of Justice simply noted that in view of the replies given to the question of substance, it was unnecessary to reply to the question of the direct enforceability of the Portugal Agreement.<sup>28</sup>

The Court of Justice thus sidestepped the issue of the enforceability of international agreements by individuals. As it had done in several previous cases, it managed to avoid the issue by directly interpreting an international agreement in a way which avoided a conflict with Community Law.<sup>29</sup> With respect to the earlier cases it could perhaps be argued that, in so doing, the Court of Justice had implicitly recognized the enforceability. After *Polydor* such a reading is no longer tenable; the issue had loomed too large in the proceedings. No less than five Member States had participated in it, four of which had vigorously defended the view that the Agreement was not enforceable by individuals.

This reluctance of the Court of Justice is understandable in the light of the following observations.

### B. *The Status of International Agreements*

The question of direct enforceability by individuals of international agreements is part of the broader problem of the status of international agreements within the domestic legal systems of the Member States. This status involves a series of questions such as: whether, when and how international agreements become binding on the state and become part of domestic law, whether and how they can be used to interpret domestic law and whether, how and to what extent they can be relied upon to review the legality of inconsistent domestic law. In general terms it may be said that the concept of the "self-executing treaty" may solve some of the difficulties, but does not come close to providing the answer to all the questions which arise in connection with the enforcement of international agreements by domestic courts.<sup>30</sup>

Leaving aside the disputed question of whether domestic or international law determines the qualifications of a treaty as "self-executing,"<sup>31</sup>

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28. *Polydor*, 1982 E. Comm. Ct. J. Rep. at 350 (ground 23).

29. *E.g.*, *Carciati* (Case No. 823/79), 1980 E. Comm. Ct. J. Rep. 2773 (Preliminary Ruling); *Regina v. Henn* (Case No. 34/79), 1979 E. Comm. Ct. J. Rep. 3795 (Preliminary Ruling); *Razanatsimba* (Case No. 65/77), 1977 E. Comm. Ct. J. Rep. 2229 (Preliminary Ruling); *R. & V. Haegeman v. Belgian State* (Case No. 181/73), 1974 E. Comm. Ct. J. Rep. 449 (Preliminary Ruling); *I. Schroeder KG v. Federal Republic of Germany* (Case No. 40/72), 1973 E. Comm. Ct. J. Rep. 125 (Preliminary Ruling).

30. See the concise but excellent review of the different approaches to these questions in various legal systems given by Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INTL. L. 892 (1980), with numerous references to other legal writings.

31. According to Riesenfeld, *supra* note 30, at 900, the self-executing character of a treaty is a product of international and domestic international law rules; according to Verhoeven, *La notion d' "applicabilité directe" du droit international*, 15 R.B.D.I. 243, 258 (1980), this is an international law question; A. BLECKMANN, BEGRIFF UND KRITERIEN DER INNERSTAATLICHEN ANWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE 138, 231 (Schriften zum öffentlichen Recht, Band 123, 1970), concludes that the arguments rooted in the domestic legal system ought to have the most weight.

domestic constitutional law provisions determine in fact, at any rate, the enforcement of an international treaty.

The cautious approach of the Court of Justice on the direct enforceability by individuals of international agreements goes hand in hand with the fact that it has not, so far, attempted to establish a firm and clear theory on the broader question of the status of international agreements in Community Law. In all fairness one should add that in its various submissions to the Court of Justice the Commission has also failed to develop and defend a comprehensive theory in this respect.

Quite apart from what, to a casual observer, may appear to be a state of disarray in international legal thinking, this state of affairs is understandable in the light of the constitutional provisions of the EEC Treaty and the practice followed by the EEC institutions on the one hand, and of the legal situation in the Member States on the other.

### 1. *Institutional Provisions and Practice*

Pursuant to article 228(1) of the EEC Treaty, international agreements are negotiated by the Commission of the European Communities and concluded, as a rule, by the Council of Ministers of the European Communities. With respect to tariff and trade agreements, article 113 lays down a procedure consisting of a recommendation by the Commission to the Council, followed by an authorization by the Council to the Commission to open and conduct negotiations within the framework of negotiation directives issued by the Council and in consultation with a special committee appointed by the Council to assist the Commission. In practice this procedure has been extended to other agreements.

Once the text of the agreement has been initialed or authenticated in some other form by the Commission, the Council "concludes" the agreement, following either a simplified procedure or a more complicated procedure involving two or three stages.<sup>32</sup> In doing so, the Council approves the agreement and decides on such steps as are required to express the Community's consent to be bound by the agreement by whatever means are applicable.<sup>33</sup>

In Community practice, "conclusion," within the meaning of the relevant EEC Treaty provisions (articles 114, 228 and 238), thus covers simultaneously two different measures: the measure whereby the *internal* procedure to conclude an agreement is completed and the measure whereby the Community binds itself internationally. This final act of the Council takes the form of a decision or a regulation. The decision or regulation, to which the international agreement is appended, is published in the Official Journal of the European Communities. A notice announcing the agreement's international entry into effect may appear subsequently in the Official Journal.

Beyond a certain analogy to legal systems providing for legislative ap-

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32. For a detailed description, see Louis & Brueckner, *Relations Extérieures* in 12 LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE 35-45 (J. Megret, M. Waelbroeck, J. Louis, D. Vignes & J. Dewost ed. 1980).

33. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 11, UN Doc. A/CONF. 39/27, reprinted in 63 AM. J. INTL. L. 875 (1969).



proval of international agreements, these treaty provisions do not offer much guidance on the status and effects of international agreements in the Community legal system, except that under article 228(2) agreements "concluded" under these conditions are "binding on the institutions of the Community and on Member States."

The institutional provisions are silent on the question of whether and how an international agreement binding on the Community becomes part of Community law. They do not contain any indication of the Treaty framers' views on what, for convenience, are called the "monist" and "dualist" approaches. The practice followed by the Community institutions does not offer much guidance either. In some cases the practice seems to reflect a "dualist" attitude; in other cases it reflects a "monist" one. The choice of a regulation (by definition "directly applicable") rather than a decision for the purpose of approving an international agreement, normally implies that a regulation was in that case necessary to ensure direct efficacy to an agreement which was itself considered "self-executing." It can thus be seen as the expression of a "dualist" attitude. However, that choice may also be influenced by other considerations, such as the need to adopt simultaneously complementary provisions requiring the use of a regulation. For its part, the Court of Justice has demonstrated that it does not attach much weight to the type of legal act used for the purpose of deciding whether an agreement has become part of Community law and is directly enforceable.<sup>34</sup>

On the other hand, in Community practice, legislation implementing an international agreement, i.e., transforming it into Community legislation, is considered necessary only where the agreement both entails precise legal obligations and requires changes of or additions to rules in force internally, or where the provisions of the agreement, in order to be implemented in a clear and effective manner, call for special measures of internal law.<sup>35</sup>

## 2. *The Laws of the Member States*

In the absence of clear indications in the institutional provisions of the Treaty, could the Court of Justice have found in the laws of the Member States the elements of a legal theory of the status and effects of international agreements which would not be too at odds with the attitude prevailing in the Member States?

In his recent study on judicial enforcement of international agreements in the European Community and in its Member States, Pescatore came to some remarkable conclusions.<sup>36</sup> *First*, the constitutional systems of several Member States operate in such a way that these Member States are in a

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34. In *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze* (Case No. 87/75), 1976 E. Comm. Ct. J. Rep. 129, 144, 155 (Preliminary Ruling), the Court of Justice allowed the plaintiff in the main case to rely on the Yaoundé Agreement although it had been approved by a Decision and not by a Regulation.

35. On the way in which some of the results of the latest GATT Multilateral Trade Negotiations were implemented, see Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5, 26-31 (1982).

36. Pescatore, *L'application judiciaire des traités internationaux dans la Communauté européenne et dans ses Etats membres*, in *MÉLANGES PIERRE-HENRI TEITGEN* (forthcoming);

position to accept international commitments, while reserving the possibility of leaving the commitments unimplemented in their territory or implemented only partially or selectively. In other Member States, either pursuant to constitutional provisions (e.g., the Netherlands) or as a result of judge-made law (e.g., Belgium), nothing, not even a subsequent inconsistent act of Parliament, stands in the way of judicial enforcement of international agreements that are by nature capable of such enforcement. *Second*, some Member States adhere to a "transformation" theory. As under U.S. constitutional law, the *lex posterior derogat legi priori* principle allows the legislature by a subsequent act to modify in effect the terms of a treaty or even to put an end to its effects. *Third*, in some Member States, under the *acte de gouvernement* or a similar doctrine, which may be compared to some aspects of the political question doctrine in U.S. law,<sup>37</sup> the judiciary spontaneously limits its powers with respect to application or interpretation of international treaties. In France, for example, in case of doubt on the interpretation of a treaty, the judiciary is supposed to refer the question to the executive branch for a ruling. *Fourth*, the doctrine of "self-executing treaties" has paradoxical results. In "dualist" Member States this doctrine may actually favor the penetration of international law.<sup>38</sup> In "monist" Member States the doctrine offers the judiciary the possibility of setting aside provisions of an international agreement, by declaring them not self-executing.

Thus, not only are there substantial differences in the constitutional framework, including the possibility of judicial review of national legislation, which is the ultimate test of the efficacy of an international treaty in domestic law, but, in addition, there are no two Member States which have regulated in the same manner the technical means to ensure domestic execution of international treaties.

### C. *Relevance of International Agreements in the Community System*

When one tries to find a pattern in the case law on the status and effects of international agreements, one is quite naturally tempted to look first for answers to the three main questions: (a) does the agreement bind the Community? (b) does it form part of Community law? (c) is it enforceable by private individuals? One would then attempt to establish logical links between these questions, in order to arrive at an assessment of the responsiveness of the Community's legal system to international agreements. Thus, one could say the following: question (b) only arises if (a) is answered affirmatively; if (b) is answered affirmatively, then, quite logically, the answer to (c) must be that the international agreement should be enforceable to the same extent as any piece of Community law.

However, the reality is too complex to be reduced to a neat syllogism. It

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*accord Groux, L' "invocabilité en justice" des accords internationaux des Communautés européennes*, REV. TRIM. DR. EUR. 203, 212 (1983).

37. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962).

38. See Waelbroeck, *Enforceability of the EEC-EFTA Free-trade Agreements: A Reply*, 3 EUR. L. REV. 27 (1978). The most remarkable example is the Italian case law granting "direct efficacy" to the GATT via the statute which incorporated it into Italian law. For comments, see Sacerdoti, *Application of GATT by Domestic Courts: European and Italian Case Law*, 1976 ITAL. Y.B. INTL. L. 224 (vol. 2).

cannot be summarized by the insufficiently qualified questions of whether international agreements are "applicable" within the Community and whether they are "directly enforceable."<sup>39</sup> This may be illustrated by the following two sets of considerations, which to American lawyers will appear to be paradoxes of the Community legal system.

The first paradox is that an international agreement does not necessarily have to be binding on the Community in order to be relevant to the interpretation and application of Community law. There are the agreements concluded by Member States with third countries before the entry into force of the EEC Treaty or before the Member State's accession to the Community. After this date, under the existing division of powers between the Community and the Member States, Member States continue to enter into international agreements in fields not preempted by Community action or in fields where there is no exclusive Community power. Even with the utmost care, it appears hardly possible to prevent frictions between Community law and such agreements. How and where should such conflicts then be solved?

There can be little doubt that under international law such agreements entered into by the individual Member States must be respected. This much is obvious as to Member States' agreements entered into before the entry into force of the EEC Treaty, and is reflected in article 41 of the Vienna Convention on the Law of Treaties. Community law itself recognizes this expressly. Under article 234, rights for third countries arising from Member States' preexisting international agreements and obligations for Member States arising therefrom are not affected by the EEC Treaty.<sup>40</sup> As to agreements entered into subsequently by Member States, it hardly seems equitable for them to invoke the invalidity of such agreements, except perhaps where the third country concerned had been advised, before concluding the agreement, of its incompatibility with Community law. Yet the interpretation of such international obligations cannot be left to each Member State's legal system. This would strike at the uniform application of Community law, its most fundamental characteristic. There is no other option than to conclude that, without being binding on the Community, such agreements are nonetheless part of Community law, and their observance must be ensured by the Court of Justice, under article 164 of the EEC Treaty, in its interpretation and application of Community law.<sup>41</sup>

This, in turn, sheds a particular light on the attitude of the Court of Justice with respect to treaties that are internationally binding on the Community either because the Community concluded them or because the Community has been substituted to the Member States for the execution of

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39. See *Pescatore*, *supra* note 11, at 663.

40. Treaty establishing the European Economic Community, Mar. 25, 1957, art. 234, para. 1, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty]; see Commission of the Eur. Economic Community v. Italian Republic (Case No. 10/61), 1962 E. Comm. Ct. J. Rep. 1.

41. In *Attorney Gen. v. Burgoa* (Case No. 812/79), 1980 E. Comm. Ct. J. Rep. 2787 (Preliminary Ruling), the Court of Justice concluded that even if the Community is itself not bound by agreements entered into by Member States before the Community exercised its powers, it has the duty not to impede the performance of the obligations by the Member State which stem from such agreements.

such treaties.<sup>42</sup> In this respect, it is worth recalling one of the latest GATT judgments in which one of the questions submitted to the Court of Justice dealt precisely with its jurisdiction: the Italian Court of Cassation questioned whether the Court of Justice had jurisdiction to interpret the GATT in cases other than those where the interpretation or the legality of Community measures were at stake. Referring to an earlier judgment, the Court of Justice confirmed its jurisdiction on the following grounds:

[I]t is important that the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community. Any difference in the interpretation and application of provisions binding the Community as regards non-member countries would not only jeopardize the unity of the commercial policy, which according to Article 113 of the Treaty must be based on uniform principles, but also create distortions in trade within the Community, as a result of differences in the manner in which the agreements in force between the Community and non-member countries were applied in the various Member States.<sup>43</sup>

Two conclusions may be drawn from this first paradox. *First*, even agreements that are not internationally binding on the Community may be held relevant for the interpretation and application of Community law. *Second*, when the Court of Justice takes cognizance of international agreements as part of Community law, or treats them as if they were part of Community law, it does so to protect uniform application of Community law as much as, if not more than, to enforce international law.

The second paradox is that, in the Community system, a norm may be part of Community law without being enforceable by individuals. Consequently, logic does not compel the conclusion that, once it is established that an international agreement binding on the Community has become part of Community law, such agreement may be relied upon by individuals to review the legality of subordinate Community legislation or even of subsequent acts of the Community "legislature" — i.e., a subsequent act of the Council of Ministers inconsistent with the international agreement previously approved by the same Council of Ministers. Conversely, logic does not compel the conclusion that, once it is established that a given international agreement may not be relied upon by an individual, the agreement is therefore not part of Community law.

Indeed, Community law proper is not always necessarily enforceable by individuals. The quite remarkable development of the "direct effect" doctrine should not obfuscate the fact that Community law is also very much concerned with regulating the relations between the Community and its Member States and that this is as much a part of intra-Community law as is

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42. GATT is a prime example. See, e.g., *SPI*, 1983 E. Comm. Ct. J. Rep. at 801; *SIOT*, 1983 E. Comm. Ct. J. Rep. at 731; *Singer*, 1983 E. Comm. Ct. J. Rep. at 847; *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen* (Case No. 38/75), 1975 E. Comm. Ct. J. Rep. 1439 (Preliminary Ruling); *International Fruit*, 1972 E. Comm. Ct. J. Rep. at 1219; see also *Pescatore*, *supra* note 11. According to Bebr, no hasty conclusions should be drawn from this as to the direct effect of an agreement. See Bebr, *supra* note 10, at 35, 40.

43. *SPI*, 1983 E. Comm. Ct. J. Rep. at 828 (ground 14).

law having direct effect.<sup>44</sup> Not only is that part of Community law binding on the Community institutions and on Member States, but it can also be relied upon by the Commission or by Member States before the Court of Justice and may even be interpreted by the Court of Justice under article 177.<sup>45</sup>

Enforcement of Community law is thus not only guaranteed by "direct effect" where appropriate, but also by these other judicial means, in particular by the possibility that the Commission may proceed against Member States for breach of their Community law obligations. This alternative means of judicial enforcement also applies to international agreements that have become part of Community law. This point was emphasized implicitly but clearly by the Court of Justice in one of its recent GATT decisions. Although it denied that article V of GATT could be relied upon by the complainant in the main case to challenge the application of certain Italian port taxes on goods in transit to Austria, it did refer to article V and stressed "the Community's obligation to ensure that the provisions of GATT are observed in its relations with non-member States which are parties to GATT."<sup>46</sup> Even where a provision of an international agreement would be capable of having "direct effect" as a similarly worded provision of Community law, the reasons for considering the Community law as directly enforceable may not necessarily apply to international law binding on the Community.<sup>47</sup>

Two conclusions may be drawn from this second paradox. *First*, it is not true that because an international agreement is part of Community law that it is *therefore* enforceable by individuals. *Second*, enforceability by individuals is not the only judicial means to ensure application of and compliance with international agreements within the Community legal system.

## II. THE ENFORCEABILITY OF INTERNATIONAL AGREEMENTS: *KUPFERBERG AND THEREAFTER*

It is now time to turn to the main question raised at the outset of this contribution. In those cases where the Court of Justice has held that a provision of an international agreement is "directly applicable" and "capable of conferring to individuals rights which the courts must protect," has it transferred to the relationship between international law and Community law the doctrine of "direct effect" which applies to the relationships between Community law and the domestic law of the Member States?

The significance of this question appears when one considers some of the aspects of the direct effect doctrine, as it is set out in *van Gend & Loos*<sup>48</sup>

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44. To a very large extent Community law has replaced international law for the purpose of regulating relations between Member States in matters falling within the scope of the Community treaties. For the most recent contribution on this, see Schwarze, *Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen*, 18 EuR 1-39 (1983).

45. *Impresa Costruzioni Comm. Quirino Mazzalai v. Ferrovia del Renon* (Case 111/75), 1976 E. Comm. Ct. J. Rep. 657 (Preliminary Ruling).

46. *SIOT*, 1983 E. Comm. Ct. J. Rep. at 780 (grounds 27 and 28).

47. On this distinction see Bebr, *supra* note 10, at 36-38; Tomuschat, *supra* note 5, at 803-04.

48. 1963 E. Comm. Ct. J. Rep. at 1.

and *Costa v. ENEL*.<sup>49</sup> The doctrine is justified by the *legal nature* of the Community: it represents a new legal order, the subjects of which are not only Member States but also individuals; for the benefit of this Community the Member States have limited their sovereign rights. In addition, the doctrine is related to the *objective* of the EEC Treaty of establishing a common market, which implies that the EEC Treaty is more than an agreement that merely creates mutual obligations between Member States. Furthermore, the doctrine is closely linked to the *institutional* structure set up by the EEC Treaty. The Treaty provides for the establishment of common institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. It also grants jurisdiction to the Court of Justice to ensure a uniform interpretation of Community law by national courts. Finally, the direct effect doctrine has, as a *corollary*, the supremacy of Community law over inconsistent national law.

Apart from its implications for the status and the efficacy of international agreements within the Community legal system in general, the question of direct effect has, for trade agreements such as the Portugal Agreement, some potentially wide-ranging specific implications. All Community trade agreements — e.g., its Association agreements and the Lomé Convention concluded with the African, Caribbean and Pacific States — contain clauses that are expressed in terms identical or similar to those of the EEC Treaty on the abolition of restrictions on intra-Community trade. It is as if the United States had inserted the interstate commerce clause in its trade agreements. Not only has the Court of Justice recognized the “direct effect” of those EEC Treaty provisions on which the trade agreement clauses are based, it has also interpreted them very broadly in accord with the aims of the EEC Treaty and the economy thereof, in a fashion reminiscent of the U.S. Supreme Court’s interpretation of the basic tenets of the U.S. Constitution.<sup>50</sup> A characteristic example is the prohibition in article 30 of the EEC Treaty of “measures having equivalent effect to quantitative restrictions,” and the article 36 exceptions dealing with national import restrictions justified on the ground of protection of industrial and commercial property rights.<sup>51</sup>

As the Court of Justice dealt at some length with the underlying issues in *Kupferberg*, the attempt to find an answer to our question will be made with the help of that decision. The decision of the Court of Justice in *Kupferberg* arose from a case pending before the Bundesfinanzhof, Germany’s highest court for fiscal matters, in which Christian Adalbert Kupferberg KGA and the Hauptzollamt Mainz, a principal German customs office, were litigating the application to port wines of a “monopoly equalization duty,” levied under the German law on the (State) Monopoly

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49. 1964 E. Comm. Ct. J. Rep. at 585; see text at notes 1-2 *supra*.

50. See, e.g., Blasi, *Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce*, in 1 COURTS AND FREE MARKETS 174 (T. Sandalow & E. Stein eds. 1982) (as to U.S. law); Schermers, *The Role of the European Court of Justice in the Free Movement of Goods*, in 1 COURTS AND FREE MARKETS, *supra*, at 222 (as to Community law).

51. See note 27 *supra*.

in Spirits.<sup>52</sup> This duty on imported spirits is of the same amount as the duty, called the "spirits surcharge," on certain domestic spirits whose producers are exempt from the obligation to deliver all domestic spirits to the Federal Monopoly Administration. Liquor wines with an alcohol content of more than fourteen percent by volume are considered spirits and are liable to a monopoly equalization duty calculated on the quantity of alcohol in excess of fourteen percent by volume. The point of contention was that, provided certain conditions were met, the "spirits surcharge" applying to domestic spirits was reduced, but such reduction was not extended to imported port wines. Kupferberg claimed that the refusal to extend this reduction to imported port wine was illegal. It relied, *inter alia*, on a provision of the Agreement between the EEC and Portugal signed in Brussels on July 22, 1972 and concluded and adopted on behalf of the Community by Council Regulation.<sup>53</sup> The provision in question, article 21, paragraph 1, provides that "The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party."<sup>54</sup> Pursuant to article 177 of the EEC Treaty, the Bundesfinanzhof referred a series of questions to the Court of Justice, relating, among other things, to the direct applicability of article 21 of the Portugal Agreement and to its meaning.

In reaching its conclusion that "[t]he first paragraph of article 21 of the Agreement between the Community and Portugal is directly applicable and capable of conferring on individual traders rights which the courts must protect,"<sup>55</sup> the Court of Justice made a series of important pronouncements.

*First*, elaborating on earlier decisions, the Court of Justice stated that international agreements made by the Community "form an integral part of the Community legal system"; that where the implementing measures are to be taken by Member States, the Member States in so doing fulfill an obligation "above all in relation to the Community which has assumed responsibility for the due performance of the agreement";<sup>56</sup> and that the effect in the Community of such an agreement is the subject of Community law and not of the internal legal order of each Member State.

*Second*, having thus recognized the "Community nature" of the Portugal Agreement,<sup>57</sup> the Court of Justice dealt with the various arguments, derived from the structure of the agreement, which Member States had advanced against the direct enforceability of the agreement as such.<sup>58</sup> Most of these arguments related directly or indirectly to the proper division of powers within the Community legal system between the legislative and the ex-

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52. Branntweinmonopolgesetz (Law on the monopoly in spirits), 1922 RGBL 405 (W. Ger.).

53. See note 26 *supra*, at 165.

54. See note 26 *supra*, at 170.

55. Kupferberg, 1982 E. Comm. Ct. J. Rep. at 3670.

56. 1982 E. Comm. Ct. J. Rep. at 3662 (ground 13).

57. 1982 E. Comm. Ct. J. Rep. at 3662 (ground 14).

58. The Commission's position was more subtle and had shifted since *Polydor*. See text at note 75 *infra*.

executive, on the one hand, and the judiciary, on the other, with respect to the Community's external relations. They were intended to demonstrate the existence of fundamental differences between judicial enforcement of the EEC Treaty and of Community international agreements. They conveyed the idea that judicial enforcement of agreements at the initiative of private parties would fetter the necessary freedom of the legislature and the executive in the field of external relations of the Community and that such enforcement would be inappropriate, counterproductive and would interfere with the consultation and negotiation procedures of such agreements.

The Court of Justice did not consider these arguments sufficient to conclude that the nature or the structure of the Portugal Agreement, as such, could prevent a trader from relying on the provisions thereof before a court in the Community. However, the reasoning of the Court of Justice contained some qualifying elements which will be examined later.

*Third*, the Court of Justice turned then to the analysis of the provision itself. It decided that the question of whether the provision was unconditional and sufficiently precise to have direct effect had to be examined "in the light of both the object and purpose of the Agreement and of its context."<sup>59</sup> Noting that the purpose of the Agreement was to create a system of free trade, and that it provides for the elimination of rules restricting commerce in virtually all trade, the Court of Justice found that article 21 sought to prevent this elimination of restrictions from being rendered nugatory by fiscal practices of the Contracting Parties. Finding that the application of this unconditional rule against fiscal discrimination "is dependent only on a finding that the products affected by a particular system of taxation are of like nature," the Court of Justice concluded that this rule could thus produce direct effects throughout the Community.<sup>60</sup>

#### A. *On the "Nature" of an International Agreement*

When it held in earlier cases that an international agreement formed "an integral part of Community law,"<sup>61</sup> the Court of Justice decided that the effects of such international agreements were to be determined by Community law and not by the laws of the Member States. The issue of whether those effects would be determined, in view of the agreement's international nature, in the same manner as for any other piece of Community law was not clarified.

*Kupferberg* makes clear that an international agreement, once it has become internationally binding on the Community, not only becomes "the law of the land" but also that, as such, it cannot be deprived in principle of "direct effect." This does not, however, imply that for the purposes of "direct effect," the international nature of the Portugal Agreement is entirely disregarded and that it is fully assimilated into Community law proper.

*First*, the Court of Justice declared that it will only decide on the effects

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59. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3665 (ground 23). In *Polydor*, 1982 E. Comm. Ct. J. Rep. at 346 (ground 8), the criteria are worded differently: "in the light of both the object and purpose of the Agreement and of its wording." They are probably intended to mean the same thing.

60. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3665 (grounds 24 to 26).

61. *Haegeman*, 1974 E. Comm. Ct. J. Rep. at 460 (ground 5).



of an international agreement in the Community legal order if the contracting parties did not settle that question in the agreement themselves.<sup>62</sup> At first blush this may appear to be stating the obvious. In so doing, however, the Court of Justice addressed one of the policy arguments of the Member States and the Commission. What the Court of Justice said is that, if judicial enforcement of an agreement is considered inappropriate or counterproductive, as Member States and the Commission had argued, it is up to the Community institutions to exclude it by inserting appropriate clauses in the agreement. More importantly, by leaving to the Council and the Commission the discretion to exclude judicial review in international agreements, the Court of Justice established a major distinction between the direct effect of international agreements and of Community law proper, where such discretion is manifestly excluded by the general principles of the Treaty.<sup>63</sup>

*Second*, it had been argued both in *Polydor* and in *Kupferberg* that it would be a breach of reciprocity if the courts of only one of the contracting parties recognized the direct effect of agreements. Much reliance had been put on certain countries' supreme court opinions relating to free-trade agreements between those countries and the Community.<sup>64</sup> The Court of Justice found that

the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.<sup>65</sup>

The door is, however, left open for the reciprocity argument. The statement is qualified by the reservation that there must, at any rate, be *bona fide* performance of the agreement by the other party using the means of its domestic legal system appropriate for executing fully the commitments which it has undertaken.

Absence of reciprocity, in the sense of nonperformance by one party, may entitle the other party to suspend the execution of its obligations under an agreement as an *exceptio non-adimpleti contractus*.<sup>66</sup> In *Kupferberg*, the Court of Justice seems to imply that, where such absence of reciprocity could be established, the Court would take this into account in deciding whether an individual should be able to enforce the agreement in question. It has been argued that national courts do not normally take reciprocity

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62. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3663 (ground 17).

63. This does not, however, imply that the Community "legislator" has in all circumstances the duty to draft his legislation in such a way as to create directly enforceable rights for individuals.

64. See, e.g., Austrian Supreme Court, judgment of 10 July 1979, *Austra-Mechana v. Gramola Winter & Co.*, (1980) REVUE INTERNATIONALE DU DROIT D'AUTEUR No. 104; Sunlight AG v. Bosshard Partner Intertrading, 29 COMMON MKT. L. REV. Vol. 3 at 664 (1980) (Swiss Fed. S. Ct., 1979); Lingl, *International Trade: Conflict Between Swiss Trademark Law and EEC Trade Agreement*, 21 HARV. INTL. L.J. 756 (1980).

65. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3664 (ground 18).

66. Cf. Tomuschat, *supra* note 5, at 812. For an examination of the theoretical underpinnings and the practice, see Decaux, *La Réciprocité en Droit International* in BIBLIOTHÈQUE DE DROIT INTERNATIONAL (C. Rousseau ed. 1980).

into account when interpreting international agreements or when considering the effect of international agreements in their legal system,<sup>67</sup> and that, where the judiciary does so, as in France, it enters into almost inextricable difficulties.<sup>68</sup> On the other hand, it may be argued that these courts have never given the same far-reaching effect to international agreements as the "direct effect" granted by the Court of Justice to Community law.<sup>69</sup> There certainly are weighty arguments — e.g., the introduction into the application of the law of an "element of political evaluation that cannot be calculated"<sup>70</sup> — against judicial involvement. However, once the judiciary is called upon to enforce an international agreement, it does not seem out of order for the judiciary to take into account possible manifest and substantial nonperformance by the other party that would completely upset the balance of an agreement.

The interesting point is that the Court of Justice apparently did not rule out the possibility of denying "direct effect" to an international agreement on the ground of nonperformance by the other contracting party, i.e., absence of substantive reciprocity. This is another important distinction, from the point of view of the direct effect doctrine, between international agreements and Community law proper: neither the refusal of a national court to grant direct effect to a provision of purely Community origin, nor the failure of a Member State to comply otherwise with its obligations under Community law, can in any way justify a denial of "direct effect" in or by another Member State.

#### B. On the "Structure" of the Portugal Agreement

In both *Polydor* and *Kupferberg* several Member States argued against the direct enforceability of the Portugal Agreement by individuals, and the Commission had argued for a limited enforceability, on the basis of the "direct effect" doctrine of Community law. Seeking to avoid the transposition of this doctrine to international agreements, they stressed the structural differences between the EEC Treaty and classical international agreements, emphasizing distinctive substantive and legal features of the EEC Treaty, such as its wide-ranging scope, aims going far beyond trade matters, and its common institutions endowed with sovereign law-making powers.

*Kupferberg* did not enter into this discussion. The Court of Justice limited its reasoning to the arguments relating to the Portugal Agreement itself. The Court found that neither the existence of a special institutional framework for consultations and negotiations, established by the contracting parties *inter se*, nor the possibility that contracting parties could derogate from the Agreement pursuant to safeguard clauses, was sufficient in itself to exclude the direct applicability "which may attach to certain stipulations in the agreement."<sup>71</sup>

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67. See, e.g., Tomuschat, *supra* note 5, at 815-16 (as to Germany). In the United States, the judiciary would leave it to the political branch to decide. See Decaux, *supra* note 66, at 268-69.

68. See Groux, *supra* note 36, at 230.

69. Bebr, *supra* note 10, at 72.

70. Tomuschat, *supra* note 5, at 818.

71. *Kupferberg*, 1982 E. Comm. Ct. J. Rep. at 3664 (ground 21).

This gives rise to two comments. *First*, the Court's benign neglect of the structural differences between the law of the EEC Treaty and the law of the Portugal Agreement is surprising, since it was precisely the structural weaknesses of the GATT law that led the Court of Justice to exclude possible direct applicability of GATT provisions. Quite clearly, *Kupferberg* does not herald a new direction on the direct applicability of GATT. The latest GATT rulings of March 16, 1983, refer unambiguously to earlier judgments in the following terms:

The Court reached that conclusion on the basis of considerations concerning the general scheme of GATT, namely that it was based on the principle of negotiations undertaken on a reciprocal and mutually advantageous basis and was characterized by the great flexibility of its provisions, in particular those concerning the possibilities of derogation, the measures which might be taken in cases of exceptional difficulty and the settlement of differences between the contracting parties.<sup>72</sup>

On the face of it, the "structure" of the Portugal Agreement does not differ greatly from that of the GATT. At any rate, it is much closer to the structure of the GATT than to that of the EEC Treaty. Since the Court of Justice has not offered any clues, any explanation of this difference in approach is a venture into the realm of speculation, but the following considerations may have played a part. The Community agreements are "young"; their legal personality is at present being shaped. The GATT is "mature"; it has already acquired a certain legal personality that probably makes it less capable of judicial enforcement.<sup>73</sup> In addition, Community agreements, such as the Portugal Agreement, are bilateral agreements: the unilateral decision of one party to recognize their direct enforceability in the domestic system, expecting thus to enhance their efficacy in general, is still a gamble but with far better odds than in the case of multilateral agreements.

Finally, there undoubtedly is a qualitative difference between the GATT and agreements such as the Portugal Agreement, whose essential feature is the establishment of a free-trade area which goes beyond the scheme and the objectives of GATT. This differential treatment by the Court of Justice is timely. In formal proceedings, instituted in GATT in 1983 against the preferential customs treatment of citrus fruit under some such agreements, the United States disputed the Community's claim that the agreements are genuinely aimed at establishing free-trade areas within the meaning of article XXIV of GATT.

*Second*, the disregard for the structural differences between the EEC Treaty and an international agreement is not absolute. It does not imply that the provisions of an international agreement are then, for all other purposes, treated without further ado as if they were provisions of purely Community origin. Indeed, it remains to be seen whether, precisely in view of their different context, international provisions are subjected to the same "direct effect" test as Community provisions. Moreover, these structural differences may be relevant to the substantive interpretation of similarly worded provisions.

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72. *SPI*, 1983 E. Comm. Ct. J. Rep. at 830 (ground 23).

73. See, e.g., Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J.W.T.L. 615 (1970).

### C. On the "Direct Effect" Test for International Provisions

Leaving certain variations aside, a Community law provision can be said to have "direct effect" where it imposes a clear and unconditional obligation, the implementation or effectiveness of which is not dependent upon further acts. As the evolution of the case law shows, this "direct effect" test is not neutral; it does not operate as a chemical formula. What is "clear" and "unconditional" depends to some extent on the "value" which one attributes to the obligation. Bearing this in mind, in the observations it submitted both in *Polydor* and *Kupferberg*, the Commission suggested a distinction between the "hard core" of the Portugal Agreement, such as provisions prohibiting customs duties and quotas, and the surrounding grey area, proposing to grant direct effect only to "hard core" provisions.<sup>74</sup>

The judgments rendered so far do not permit one to draw conclusions as to the direct effect test to be applied to international provisions. In *Polydor* the Court of Justice avoided the issue of "direct effect."<sup>75</sup> Neither in *Bresciani*<sup>76</sup> nor in *Kupferberg* were the provisions in question such as to leave much room for interpretation. The provision which was at stake in *Pabst* did raise a problem in this respect; however, *Pabst* concerned the Association Agreement with Greece,<sup>77</sup> a country which in the meantime had acceded to the Community. It can hardly be treated as a precedent applicable to other international agreements.

"Clarity" and "unconditionality" must depend on the wording of each provision of an international agreement and, when these provisions mirror Community law provisions, on the substantive interpretation of the Community law provisions. Although strictly speaking this no longer relates to the "direct effect" of a provision, in practical, economic and political terms there is an obvious link between such effect, with its guarantee of judicial enforcement, and the substantive interpretation of an international provision. Quite evidently, the broader the scope of a provision and the wider the room for judicial interpretation, the more difficult it is for political bodies to accept enforcement by the judiciary.

### D. On the Substantive Interpretation of International Agreements

Granted that provisions of international agreements have "direct effect" in the Community legal system, are such provisions then to be interpreted in the same way as similarly worded EEC Treaty provisions?

It is on this point that the major difference, apart from limitations on the recognition of the direct effect of provisions of international agreements, appears between international agreements and Community law proper. Indeed, as has been made clear in several other judgments,<sup>78</sup> the Court of

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74. *Kupferberg*, 1982 E. Comm. Ct. Rep. at 3652-56.

75. See text at notes 25-29 *supra*.

76. 1976 E. Comm. Ct. J. Rep. at 129.

77. *Pabst & Richarz KG v. Hauptzollamt Oldenburg* (Case No. 17/81), 1982 E. Comm. Ct. J. Rep. 1331, 1333 (Preliminary Ruling).

78. See, e.g., *Polydor*, 1982 E. Comm. Ct. J. Rep. at 348; *Procureur de la République, Besançon v. Bouhelier* (Case 225/78), 1979 E. Comm. Ct. J. Rep. 3151, 3160 (Preliminary Ruling); *EMI Records v. CBS U.K.* (Case 51/75), 1976 E. Comm. Ct. J. Rep. 811, 847 (Preliminary Ruling). The only apparent exception is *Bresciani*, 1976 E. Comm. Ct. J. Rep. at 141-42,

Justice decided in *Kupferberg* that similarity of terms is not a sufficient reason for transposing to the provisions of international agreements the case law on provisions of the EEC Treaty dealing with intra-Community trade.

The clearest statement of the reasoning on which the Court of Justice relied appears in *Polydor*. The Court of Justice first stressed the structural differences between the EEC Treaty and the Portugal Agreement. Referring to its case law interpreting the EEC Treaty provisions, the Court of Justice emphasized that its scope "must indeed be determined in the light of the Community's objectives and activities" and recalled that "the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a domestic market."<sup>79</sup> In contrast, the Portugal Agreement, "although it makes provision for the unconditional abolition of certain restrictions . . . and measures having equivalent effect," does not have the same purpose as the EEC Treaty.<sup>80</sup>

Second, there is also, according to the Court of Justice, an institutional difference. A distinction as to interpretation between EEC Treaty provisions and similarly worded provisions of the Portugal Agreement

is all the more necessary inasmuch as the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the Community and Portugal.<sup>81</sup>

In *Polydor*, this led to the conclusion that, unlike articles 30 and 36 of the EEC Treaty, concerning intra-Community trade, the similarly worded provisions of the Portugal Agreement do not exclude a prohibition, based on the protection of copyright, on the importation into the Community of a product originating in Portugal. A comparison between the substantive interpretation of article 21, paragraph 1 of the Portugal Agreement in *Kupferberg* and the interpretation of the corresponding EEC Treaty provision (article 95, first paragraph) is made more difficult by the facts of the case — no like product was manufactured in Germany — and some textual differences between the two provisions.

The Court of Justice has been less clear, however, on how it will interpret international agreements in future cases.<sup>82</sup> In *Polydor* it stated that "it is necessary to analyse the provisions in the light of both the object and purpose of the Agreement and of its wording."<sup>83</sup> In and by themselves, these criteria, when applied to international agreements, are "more sensible

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in which the agreement expressly referred to article 13 of the EEC Treaty as such, in conformity with articles 132 and 133 of the Treaty.

79. *Polydor*, 1982 E. Comm. Ct. J. Rep. at 348 (ground 16).

80. 1982 E. Comm. Ct. J. Rep. at 349 (ground 18).

81. 1982 E. Comm. Ct. J. Rep. at 329 (ground 20). Such an approach finds support in international law. See Schermers, *The Direct Application of Treaties with Third States: Note Concerning the Polydor and Pabst Cases*, 19 COMMON MKT. L. REV. 563, 568 (1982).

82. *Sektkellerei CA v. Hauptzollamt Mainz* (Case No. 253/83, filed Nov. 11, 1983) (Reference for a Preliminary Ruling) is pending before the Court of Justice involving fiscal discrimination both in intra-Community trade and trade with Spain and Portugal.

83. *Polydor*, 1982 E. Comm. Ct. J. Rep. at 346 (ground 8).

than the rather specious intent-of-the-parties test not uncommonly used in various national systems."<sup>84</sup>

From such a statement and from the absence of transposition of the case law on Community law provisions, the following general indications may reasonably be inferred. Existing interpretations relating to similarly worded Community law provisions are useful only to the extent that they do not relate to the purpose of the EEC Treaty, which seeks to create a single market reproducing as closely as possible the conditions of a domestic market.<sup>85</sup> This is particularly relevant for provisions of international agreements relating to charges on imports other than customs duties, to measures applying specifically to imported products other than import bans or import quotas, to discrimination in taxation and in domestic legislation on manufacturing, marketing, and so on, to competition, and to state aid.

To be compatible with an international agreement it will be sufficient that a measure having a restrictive effect on trade, be either justified by an exception or a derogation or pursue an aim which is legitimate under the agreement. Neither the restrictive effect<sup>86</sup> nor the aim<sup>87</sup> of such a measure will be weighed against the broader objectives of the agreement. This kind of assessment, in which considerations of expediency have a large part to play, is left to the contracting parties.

#### E. *International Agreements as "the Supreme Law of the Land"*

There is one major question left; i.e., in case of conflict between an international agreement and Community law, which will prevail over the other in the Community legal system? In other words, does the recognition of "direct effect" carry with it its corollary — supremacy — under Community law? The answer to this question is still outstanding. Since they involved conflicts between international agreements concluded by the Community and provisions of the law of a Member State, *Kupferberg*, *Pabst* and *Polydor* are, as such, not relevant in deciding how to solve a conflict between an international agreement and Community law. There is no past case law solving this conflict one way or another. And, apart from some *obiter dicta*,<sup>88</sup> there are no indications on how such a conflict would

84. Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community*, 67 AM. J. INTL. L. 504, 507 (1973).

85. *Polydor*, 1982 E. Comm. Ct. J. Rep. at 348 (ground 16).

86. See the distinction between intra-Community trade and trade with third countries made in *International Fruit*, 1971 E. Comm. Ct. J. Rep. at 1107. See also *EMI*, 1976 E. Comm. Ct. J. Rep. at 811.

87. In *Polydor*, 1982 E. Comm. Ct. J. Rep. at 329, the injunction restraining the sale and distribution of the imported records was tantamount to an import ban. The aim which the restrictive measure pursued, i.e., the protection of the copyright, was accepted; the Court of Justice did not examine whether this aim and the restrictive effect of the measures outweighed the objectives of the Agreement.

88. For example, in *I. Schroeder KG v. Federal Republic of Germany* (Case No. 40/72), 1973 E. Comm. Ct. J. Rep. 125, 135 (Preliminary Ruling), the Court of Justice stated that, in any event, when the Commission took protective measures against imports from Greece, it was bound to comply with the provisions of the Association Agreement.

be resolved. Furthermore, as explained earlier,<sup>89</sup> the institutional provisions under which the Court of Justice operates do not offer any guidance on this front. In the last analysis, the answer to this question depends, on the one hand, on the extent to which, according to the Court of Justice, the enforcement of the international rule of law should take precedence over more immediate, specific Community interests, and, on the other hand, on what the Court of Justice perceives as being its mandate in this connection.

As stated earlier,<sup>90</sup> the cautious attitude taken by the Court of Justice so far, which is even more striking when compared to the judicial activism displayed with respect to the enforcement of Community law proper, is understandable, but also probably means that the Court of Justice is very divided. Any possible inference to be drawn from the case law must consequently be taken *cum grano salis*. Thus, it is true that in the past the Court of Justice has, possibly more so than U.S. courts,<sup>91</sup> made every effort to interpret Community law so as to avoid a conflict with Community international law obligations.<sup>92</sup> This may be construed as a willingness to examine an international agreement on its merits and an implicit acceptance of its enforceability.<sup>93</sup> However, this phenomenon may be explained equally well by the reluctance — again quite understandable — to address the issue of the conflict. Similarly, as mentioned earlier,<sup>94</sup> where it took cognizance of international law the Court of Justice did so more for the benefit of uniformity of Community law than for the sake of upholding international law. Moreover, the opinions in question dealt with actual or potential conflicts between Member State law and international agreement, not between Community law and international agreements. The rationale was a *Missouri v. Holland*<sup>95</sup> one, rather than a *Foster and Elam*<sup>96</sup> one.

Yet, there is an unmistakably open attitude vis-à-vis international law and a willingness to take it into consideration. This results not only from the recognition that international agreements for the protection of human rights, in which Member States participate or to which they have adhered, contain elements which must be taken into account within the framework of Community law.<sup>97</sup> It also results from the fact that, in those cases where

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89. See text at notes 32-35 *supra*.

90. See text at notes 21-29 *supra*.

91. For a discussion of the attitude of the U.S. courts, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (2d ed. 1975).

92. See, e.g., *Caciati*, 1980 E. Comm. Ct. J. Rep. at 2773; *Henn*, 1979 E. Comm. Ct. J. Rep. at 3795; *Razanatsimba*, 1977 E. Comm. Ct. J. Rep. at 229; *Haegeman*, 1974 E. Comm. Ct. J. Rep. at 449; *Schroeder*, 1973 E. Comm. Ct. J. Rep. at 125; see also Commission of the Eur. Economic Communities v. Council of the Eur. Communities, (Case No. 218/82), 1984 COMMON MKT. REP. (CCH) ¶ 14,019 (Ct. J. Eur. Comm., Dec. 13, 1983), *digested in* 1983 ECJR 126 (in which the Court interpreted a regulation implementing a clause of the Lomé Agreement guaranteeing ACP countries the development of their traditional trade of rum with the Community and the Member States in such a way that it did not violate the EEC Treaty).

93. See *Pescatore*, *supra* note 11, at 678.

94. See text at notes 39-47 *supra*.

95. 252 U.S. 416 (1920).

96. 27 U.S. (2 Pet.) 253 (1829).

97. See, e.g., *J. Nold, Kohlen— und Baustoffgrosshandlung v. Commission of the Eur. Communities* (Case No. 4/73), 1974 E. Comm. Ct. J. Rep. 491. This technique has been used repeatedly in later cases with reference to the European Human Rights Convention.

it gave precedence to international agreements over Member States' law, the Court of Justice could conceivably have achieved the opposite result by denying expressly that the international agreement gave rise to directly enforceable rights.

In the light of this, it does not seem impossible, or even improbable, that if and when the issue arises, the Court of Justice will give precedence to international agreements over inconsistent provisions of purely Community origin. For reasons that will be set out in the conclusion of this contribution, such a development is to be welcomed, provided that account is taken of the qualifying elements to which the recognition of "direct effect" to international agreements has been subjected, and provided that certain accompanying measures are taken.

### III. SOME CONCLUSIONS

The cautious and pragmatic attitude displayed by the Court of Justice should not obscure the fact that in the end, particularly in the light of *Kupferberg*, it has transposed its doctrine of the direct effect of Community law to the quite different setting of the law of international agreements. It has taken account of the differences by granting such "direct effect" only in the absence of a contrary decision of the contracting parties in the international agreement. Moreover, it has left open the possibility of denying direct effect where the contracting party does not offer substantive reciprocity in its implementation of the agreement. Finally, the different "structure" of an international agreement may in certain cases — e.g., GATT — lead to the exclusion of direct effect, and in others to stricter requirements as to the "clarity" and "unconditionality" of the provisions.

The corollary of direct effect, i.e., supremacy of Community law over inconsistent national law, has been recognized in relation to international agreements vis-à-vis the law of the Member States. Whether this supremacy also applies vis-à-vis inconsistent Community law is still an open question. However, subject to the same "direct effect" limits to which international agreements are subject vis-à-vis Member State law, supremacy should also be granted to international agreements over inconsistent Community law.

The qualified transposition of the direct effect doctrine to international agreements does not require that the substantive interpretation of intra-Community law also be transposed to international agreements. The provisions of such agreements are to be interpreted "in the light of both the objective and the purpose" of these agreements and of their wording.

The direct effect of international agreements is subject to certain necessary qualifications which reflect the different nature and structure of such agreements. The enforcement of international agreements as an "integral part of Community law," through the device of "direct effect," is likely to further significantly the uniform and effective application of "external" Community law, just as, in the past, the possibility of individuals enforcing Community law having "direct effect" has proved the major tool in achieving uniform and effective application of "internal" Community law. Its role may even turn out to be relatively more important than in "internal"

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Community law. Commission proceedings against Member States for breaches of "internal" Community law are frequent, whereas there are practically none for breaches of "external" Community law.

The decision not to give the same interpretation to similarly worded provisions of the EEC Treaty and of international agreements is entirely justified. Moreover, the resulting interpretation is not inconsistent with that followed by the Community's contracting parties. Finally, it is hard to see how, as a matter of practical politics, the Council of Ministers could have taken corrective legislative action comparable to the legislation of some of the Community's trading partners, if the far-reaching interpretations of "internal" Community law had been transposed to trade with third countries.

These developments in the case law of the Court of Justice are to be welcomed. They are in line with the Community's legislative policy. In its legislative practice the Community is, as a rule, aware of its international obligations, conscious of the need to comply with them and intent on doing so.<sup>98</sup> Intentional breaches of international obligations may, for all practical purposes, be excluded. The question of whether the way in which the Community interprets its obligations is shared by its contracting parties is another matter. The difficulty and the risk of fully asymmetric interpretations, with their implications for the balance of advantages between contracting parties, require increased efforts to establish appropriate dispute settlement mechanisms, a greater willingness to use such mechanisms and the readiness to abide by their results. Furthermore, at a time when the recognition of the Community as a full-fledged participant in international relations still meets with opposition, be it for reasons of international policy or politics or because of a genuine distrust vis-à-vis this new breed of international body, it would be misguided to create the impression that the Community is somehow holding back in honoring its international commitments to the fullest extent possible.

Last but not least, these developments also have their merits from the point of view of international law. Assuming that, in bringing them about, the Court of Justice desired that the Community contribute to the improved enforcement of the international rule of law, such a goal does not appear unrealistic or inordinate. After all, in the field of international trade the Community's weight equals that of the United States and Japan combined. In light of its position, these developments are consistent with the Community's responsibility.

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98. There is no provision to be found in Community law comparable to sec. 3(a) of the U.S. 1979 Trade Agreement Act stating that, in case of conflict with any statute of the United States, provisions of the agreement referred to have no effect under domestic U.S. law. Trade Agreements Act of 1979 § 3(a), 19 U.S.C. § 2504(a) (1982).