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## Direct Effect of International Economic Law in the United States and the European Union

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# Direct Effect of International Economic Law in the United States and the European Union

*Ronald A. Brand\**

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## I. INTRODUCTION

One of the most difficult problems in the study of international law is determining when a rule of law applies to a given situation. This problem has two dimensions: (1) determining what the rule of law is and (2) determining when and how it is applied. The first dimension, though complex, is the subject of Article 38 of the Statute of the International Court of Justice,<sup>1</sup> and the starting point for most discussions of international law.<sup>2</sup> Though it may be difficult to establish the existence of a rule of international law, particularly in the absence of a treaty, the process of demonstrating customary international law is one with which international lawyers are familiar.

The *application* of international law is perhaps the more difficult issue. Traditional jurisprudential theory is based on political concepts of sovereignty.<sup>3</sup> The state, as sovereign, both creates and enforces law. In the international arena, each state is sovereign within its own territory and equal to all other states in international matters. There is no supreme executive to administer and enforce international law, even when states agree on the rule of law. Thus, while the international community may be able to carry out the legislative function in the creation of rules of conduct (through either treaty law or the establishment of customary international law), it has not yet provided an effective framework for the judicial and executive functions of application and enforcement.

Despite this problem, the latter half of the twentieth century has seen unprecedented development of international economic law, governing the extent to which states may place restrictions on transactions involving goods, services, capital and persons crossing their

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<sup>1</sup> Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993.

<sup>2</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT].

<sup>3</sup> Modern international law is generally considered to trace its roots to the work of Hugo Grotius, first published in 1625, which focused on relationships between nations. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (De Jure Belli ac Pacis) (A.C. Campbell trans., 1901). See also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 1 (1995) ("International law is the law of the international system of nation states."); JAMES BRIERLY, THE LAW OF NATIONS 1-40 (6th ed. 1963).

borders. The European Community (EC) is the best example of a source of regional, supranational rules that have the force and effect of law in each of the Member States.<sup>4</sup> Through the concept of "direct effect," developed in the Treaty of Rome and through the jurisprudence of the European Court of Justice, European Community legislation can be asserted in national courts as the source of rights running to private parties even against their own governments.<sup>5</sup> Thus, there is a method for both the creation and application of European Community law.

More problematic is whether rules similar to those in the European Community, but developed on a global scale, have equivalent effect in national courts. Most recently, the 1994 agreements signed in Marrakech substantially expanded, supplemented and strengthened the rules of the General Agreement on Tariffs and Trade (GATT or General Agreement) and created the World Trade Organization (WTO) to administer those rules.<sup>6</sup> Despite the inclusion of a strengthened dispute resolution mechanism,<sup>7</sup> the extent to which the rules contained in the Marrakech agreements can be applied by national courts especially within the member states of the WTO is not entirely clear.

The rules governing state regulation of international economic transactions are based largely on the economic theory of comparative advantage.<sup>8</sup> Thus, they assume the benefits of open trade regimes, whether on a national, regional or global scale. Applying comparative advantage theory, it is easy to decide that states should not restrict trade at their borders, whether it be through import or export tariffs,

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<sup>4</sup> It is the European Community, not the European Union, which has legal personality and the power to enter into relationships with third countries. Thus, throughout this article, most references will be to the Community, which is one of the three "pillars" of the European Union. See generally TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, art. 177, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

<sup>5</sup> See *infra* notes 80-99 and accompanying text. The European Economic Community was established by the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 3, 19 [hereinafter EEC TREATY]. The EEC TREATY was amended by the EC TREATY, *supra* note 4.

<sup>6</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round Final Act].

<sup>7</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1226 (1994) [hereinafter Dispute Settlement Understanding].

<sup>8</sup> For a more detailed discussion of the economic theory underlying international trade law see Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in THE ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Jagdeep Bhandari & Alan O. Sykes eds., forthcoming) (copy on file with author).

quotas, or other measures of trade inhibition. European Community rules prohibiting internal tariffs, quotas or discriminatory taxes, and limiting state aid to economic enterprises, are supported by this theory. Commentators generally agree that all Member States have benefited from the single market which prohibits (or at least limits) restrictions on the free movement of goods, services, capital and persons. The European Court of Justice is available to interpret Community legislation to help insure the availability of these benefits.<sup>9</sup>

On a global scale, the WTO administers the rules prohibiting governmental restraints on trade. There is, however, no single court to apply these rules to every claim of violation or inconsistency. While the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) is available to apply the rules in disputes between states,<sup>10</sup> states have not demonstrated the willingness to give to the WTO the kind of authority European Member States have relinquished to the European Court of Justice.

This creates problems for international lawyers who view the rules of the multilateral system as law applicable to the Member States of the WTO. In the United States, the GATT has at times been reviewed in the courts to determine whether it is "self-executing" (the U.S. concept equivalent to the EC's "direct effect").<sup>11</sup> While judicial decisions provide no clear position on this question, Congress made clear in the legislation implementing the Marrakech agreements that those agreements *do not* provide rules enforceable in U.S. courts by private parties.<sup>12</sup> Thus, the question is decided by statute in the United States, with the rules of the GATT having less than full legal effect.

Despite statutory limitations on the application of WTO agreements in U.S. courts, case law in both the United States and the European Community recognizes that international agreements may confer upon individuals rights which can be invoked in the courts.<sup>13</sup> In both jurisdictions, however, limitations are placed on the derivation of such rights from international agreements. Whether the question is one of "direct effect" in the European Community or of "self-execution" in the United States, the issue is whether a treaty provides legal rules

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<sup>9</sup> See EC TREATY, *supra* note 4, art. 177.

<sup>10</sup> Dispute Settlement Understanding, *supra* note 7.

<sup>11</sup> See *infra* notes 36-64 and accompanying text.

<sup>12</sup> See *infra* notes 74-75 and accompanying text.

<sup>13</sup> See *infra* notes 16-29, 80-228 and accompanying text.

capable of enforcement through litigation when private parties contend their rights have been affected, or simply provides rules applicable to sovereign relations.

This article reviews the doctrines of self-execution in U.S. law and direct effect in EC law, as they have been applied to the General Agreement on Tariffs and Trade. It then addresses whether the practice in each of the United States and the European Community is consistent with the development of the more complete framework of international economic law provided by the Uruguay Round agreements, and suggests the need for reconsideration of the politically rational but legally troublesome doctrine of direct effect.<sup>14</sup>

## II. THE U.S. DOCTRINE OF SELF-EXECUTION<sup>15</sup>

### A. The Doctrine Generally Stated

Article VI of the U.S. Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>16</sup> This provision places treaties on the same level as statutes in the U.S. legal order. The co-equal status of statutes and treaties required that a rule be developed early in U.S. history for the event of conflict between a treaty and a statute.<sup>17</sup> Such conflicts are resolved by the rule, *lex posterior derogat priori* (the later-in-time prevails), which was enunciated by the Supreme Court as follows:

But even [though a treaty is the law of the land as an act of Congress is] . . . there is nothing in [a treaty] which makes it irrevocable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. . . .

. . . .  
In short, we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.<sup>18</sup>

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<sup>14</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 187, as amended by the Uruguay Round Final Act, *supra* note 6 [hereinafter GATT].

<sup>15</sup> Portions of this section are developed from the author's earlier work: Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990).

<sup>16</sup> U.S. CONST. art. VI, cl. 2.

<sup>17</sup> Both treaties and statutes are considered subsidiary to the Constitution itself, and must give way if found to conflict with constitutional principles.

<sup>18</sup> *Head Money Cases*, 112 U.S. 580, 598-99 (1884). See also *Whitney v. Robertson*, 124 U.S. 190 (1888); *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

Where there is no later act of Congress in conflict with a treaty provision, this *lex posterior* rule is inapplicable, and the treaty itself provides the source of law. However, the absence of conflicting legislation does not guarantee that a treaty rule will be determinative in a dispute in a U.S. court. The application of treaty rules is further circumscribed by the doctrine of self-execution. This doctrine limits the role of treaty rules by providing that, in the absence of implementing legislation, treaty law will be applicable to disputes in U.S. courts only if the provision addressed is "self-executing."<sup>19</sup>

A treaty is self-executing when it "operates of itself without the aid of any legislative provision,"<sup>20</sup> and "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."<sup>21</sup> Such treaties may not deal with matters which have been expressly and exclusively delegated to Congress,<sup>22</sup> and treaties calling for the expenditure of funds are non-self-executing inasmuch as they are ineffective without the implementing legislation providing the necessary appropriation.<sup>23</sup>

To the extent concepts of "dualism" and "monism" may be useful in explaining the manner in which a legal system takes account of in-

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<sup>19</sup> See RESTATEMENT, *supra* note 2, § 111.

<sup>20</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

<sup>21</sup> *Head Money Cases*, 112 U.S. at 598-99. Commentators have dissected this language in a manner that leaves some with the conclusion that self-executing status is "distinct from whether the treaty creates private rights or remedies." RESTATEMENT, *supra* note 2, § 111 cmt. h. Some have separated the question of whether a treaty requires implementing legislation from the question of whether a treaty "aims at the immediate creation of rights and duties of private individuals which are enforceable," while finding that both questions are part of the "concept of self-executing treaties." Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win At Any Price?*, 74 AM. J. INT'L L. 892, 896-97 (1980). A treaty may create private rights and remedies with an accompanying procedural mechanism of its own for application of those rights and remedies. However, to the extent it does not do so, the question of whether it provides substantive rules creating rights or remedies is generally considered under the rubric of self-execution in U.S. courts.

<sup>22</sup> See, e.g., *Robertson v. General Electric Co.*, 32 F.2d 495, 500 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929) (finding that the article I, § 8, cl. 7 delegation of authority to Congress prevented a self-executing treaty on patents). It has more recently been determined that some patent treaties are self-executing. See, e.g., *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 640 (2d Cir. 1956).

<sup>23</sup> *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (D. Mich. 1852) (No. 14,251). A list of examples of such treaties is found in *The Over the Top*, *Schroeder v. Bissell*, 5 F.2d 838, 845 (D. Conn. 1925). The Restatement states that a treaty will be considered non-self-executing if (a) it "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation," (b) the Senate, in consenting to the treaty (or Congress in a resolution), requires implementing legislation, or (c) implementing legislation is constitutionally required. RESTATEMENT, *supra* note 2, § 111(4).

ternational law,<sup>24</sup> the doctrine of self-execution reflects "the United States' adoption of a partly 'dualist' – rather than a strictly 'monist' – view of international and domestic law."<sup>25</sup> A treaty that is not self-executing,

depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations . . . [but] with all this the judicial courts have nothing to do and can give no redress.<sup>26</sup>

Just as notions of "dualism" and "monism" cannot fully explain the doctrine of self-execution in U.S. law; however, a treaty is not likely to be reviewed by a court to determine if it is self-executing as a whole. U.S. courts generally confine their analysis to specific provisions of a treaty in determining self-executing status.<sup>27</sup> A relevant treaty provision is analyzed to determine "the intent of the signatory parties as manifested by the language of the instrument."<sup>28</sup> Courts look to the language of a provision to determine whether it is "addressed to the judicial branch of our government," and confers rights upon individual citizens, or merely "calls upon governments to take certain actions."<sup>29</sup>

#### B. The Self-Execution Doctrine and the General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade never received the consent of the Senate referred to in Article II, Section 2, of the U.S. Constitution.<sup>30</sup> The GATT originally was designed to operate only provisionally until the establishment of more comprehensive institutional arrangements under the Charter of the International Trade Or-

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<sup>24</sup> "[D]ualists view international law as a discrete legal system [which] . . . operates wholly on an inter-nation plane." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987). Conversely, "monists" view international law as an integral part of the legal system, often prevailing over all inconsistent statutes. See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564-65 n.34 (1984).

<sup>25</sup> Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988).

<sup>26</sup> *Head Money Cases*, 112 U.S. 580, 598 (1884).

<sup>27</sup> See, e.g., Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (finding Article 94 of the U.N. Charter not to be self-executing). For a discussion of earlier cases applying the doctrine of self-execution to articles of the U.N. Charter see Ronald A. Brand, *Security Council Resolutions: When Do They Give Rise to Enforceable Legal Rights? The United Nations Charter, the Byrd Amendment and a Self-Executing Treaty Analysis*, 9 CORNELL INT'L L.J. 298, 299-301 (1976).

<sup>28</sup> *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

<sup>29</sup> *Id.*

<sup>30</sup> See generally U.S. CONST. art. II, § 2, cl. 2.



ganization (ITO).<sup>31</sup> When the Truman administration dropped its efforts to seek Senate consent to the Havana Charter establishing the ITO, the GATT was adopted by agreement to the Protocol for Provisional Application of October 30, 1947.<sup>32</sup> Thus, the GATT was entered on behalf of the United States through executive agreement.

Like treaties, executive agreements create law applicable in U.S. courts if they are entered with proper Presidential authority,<sup>33</sup> and do not conflict with subsequent legislation.<sup>34</sup> Also like treaties, the language of an executive agreement will be applied to disputes before U.S. courts only if it is self-executing in nature.<sup>35</sup>

While no case has addressed directly the question of whether a provision of the GATT is self-executing, a 1960 Opinion of the California Attorney General concluded that the words of paragraph 1 of the Protocol of Provisional Application created a self-executing obligation that combined with the national treatment provisions of GATT Article III to invalidate portions of the California Buy-America Act.<sup>36</sup> Case law also has addressed the application of GATT Articles I,<sup>37</sup> III,<sup>38</sup> XI,<sup>39</sup> XIX,<sup>40</sup> XXVII,<sup>41</sup> and XXVIII, but without clear results on

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<sup>31</sup> United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents, Havana, Cuba, November 21, 1947, to March 24, 1948, U.N. Doc. ICITO/1/4/1948. For a discussion of the events leading up to the Havana Charter, see the following: WILLIAM A. BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 15-160 (1950); GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES* 15-33 (1965); WILLIAM DIEBOLD, JR., *THE END OF THE ITO* (PRINCETON ESSAYS IN INTERNATIONAL FINANCE NO. 16, 1952); RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE* (new, expanded edition with rev. intro. 1980); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35-57 (1969); CLAIRE WILCOX, *A CHARTER FOR WORLD TRADE* 3-52 (1949).

<sup>32</sup> Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 stat. A2051, 55 U.N.T.S. 308.

<sup>33</sup> For a discussion concluding that the GATT is a valid executive agreement authorized by Congress, see Brand, *supra* note 15. See also Robert Hudec, *The Legal Status of GATT in the Domestic Law of the United States, in THE EUROPEAN COMMUNITY AND GATT* 187 (Meinhard Hilf et al. eds., 1986); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967); Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505 (1961). For a discussion of the concept of direct application generally, see John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

<sup>34</sup> See *supra* note 18 and accompanying text.

<sup>35</sup> See, e.g., *United States v. Pink*, 315 U.S. 203, 230-31 (1942) and *United States v. Belmont*, 301 U.S. 324, 331 (1937) (holding self-executing executive agreements superior to state law).

<sup>36</sup> 36 Op. Att'y Gen. 147 (Cal. 1960).

<sup>37</sup> See *American Express Co. v. United States*, 472 F.2d 1050, 1059 n.14 (C.C.P.A. 1973); *United States v. Star Industries, Inc.*, 462 F.2d 557 (1972), *cert. denied*, 409 U.S. 1076 (1972).

<sup>38</sup> See *China Liquor Distrib. Co. v. United States*, 343 F.2d 1005 (C.C.P.A. 1964), *cert. denied*, 380 U.S. 962 (1965); *Bercut-Vandervoort and Co. v. United States*, 151 F. Supp. 942

the question of self-execution.<sup>42</sup> Courts instead have implied authority for the GATT without any complete self-execution analysis.

Federal court decisions considering the GATT provide little guidance because they consistently have rejected arguments that questioned legislation or administrative acts violate GATT obligations.<sup>43</sup> Although courts have assumed GATT authority in making these determinations (thereby providing implicit authority for the self-executing status of the GATT provisions addressed), the outcome in each case has made it unnecessary to provide a rationale for such an assumption. One group of federal cases determined that the now-abandoned "wine gallon" method of determining the application of U.S. excise taxes to distilled spirits did not violate national treatment obligations under GATT Article III because the tax was applied in a non-

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(C.C.P.A. 1957), 46 C.C.P.A. 28 (1958), *cert. denied*, 359 U.S. 953 (1959); *Select Tire Salvage Co. v. United States*, 386 F.2d 1008 (Ct. Cl. 1967); *Delta Chemical Corp. v. Ocean County Utilities Auth.*, 554 A.2d 1381 (N.J. Super. Ct. Law Div. 1988); *Association of Alabama Prof'l Numismatists, Inc. v. Eagerton*, 455 So. 2d 867 (Ala. Civ. App. 1984); *Armstrong v. Taxation Div. Dir.*, 5 N.J. Tax 117 (N.J. Tax Ct. 1983), *aff'd*, 6 N.J. Tax 447 (N.J. Super Ct. App. Div. 1984); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978); *American Inst. for Imported Steel, Inc. v. County of Erie*, 297 N.Y.S.2d 602 (N.Y. Sup. Ct. 1968), *aff'd in part, rev'd in part on other grounds*, 302 N.Y.S.2d 61 (1969); *Baldwin-Lima-Hamilton Corp. v. Superior Ct.*, 25 Cal. Rptr. 798 (Cal. Dist. Ct. App. 1962); *Territory of Hawaii v. Hawaii*, 41 Haw. 565 (1957); 40 Op. Att'y Gen. 65 (Cal. 1962); 36 Op. Att'y Gen. 147 (Cal. 1960); 34 Op. Att'y Gen. 302 (Cal. 1959).

<sup>39</sup> See *U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399 (C.C.P.A. 1982).

<sup>40</sup> See *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978), *aff'd without opinion*, 614 F.2d 1290 (2d Cir. 1979).

<sup>41</sup> *George E. Bardwil & Sons v. United States*, 42 C.C.P.A. 118 (1955).

<sup>42</sup> See *United States v. Star Indus., Inc.*, 462 F.2d 557 (C.C.P.A. 1972), *cert. denied*, 409 U.S. 1076 (1972).

<sup>43</sup> See, e.g., *Farr Man & Co. v. United States*, 544 F. Supp. 908 (Ct. Int'l Trade 1982) (MFN provisions of Art. I considered effective, but superseded through later-in-time rule by amendments to § 22 of the Agricultural Adjustment Act delegating authority to President to adjust quotas in response to surges in sugar imports); *U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399 (C.C.P.A. 1982) (sugar quotas authorized by language inserted in a U.S. tariff concession did not violate prohibition of quotas in GATT Art. XI); *Michelin Tire Corp. v. United States*, 2 Ct. Int'l Trade 143 (1981) (plaintiff contested countervailing duty determination, alleging violation of Art. VI in Treasury Decision's failure to make determination of injury. Argument rejected based on Protocol of Provisional Application grandfather clause for pre-existing inconsistent legislation); *American Express Co. v. United States*, 472 F.2d 1050, 1059 n.14 (C.C.P.A. 1973) (rejected allegations of violation of Art. I MFN obligations (and MFN requirements under FCN treaty with Italy) in subsidies case where importer alleged other nations had similarly rebated tax and the United States had not imposed similar countervailing duties against those nations).

One case, *Regiomontana v. United States*, 64 F.3d 1579 (Fed. Cir. 1995) struck down the imposition of countervailing duties accumulating after Mexico became entitled to an injury analysis under the Tokyo Round GATT Subsidies Code, as in violation of GATT obligations. *Id.* at 1580. Thus, it arguably exists as authority for the application of GATT rules directly to invalidate agency action.

discriminatory manner.<sup>44</sup> Other cases carefully avoid responding to allegations of GATT applicability.<sup>45</sup> None of these cases provides useful analysis of the self-executing status of GATT provisions.

One group of federal cases focuses on the issue of authority for entering into the GATT, finding that it does not have treaty status, thereby avoiding the issue of self-execution.<sup>46</sup> Conversely, the case of *United States v. Star Industries*<sup>47</sup> assumes both binding authority and self-executing status for the GATT without ever raising either issue for specific discussion. The plaintiffs in that case asserted that section 252 of the Trade Expansion Act of 1962,<sup>48</sup> which authorized the President to amend tariff schedules in response to unfair trade practices by other countries, required that such retaliatory amendment be targeted solely at the offending party. The court never raised the question of whether (and how) the GATT has legal status in such a dispute. Rather, it simply assumed such status and found that the most-fa-

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<sup>44</sup> *China Liquor Distrib. Co. v. United States*, 343 F.2d 1005 (C.C.P.A. 1964), *cert. denied*, 380 U.S. 962 (1965); *Bercut-Vandervoort v. United States*, 151 F. Supp. 942 (C.C.P.A. 1957), 46 C.C.P.A. 28 (1958), *cert. denied*, 359 U.S. 953 (1959). The *Bercut-Vandervoort* case included an interesting dissent by Judge Donlan providing analysis of the GATT as a treaty obligation and considering the application of the grandfather clause contained in the Protocol of Provisional Application as well as the later-in-time rule of treaty application. *See also* Schieffelin & Co. v. United States, 424 F.2d 1396 (C.C.P.A.), *cert. denied*, 400 U.S. 869 (1970), in which the court considered allegations that the distilled spirits excise tax was in violation of the Friendship, Commerce and Navigation treaty with Ireland.

<sup>45</sup> *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 439 n.4 (1979) (dismissed as "frivolous" an argument that California ad valorem property tax applied to Japanese shipping companies' cargo containers, which were also taxed in Japan, violated Art. III national treatment obligations); *Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989), *cert. denied*, 492 U.S. 919 (1989) ("We have also considered the General Agreement on Tariffs and Trade (GATT). Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours. Should there be a conflict, the United States legislation must prevail."); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) (instructed district court, on remand, to consider treaty obligations under GATT in shaping remedy for possible antitrust violation); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015 (D.C. Cir. 1971) (avoided addressing GATT, but indicated "the need to consider the intention and effect of GATT and the Government's policy with respect to GATT whether or not GATT is mandatorily prohibitive" in ordering hearing on remand); *Select Tire Salvage Co. v. United States*, 386 F.2d 1008 (Ct. Cl. 1967) (action to recover excise tax paid on imported tire carcasses decided on grounds of Congressional intent without need to refer to GATT).

<sup>46</sup> *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975); *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978); These cases were either decided on narrow grounds making the issue of GATT applicability irrelevant or in a manner that determined that, even if the GATT were applicable and self-executing, there was no GATT violation. *See Brand, supra* note 15, at 490-91.

<sup>47</sup> *United States v. Star Indus.*, 462 F.2d 557 (C.C.P.A. 1972).

<sup>48</sup> 876 Stat. 872 (1962) (now the more familiar section 301 of the Trade Agreements Act of 1974, as amended, 19 U.S.C. § 2411 (1994)).

vored-nation obligations in Article I of the General Agreement required any retaliation under Article XXVIII to be generalized in accordance with MFN principles.<sup>49</sup> It then found that section 252 did not require tariff adjustments "inconsistent with our international obligations."<sup>50</sup> The court thus relied on the GATT to defeat the argument of the plaintiff that targeted retaliation was required. By finding the questioned legislation consistent with GATT obligations, the *Star Industries* case implies self-execution for Article I of the GATT. However, neither it nor any other federal case has actually analyzed the self-executing status of any GATT provision in regard to an alleged violation through federal legislation or administrative regulation.

In contrast to the review of challenges to federal law, decisions dealing with alleged state law violations of GATT have at times found such violations to exist, thereby clearly implying self-executing status for the GATT provisions involved. This has been done, however, without any explicit self-execution analysis. In one of the earliest state cases directly to address the applicability of the GATT, the Supreme Court of Hawaii held that a state statute requiring sellers of eggs of foreign origin to display a placard bearing the words "WE SELL FOREIGN EGGS," contravened the national treatment obligations contained in paragraphs 1 and 4 of Article III of the GATT.<sup>51</sup> This case remains one of the few to address directly the question of the authority behind the GATT, specifically noting that the "constitutionality of the grant of such authority [to enter into trade agreements under section 350 of the Tariff Act of 1930] has been repeatedly questioned in and out of Congress."<sup>52</sup> The court concluded that the GATT is "a treaty within the meaning of [Article VI, clause 2 of the Constitution], so that it has the same efficacy as a treaty made by the President by and with the advice and consent of the Senate."<sup>53</sup> While specifically addressing the binding authority of the GATT as U.S. law, the case did not, however, provide explicit analysis of the issue of self-execution. It rather assumed such effect in finding GATT Article III to prevail over the state law measure involved.

Three Opinions of the California Attorney General reached a similar result in considering that state's "buy American" legislation

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<sup>49</sup> 462 F.2d at 563.

<sup>50</sup> *Id.* at 564.

<sup>51</sup> *Territory of Hawaii v. Hawaii*, 41 Haw. 565 (1957).

<sup>52</sup> *Id.* at 567.

<sup>53</sup> *Id.* at 568.

under GATT Article III.<sup>54</sup> These opinions also found GATT to have “supreme law of the land” status under Article VI, clause 2, of the Constitution.<sup>55</sup> A contract for the purchase of turbine generator units by the Los Angeles Department of Water and Power from a Swiss corporation was determined properly awarded, with the “buy American” statute found to be inapplicable.<sup>56</sup> Similarly, a contract for the purchase of pumps and motors for the production of electricity was found not subject to the statute.<sup>57</sup> However, when the purchase was for “governmental purposes,” the exception contained in paragraph 8(a) of Article III was found to allow the application of the “buy American” statute, even though it was an expression of state, rather than federal, policy.<sup>58</sup> A subsequent decision of the California First District Court of Appeal similarly struck down a provision of a San Francisco contract proposal (designed to comply with the state buy American statute) that would have required that equipment furnished under the proposal be manufactured in the United States.<sup>59</sup>

Other state cases have considered the GATT but have not relied upon it to invalidate inconsistent legislation or contract provisions. Two New Jersey cases and a Tennessee Attorney General’s Opinion have implied self-execution in the application of the GATT but found that the situations involved were within the Article III, paragraph 8(a), “governmental purposes” exception to national treatment re-

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<sup>54</sup> 40 Op. Att’y Gen. 65 (Cal. 1962); 36 Op. Att’y Gen. 147 (Cal. 1960); 34 Op. Att’y Gen. 302 (Cal. 1959).

<sup>55</sup> The 1960 opinion not only implied full treaty status for the GATT in the context of the supremacy clause, but also found that the national treatment obligations of Article III were self-executing and required no further legislation. 36 Op. Att’y Gen. 147, 149 (Cal. 1960):

GATT, as a multilateral trade agreement, has the legal force of a treaty under the supremacy clause of the U.S. Constitution . . . and its obligations are treaty obligations. . . . Paragraphs 4 and 8(a) of Article III indicate a mandatory duty . . . . Section 1 of the Protocol of Provisional Application . . . does not have the effect of changing the national treatment provisions of Paragraph 4 of Article III of Part II into executory provisions requiring further congressional action to make the provisions operative.

<sup>56</sup> *Id.* 34 Op. Att’y Gen. 302 (Cal. 1959).

<sup>57</sup> 36 Op. Att’y Gen. 147 (Cal. 1960).

<sup>58</sup> 40 Op. Att’y Gen. 65 (Cal. 1962). Subparagraph 8(a) of Article III provides: “The provisions of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.” GATT, *supra* note 14, art. III.

<sup>59</sup> *Baldwin-Lima-Hamilton Corp. v. Superior Ct. of the City and County of San Francisco*, 25 Cal. Rptr. 798 (1st Dist. 1962) (“Compacts and similar international agreements, such as GATT, which are negotiated and proclaimed by the President are ‘treaties’ within the . . . supremacy clause of the Constitution.”). *But see* *American Institute for Imported Steel, Inc. v. County of Erie*, 297 N.Y.S.2d 602, 607 (N.Y. Sup. Ct. 1968), *aff’d in part, rev’d in part on other grounds*, 302 N.Y.S.2d 61 (1969) (“buy American” resolution found not to violate GATT where “it is this Court’s opinion that the GATT provisions are not here applicable”).

quirements of other provisions of Article III.<sup>60</sup> Cases in New Jersey and Alabama have determined that state sales taxes applied to the sale of gold coins were not in contravention of national treatment obligations, even though original issue of such coins by the U.S. treasury could not constitutionally be taxed by the states.<sup>61</sup>

The best that can be said from this survey of U.S. law is that decisions consistently have implied self-executing status for GATT provisions in considering challenges to conflicting state law measures, and one state Attorney General's opinion has specifically found GATT Article III to be self-executing.<sup>62</sup> Cases considering challenges to federal law on the basis of the GATT carefully have avoided the issue by founding decisions on other grounds. Only the *Star Industries* case can be said clearly to have implied self-executing status for a provision of the GATT in the face of a challenge to federal law.<sup>63</sup> Even there, it is difficult to carry the opinion too far because the court (by demonstrating consistency between the GATT and the law in question) was using the GATT to defeat the plaintiff's allegation of invalidity of federal law, rather than in finding a conflicting law invalid.<sup>64</sup> Thus, the rule applied by the court arose out of a federal statute, supported by the GATT, and not out of the GATT itself.

### C. Statutory Restrictions on Self-Execution of International Trade Agreements

In the Trade Agreements Act of 1979, Congress made clear that the implementation of the Tokyo Round agreements, negotiated under the GATT framework, would not allow any provision of those agreements to prevail over a U.S. statute, regardless of when the statute was enacted.<sup>65</sup> The same Act further provided that the implementation of the Tokyo Round agreements was not to be "construed as

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<sup>60</sup> *Delta Chemical Corp. v. Ocean County Utilities Authority and Allied Colloids, Inc.*, 554 A.2d 1381 (1988), *aff'd in part, rev'd in part*, 594 A.2d 1343 (1991); *K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978); *Tenn. Op. Att'y Gen. No. 78-303A*, 1978 WL 27244 (Tenn. A.G.).

<sup>61</sup> *Association of Alabama Professional Numismatists v. Eagerton Inc.*, 455 So. 2d 867 (Ala. Civ. App. 1984) (GATT not applicable because sales tax was not related to imports and exports); *Armstrong v. Taxation Division Director*, 5 N.J. Tax 117 (N.J. Tax Ct. 1983), *aff'd*, 6 N.J. Tax 447 (Super. Ct. App. Div. 1984) (no violation because sales tax was applied uniformly and did not result in discrimination).

<sup>62</sup> See *supra* note 55.

<sup>63</sup> See *supra* notes 47-50 and accompanying text.

<sup>64</sup> See *supra* note 50 and accompanying text.

<sup>65</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, § 3(a), 93 Stat. 144, 148 (codified at 19 U.S.C. § 2504(a)(1994)):

(a) United States statutes to prevail in conflict

creating any private right of action or remedy for which provision is not specifically made in the implementing legislation.”<sup>66</sup>

The opposition to treaty priority (but not so clearly to direct effect of international trade agreements) continued in the United States-Canada Free-Trade Agreement Implementation Act.<sup>67</sup> The Act clearly states that “[n]o provision of the Agreement, nor the application of any such provisions to any person or circumstance, which is in conflict with any law of the United States shall have effect.”<sup>68</sup> As to the relationship between the Free Trade Agreement and state law, however, the Act provides for clear preemption: “The provisions of the Agreement prevail over (A) any conflicting State law; and (B) any conflicting application of any State law to any person or circumstance; to the extent of the conflict.”<sup>69</sup>

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No provision of any trade agreement approved by the Congress under section 2503(a), nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.

This provision was cited by the Court of International Trade in countering a claim that the International Trade Commission’s practice of cumulation of sales from multiple countries in making injury determinations violated GATT Article VI and Article I of the Tokyo Round Antidumping Code. *Fundicao Tupy S.A. v. United States*, 678 F. Supp. 898, 902 (Ct. Int’l Trade), *aff’d*, 859 F.2d 915 (Fed. Cir. 1988) (“even if we were to reach the conclusion that the operation of the cumulation provision violated the GATT Code, we would be bound to give primacy to the law of the United States in accordance with the direction in 19 U.S.C. § 2504(a)”). *See also* *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (Ct. Int’l Trade 1994); *Mississippi Poultry Ass’n Inc. v. Madigan*, 992 F.2d 1359, 1365-66 (5th Cir.), *amended*, 9 F.3d 1113 (1993), *on rehearing*, 31 F.3d 293 (1994); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667 (Fed. Cir. 1992).

Prior to the 1979 Act, Congress had been careful to avoid explicit approval or rejection of GATT in any clear manner. In each of the 1951, 1953, 1954, 1955 and 1958 acts extending the authority of the President to negotiate trade agreements, Congress included the language, “the enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade.” Trade Agreements Extension Act of 1951, ch. 141, sec. 10, 65 Stat. 72, 75; Trade Agreements Extension Act of 1953, ch. 348, § 103, 67 Stat. 472; Act of July 1, 1954, ch. 445, § 3, 68 Stat. 360; Trade Agreements Extension Act of 1955, ch. 169, § 3(a), 69 Stat. 162, 163; Trade Agreements Extension Act of 1958, § 10, 72 Stat. 673, 680. No such disclaimer was included in the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872. The Trade Act of 1974 stated that Congress was not implying approval or disapproval “of all articles” of the GATT. Trade Act of 1974, Pub. L. No. 93-618, § 121(d), 88 Stat. 1978, 1987 (1975). It was in the 1974 Act, however, that Congress for the first time authorized payment of the U.S. share of GATT expenses, and directed the President to conform with GATT balance-of-payment restrictions and consider “the international obligations of the United States” in import relief actions. *Id.* § 122(a) and § 203(k).

<sup>66</sup> Trade Agreements Act of 1974, Pub. L. No. 96-39, § 3(f), 93 Stat. 144, 148 (codified at 19 U.S.C. § 2504(f)(1980)).

<sup>67</sup> Pub. L. No. 100-449, § 102, 102 Stat. 1851, 1853 (1988).

<sup>68</sup> *Id.* § 102(a).

<sup>69</sup> *Id.* § 102(b)(1).

Similar language regarding conflicts with federal law was included in the North American Free Trade Agreement Implementation Act in 1993.<sup>70</sup> The North American Free Trade Agreement's (NAFTA) relationship to state law, however, is more complex because of the establishment of intergovernmental policy advisory committees on trade. These committees are to discuss and insure conformity of state laws with treaty commitments.<sup>71</sup> The Implementation Act further removed any direct effect of the NAFTA in actions brought by private parties, by providing that state laws could be declared invalid as inconsistent with the NAFTA only in an action brought by the United States expressly for that purpose<sup>72</sup> and that no person other than the United States has any cause of action under the NAFTA or its side agreements on environment and labor, or "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement, the North American Agreement on Environmental Cooperation, or the North American Agreement on Labor Cooperation."<sup>73</sup>

The Uruguay Round Agreements Act of 1994 continued this progression toward full prohibition of direct effect of international trade agreements in challenges to either federal or state law.<sup>74</sup> Section 102 of the Act (1) denies effect to any Uruguay Round Agreement provision "that is inconsistent with any law of the United States;" (2) provides that only the United States government can bring an action to challenge the validity of a state law as inconsistent with a Uruguay Round provision; and (3) provides that no private party may challenge any law or act of the federal government or any state government as inconsistent with a provision of any Uruguay Round Agreement.<sup>75</sup>

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<sup>70</sup> Pub. L. No. 103-182, § 102(a)(1), 107 Stat. 2057 (1992)(codified at 19 U.S.C. § 3312 (Supp. 1996)).

<sup>71</sup> *Id.* § 102(b).

<sup>72</sup> *Id.* § 102(b)(2).

<sup>73</sup> *Id.* § 102(c).

<sup>74</sup> Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809.

<sup>75</sup> The language of the Act reads as follows:

Sec. 102. RELATIONSHIP OF THE AGREEMENTS TO UNITED STATES LAW AND STATE LAW.

(a) Relationship of Agreements to United States Law. —

(1) United States law to prevail in conflict. — No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

....

(b) ....

(2) Legal challenge. —



The Statement of Administrative Action accompanying the Uruguay Round Agreements Act reinforces the no-direct-effect statements in the Act by specifically stating that “[i]f there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence.”<sup>76</sup>

Thus, in determining the language of the various acts implementing the most recent trade agreements, Congress and the President have made clear the intention to bar private parties from any use of the provisions of those agreements in challenges to federal, state or local laws. Despite the fact that earlier decisions indicated a basis for the direct effect of GATT provisions – at least in challenges against

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(A) In general. – No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.

....  
(c) Effect of Agreement With Respect to Private Remedies. –

(1) Limitations. – No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress. – It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements –

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

*Id.* § 102.

<sup>76</sup> The Uruguay Round Agreements Act Statement of Administrative Action, 103d Cong., 2d Sess., H. Doc. 103-316, vol. I, 659 (1994). It is important to keep in mind that under these provisions statutes trump treaties only when there is actual conflict between the two. “[T]he initial inquiry is whether Congress has directly spoken to the precise point at issue.” *Footwear Distributors & Retailers of Am. v. United States*, 852 F. Supp. 1078, 1089 (Ct. Int’l Trade 1994). “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In determining the intent of Congress, however, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 63, 118 (1804). The Supreme Court has taken the position that the *Chevron* rule of deference to agency interpretations of congressional intent is secondary to the *Charming Betsy* doctrine of avoidance of conflict with international obligations. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). See also *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995); *Footwear Distributors & Retailers of Am.*, 852 F. Supp. at 1091.

state laws<sup>77</sup> – even provisions of the 1948 GATT that remain unchanged by the Uruguay Round Agreements are unlikely to provide a foundation for a challenge to a statute. The lid on the coffin of direct effect of these international trade agreements appears securely sealed in the United States.

### III. THE EUROPEAN UNION DOCTRINE OF DIRECT EFFECTS

#### A. Direct Effect of the Rome Treaty and Community Legislation

In the European Union, the direct effects doctrine was developed in cases concerning the application of Community law before national courts.<sup>78</sup> The European Court of Justice has followed a steady course in finding Community law to be both directly effective in the national courts of the Member States and to have primacy over national legislation.<sup>79</sup> The more difficult issue is the place of international agreements other than the European Community treaties in both Community and Member State law.

The question of the invocation of Community law before national courts arose early in the European Court's history with the case of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.<sup>80</sup> A Dutch importer challenged the transfer of ureaformaldehyde from one tariff class to another by the Netherlands government on the grounds that it increased the import duties contrary to Article 12 of the Treaty Establishing the European Economic Community.<sup>81</sup> In determining whether national courts must protect rights emanating from the Treaty, the Court found it "necessary to consider the spirit, the general scheme and the wording of those provisions."<sup>82</sup> In looking at the entire Treaty, the Court emphasized that the language of the preamble, the establishment of community institutions endowed with sovereign rights, and the purpose of securing uniform interpretation of

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<sup>77</sup> The question of application of trade agreement provisions in challenges to local ordinances may remain open.

<sup>78</sup> *Infra* notes 80-99.

<sup>79</sup> See, e.g., Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EURO. L. REV. 155 (1983).

<sup>80</sup> Case 26/62, *N.V. Algemene Transport - en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105.

<sup>81</sup> Article 12 of the EC Treaty reads as follows: "[m]ember States shall refrain from introducing, between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other." Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 19.

<sup>82</sup> 1963 E.C.R. at 12.

Community law found in Article 177 all indicated that the Treaty was intended to create rights for individuals as well as for Member States.<sup>83</sup>

The *Van Gend en Loos* decision went on to consider the specific wording of Article 12, determining that it “must be interpreted as producing direct effects and creating individual rights which national courts must protect.”<sup>84</sup> The language of Article 12 was found entitled to such effect because it was clear and unconditional, required no implementing legislation by the Member States, and provided no margin of discretion in its application.<sup>85</sup> In such circumstances, again considering the “spirit, the general scheme and the wording of the Treaty,” the court found the “vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.”<sup>86</sup> Thus, enforcement of this provision of the Treaty is not only a function of the institutions of the Community and the governments of its Member States, but also of the citizens of the Community.<sup>87</sup>

The European Court of Justice subsequently has expanded the concept of direct effects by finding that additional Articles of the Rome Treaty are directly effective in challenges of Member State laws,<sup>88</sup> that certain articles are directly effective in disputes between

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<sup>83</sup> *Id.* The Court’s conclusion is oft-quoted:

[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.*; see P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 334 (Laurence W. Gormley ed., 2d ed. 1989):

A consistent line of case-law shows that a provision can have direct effect if the obligation imposed on Member States is (A) clear and precise and (B) unconditional and, if implementing measures are provided for, (C) the Community Institutions or the Member States are not allowed any margin of discretion.

<sup>86</sup> *Van Gend en Loos*, 1963 E.C.R. at 13.

<sup>87</sup> This language of *Van Gend en Loos* bears striking similarity to the U.S. rationale for private treble damage actions in antitrust matters; a somewhat ironic similarity in light of consistent European criticism of this aspect of U.S. law.

<sup>88</sup> See, e.g., *Lüttcke v. Hauptzollamt Saarlouis*, 1966 E.C.R. 205, [1971] 10 C.M.L.R. 674 (Article 95 is directly effective); *Case 6/64, Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (Articles 37 and 53 are directly effective, while Articles 93 and 102 are not).

private parties ("horizontal" direct effect),<sup>89</sup> and that regulations,<sup>90</sup> directives,<sup>91</sup> and decisions<sup>92</sup> promulgated under Article 189 of the Treaty may all be directly effective.<sup>93</sup> In fact, as to Community law, it has been said that "the direct effect of a Community rule is the general rule in the Community legal order rather than the exception."<sup>94</sup>

Not only is the direct effects concept deeply entrenched in Community law, but it is strengthened further by the Community concept of primacy. Community law takes precedence over national law of a Member State,<sup>95</sup> even if the national law measure is adopted after the effective date of the Community law measure.<sup>96</sup> "[E]very national

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<sup>89</sup> See, e.g., Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, 1976 E.C.R. 631, [1976] 2 C.M.L.R. 98 (Article 119 provision that "men and women should receive equal pay for equal work" applies to dispute between air hostess and airline that paid cabin steward more for same work); but see Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 1986 E.C.R. 723, 749, [1986] 1 C.M.L.R. 688, 711 (denying horizontal direct effect to a directive which otherwise imposed obligations on Member States. Obligations imposed by a directive exist only on the part of "each Member State to which it is addressed."). For a discussion of the horizontal direct effect concept see KAPTEYN & VAN THEMAAT, *supra* note 85, at 346-48.

<sup>90</sup> See, e.g., Case 65/75, *Ex parte Tasca*, 1976 E.C.R. 291, [1977] 2 C.M.L.R. 183; Case 34/73, *Variola v. Italian Finance Ministry*, 1973 E.C.R. 981; Case 39/72, *Commission v. Italian Republic*, 1973 E.C.R. 101, [1973] 12 C.M.L.R. 439; see also Case 87/82, *Rogers v. Darthenay*, 1983 E.C.R. 1579, 1591, [1984] 1 C.M.L.R. 135, 145; Case 94/77, *Fratelli Zerbone S.n.c. v. Amministrazione delle Finanze dello Stato*, 1978 E.C.R. 99, 115-16; Case 43/71, *Politi S.A.S. v. Ministry of Finance of the Italian Republic*, 1971 E.C.R. 1039, 1048, [1973] 12 C.M.L.R. 60, 70.

<sup>91</sup> See, e.g., Case 71/85, *State of Netherlands v. Federatie Nederlandse Vakbeweging*, 1986 E.C.R. 3855, [1987] 3 C.M.L.R. 767; Case 148/78, *Pubblico Ministero v. Tullio Ratti*, 1979 E.C.R. 1629, [1980] 1 C.M.L.R. 96; Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, [1975] 1 C.M.L.R. 1.

<sup>92</sup> See, e.g., Case 20/70, *Transports Lesage & Cie v. Hauptzollamt Freiburg*, 1970 E.C.R. 861, 874, [1971] C.M.L.R. 1, 30; Case 9/70, *Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, 838-838, [1971] C.M.L.R. 1, 24-25.

<sup>93</sup> See KAPTEYN & VAN THEMAAT, *supra* note 85, at 345:

A regulation does not need to be and may not be transformed into national law unless it specifically requires or empowers Member States to adopt implementing measures. A directly effective provision of the Treaties needs by very definition no transformation into national law, whilst a directly effective provision of a directive has this effect despite the fact that it needs such transformation by definition. (It is, of course, given direct effect precisely because the transformation which should have taken place has not occurred). . . . All in all there is good reason to prefer, like the Court, to avoid the term "direct effect" in the case of directives and instead to speak of "similar effects." (footnotes omitted).

<sup>94</sup> Gerhard Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 *sl COMMON MKT. L. REV.* 35, 72 (1983). For a useful discussion of the direct effects doctrine generally see Pescatore, *supra* note 79.

<sup>95</sup> See, e.g., Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, 594, [1964] 3 C.M.L.R. 425, 456 (EC Treaty Article 177 allowing referral by national courts for preliminary rulings on the interpretation of Community law, "is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.").

<sup>96</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, 643, [1978] 3 C.M.L.R. 263, 283.

court must . . . apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”<sup>97</sup> When the doctrine of primacy is combined with that of direct effect, directly effective Community law supersedes all conflicting national law measures regardless of which was first enacted. Thus, a national legislature cannot contravene what has been or is later enacted within the framework of the law of the European Community.<sup>98</sup> This delegation of sovereign functions is considered unique to the structure of the Community and fundamental to the “new legal order of international law” created by the Rome Treaty.<sup>99</sup>

B. The Direct Effects Doctrine and the General Agreement on  
Tariffs and Trade

1. *The No Direct Effects Ruling of International Fruit*

The direct effects doctrine was first applied by the European Court of Justice to the General Agreement on Tariffs and Trade in the *International Fruit* case of 1972.<sup>100</sup> In this case, import certificates for apples from a non-Member State were denied by the Netherlands on the basis of Council regulations aimed at protecting the markets of Community apple producers. The importer challenged the denial and the regulations on the basis of GATT Article XI which provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, . . . shall be instituted or maintained by any contracting party

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<sup>97</sup> 1978 E.C.R. at 644.

<sup>98</sup> This preemptive role of Community law was earlier stated with specific reference to GATT in Case 10/61, *Commission v. Italy*, 1962 E.C.R. 1, 10, [1962] C.M.L.R. 187, 203:

. . . by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations.

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In fact, in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT.

<sup>99</sup> Case 26/62, *N.V. Algemene Transport - en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105.

<sup>100</sup> Joined Cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, [1975] 2 C.M.L.R. 1 (hereinafter *International Fruit*). Earlier cases had made mention of the General Agreement and negotiations under it, but only in a fashion that did not directly address whether it could be a source of law to be applied by the European Court. See, e.g., *Interfood GmbH v. Hauptzollamt Hamburg-Ericus*, 1972 E.C.R. 2442, [1973] 12 C.M.L.R. 562, 576 (challenge to provision of Common Customs Tariff defeated by reference to Kennedy Round negotiations and expectations of other GATT contracting parties arising out of those negotiations).

on the importation of any product of the territory of any other contracting party.”<sup>101</sup> The importer alleged that the restrictions on imports violated this GATT prohibition on quantitative restrictions. In order to succeed, it was necessary for the importer to show that Article XI of the GATT was directly effective, creating rights capable of enforcement by individuals before courts within the European Community.

In addressing the GATT issue, the Court first found it necessary to determine that the General Agreement was binding upon the Community.<sup>102</sup> The Community had not been in existence upon either the creation of the GATT in 1948 or the later adherence to the GATT by the Member States of the Community.<sup>103</sup> Nevertheless, the Court found a clear intention on the part of the Member States that the Community assume the functions inherent in tariff and trade policy and be bound by the obligations entered into under the General Agreement. This intent was found in Article 110 of the EC Treaty (seeking “the adherence of the Community to the same aims as those sought by the General Agreement”), the first paragraph of Article 234 (providing that the EC Treaty did not affect pre-existing multilateral agreement rights and obligations), and the common commercial policy provisions of Articles 111 and 113.<sup>104</sup> The binding nature of the GATT was further supported by the recognition by other GATT contracting parties of the European Community role in representing the Member States in GATT matters.<sup>105</sup>

The *International Fruit* decision then followed the analysis set out in the direct effects test of *Van Gend en Loos* to determine whether such a binding agreement also created rights capable of being asserted by individuals in challenging Community law.<sup>106</sup> Rather than looking directly to Article XI of the GATT, however, the Court first considered “the spirit, the general scheme and the terms of the General Agreement.”<sup>107</sup> The Court determined the GATT preamble to be “based on the principle of negotiations undertaken on the basis of ‘reciprocal and mutually advantageous arrangements,’” and the Gen-

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<sup>101</sup> GATT, *supra* note 14, art. XI.

<sup>102</sup> *International Fruit*, 1972 E.C.R. at 1226.

<sup>103</sup> See Ernst-Ulrich Petersmann, *Participation of the European Communities in the GATT: International Law and Community Law Aspects*, in *MIXED AGREEMENTS* 167 (David O’Keefe & Henry G. Schermers eds., 1983).

<sup>104</sup> *International Fruit*, 1972 E.C.R. at 1227.

<sup>105</sup> *Id.*

<sup>106</sup> See *supra* notes 80-87 and accompanying text.

<sup>107</sup> *International Fruit*, 1972 E.C.R. at 1227.

eral Agreement itself to be "characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties."<sup>108</sup> These findings were deemed sufficient for the Court to conclude, without ever addressing the language of Article XI directly, that "Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts."<sup>109</sup>

In *Schlüter v. Hauptzollamt Lörrach*,<sup>110</sup> the Court's next opportunity to consider the General Agreement, it was argued that Community Regulations had the effect of increasing duties on imports of cheese from Switzerland above those to which the Community was bound under GATT Article II. The Court simply paraphrased the language of the *International Fruit* decision in denying direct effect to Article II.<sup>111</sup>

In *Nederlandse Spoorwegen*,<sup>112</sup> the Court focused on the primacy of Community law, ignoring arguments that the national law involved (Dutch) may have recognized direct effects of GATT provisions:

since so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems.<sup>113</sup>

In *Nederlandse Spoorwegen*, an interpretive note to a regulation on classification under the Common Customs Tariff, that had the effect of raising the tariff on certain duplicating machines by moving them to a new class in the customs law of the Netherlands, was challenged on the basis of the tariff concessions agreed to by the Community under

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<sup>108</sup> *Id.* The Court specifically focused on (1) the dispute resolution provisions of Article XXII, the first paragraph of which requires that in a dispute a party is to give "sympathetic consideration to . . . representations . . . made by any other contracting party," and the second paragraph of which provides that "the contracting parties . . . may consult" with the parties to a dispute if no adequate bilateral solution is reached, (2) the further dispute resolution provisions of Article XXIII, using terms such as "sympathetic consideration," "recommendations," and "consultations," and allowing contracting parties to suspend obligations, and (3) Article XIX, which allows a contracting party unilaterally to suspend obligations and modify concessions previously made. *Id.* at 1228.

<sup>109</sup> *Id.*

<sup>110</sup> Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, 1973 E.C.R. 1135.

<sup>111</sup> *Id.* at 1157-58.

<sup>112</sup> Case 38/75, *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen*, 1975 E.C.R. 1439, [1976] 1 C.M.L.R. 167.

<sup>113</sup> *Id.* at 1450.

GATT Article II. The Court ultimately found consistency with the GATT, avoiding the direct effect issue.

Several years later, in the *Dürbeck* case,<sup>114</sup> the Court was asked to consider the direct effect of GATT Article XIII in a case contesting Community quantitative restrictions on apples from Chile. The Court disposed of the allegations by reference to dispute settlement procedures that had already occurred in the matter within the GATT framework, assuming from "uncontested" representations by the Commission that no substantial violation had been found.<sup>115</sup>

On March 16, 1983, the Court issued three decisions in cases raising direct effect issues involving the General Agreement.<sup>116</sup> Unlike earlier cases challenging Community law as inconsistent with GATT provisions, these cases all challenged national law measures. In *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA*,<sup>117</sup> an Italian duty for administrative services was challenged as a charge on imports inconsistent with GATT Article II(1)(b) bound concessions. The Court considered it "important that the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community."<sup>118</sup> As such, it was determined that the European Court of Justice, and not national courts, had sole jurisdiction to interpret the provisions of GATT within the Community.<sup>119</sup> Relying on *International Fruit* and *Schlüter*, the Court rather easily determined that Article II was incapable of direct effect because the "general scheme" of the GATT made the entire agreement incapable of providing rules on which individuals could rely in courts within the Community.

On the same day, in the *S.I.O.T.* case,<sup>120</sup> the Court considered certain Italian unloading charges against a challenge based on the GATT Article II prohibition of increases in bound tariffs, and the Article V guarantee of freedom of transit through the territory of contracting parties to the GATT. Here, the Court repeated the notion

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<sup>114</sup> Case 112/80, *Firma Anton Dürbeck v. Hauptzollamt Frankfurt con Main-Flughafen*, 1981 E.C.R. 1095.

<sup>115</sup> *Id.* at 1120.

<sup>116</sup> Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI)*, 1983 E.C.R. 801, [1984] 1 C.M.L.R. 354; Case 266/81, *Società Italiana per L'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze*, 1983 E.C.R. 731; Joined cases 290 to 291/81, *Compagnia Singer SpA v. Amministrazione delle Finanze dello Stato*, 1983 E.C.R. 847.

<sup>117</sup> *Supra* note 116.

<sup>118</sup> *Società Petrolifera Italiana, SpA (SPI)*, 1983 E.C.R. at 828.

<sup>119</sup> *Id.*

<sup>120</sup> *Società Italiana per L'Oleodotto Transalpino (S.I.O.T.)*, 1983 E.C.R. at 731.



that "the rules contained in GATT govern only the Community's relations with the other contracting parties and cannot be applied within the Community itself."<sup>121</sup> Although the Court found no enforceable rights emanating from the GATT applicable in the case at hand, it did note that the notions of freedom of transit explicitly provided for in the GATT were implied in Community law by "the existence within the Community of a customs union characterised by the free movement of goods."<sup>122</sup> The Court also acknowledged that the inability of individuals to rely upon the GATT in challenging the charges involved "in no way affects 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>123</sup> This was insufficient, however, to provide any assistance to the complainant as a result of the application of the direct effects doctrine.

The opportunity arose in a 1987 decision to address the direct effect of GATT Article III as applied to Italian charges on imported bananas.<sup>124</sup> Because the bananas had already been in free circulation in another Member State, however, the Court avoided the GATT issue by finding the matter governed by Article 95 of the EC Treaty.

## *2. Interpretation of GATT Agreements in the Application of Community Legislation*

The idea that *International Fruit* will always prevent the European Court of Justice from interpreting GATT in a case involving a private party was dispelled in *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*.<sup>125</sup> Fediol filed a complaint with the Commission under Council Regulation No. 2641/84, alleging that Argentine differential charges and quantitative restrictions on soya beans and related products were "illicit commercial practices."<sup>126</sup> When the Commission refused to institute GATT dispute resolution on Fediol's behalf,<sup>127</sup> Fediol brought the matter before the Court under EC Treaty Article 173. The Court held that Regulation 2641/84 confers

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<sup>121</sup> *Id.* at 776.

<sup>122</sup> *Id.* at 779. The Court went on, however, to find that Article 113 of the European Community Treaty is not "sufficiently precise to enable an assessment of the contested transit rules to be made." *Id.* at 780.

<sup>123</sup> *Id.* at 780.

<sup>124</sup> Case 193/85, *Cooperativa Co-Fruita Srl v. Amministrazione della Finanze dello Stato*, 1987 E.C.R. 2085.

<sup>125</sup> Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities*, 1989 E.C.R. 1781, [1991] 2 C.M.L.R. 489.

<sup>126</sup> 1984 O.J. L-252/1.

<sup>127</sup> Commission Decision 2506 (unpublished).

on private industry the right to invoke GATT provisions in complaints to the Commission, and that the Court has jurisdiction to review Commission decisions applying the regulation.<sup>128</sup> This results from the regulation's reference to the application of "international law" by the Commission in determining the existence of an "illicit commercial practice." International law, for purposes of this provision, consists primarily of the GATT. Thus, GATT provisions are explicitly brought into Community law through the regulation, and decisions of the Commission applying the GATT in that process are reviewable in a manner requiring the Court to interpret the GATT.<sup>129</sup> The *Fediol* Court ultimately interpreted Articles III, XI, XX and XXIII of the GATT, finding the Commission's interpretation and application of those provisions to be proper and no illicit commercial practice to exist.<sup>130</sup>

The *Fediol* decision found that neither the general flexibility of the GATT nor its dispute resolution provisions prevent the interpretation of specific GATT provisions that may be more precisely defined.<sup>131</sup> To the extent Regulation 2641/84 gives private industry the right to invoke the GATT in a complaint to determine whether a commercial practice is illicit, the same parties have the right to go before the Court in order to have judicial review of the decision of the Commission in applying the GATT. Thus, general aspects of the GATT that had seemed to prevent the direct effect of specific provisions in *International Fruit* were, in *Fediol*, explicitly rejected as obstacles to interpreting and applying those specific GATT provisions in the context of a Commission decision.

*Fediol* differs from prior cases dealing with the GATT in two important aspects. First, all other decisions involving more than insignificant discussion of the GATT were brought through national court requests under Article 177 of the Rome Treaty for preliminary rulings on Community law.<sup>132</sup> In contrast, *Fediol* involved an action brought

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<sup>128</sup> 1989 E.C.R. at 1831.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1832-36.

<sup>131</sup> *Id.* at 1831.

<sup>132</sup> The first *International Fruit Company* case ruled that the company's appeal to the Court under Article 173 against Community regulations restricting apple imports was unfounded and did not give significant discussion to the argument that the regulations violated the GATT. Joined Cases 41-44/70, *International Fruit Co. and Others v. Commission of the European Communities*, 1971 E.C.R. 421. A case involving a challenge under Article 173 of provisions in a Council antidumping regulation was based in part on allegations of nonconformity with GATT Article VI and the 1967 Antidumping Code. Case 113/77, *NTN Toyo Bearing Co. and Others v. Council of the European Community*, 1979 E.C.R. 1185. The Court found the challenged provi-

by a private party in the European Court of Justice under Article 173, challenging a Decision of the Commission. Second, prior challenges based on GATT provisions were brought against either Community or Member State measures. *Fediol* involved a request that the Commission challenge measures of a non-Member State (Argentina). Thus, the *Fediol* holding may be limited to the interpretation of GATT provisions specifically incorporated in a Community regulation for purposes of considering the measures of another contracting party to the GATT. No such regulation exists allowing a challenge to Community or Member State measures.<sup>133</sup>

In 1991, the Court followed the *Fediol* interpretation practice in *Nakajima All Precision Co. Ltd. v. Council*.<sup>134</sup> This time a Japanese manufacturer of printers challenged the Council Regulation under which an antidumping duty was assessed against its products.<sup>135</sup> Like *Fediol*, the case was brought under Article 173 of the European Community Treaty, with an allegation that the Council Regulation was in breach of the Tokyo Round Antidumping Code. The Court found that the regulation in question, "was adopted in order to comply with the international obligations of the Community" as expressed in the Antidumping Code.<sup>136</sup> Thus, it was necessary to interpret provisions of the Antidumping Code, in order "to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code."<sup>137</sup> Finding the regulation to be in conformity with the relevant provisions of the Antidumping Code, the Court dismissed the invalidity argument.

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sion of the regulation unlawful based on a prior Community regulation, without reference to the GATT arguments. For an excellent review of direct action consideration of the GATT by the European Court of Justice, see Marc Marescaeu, *The GATT in the Case Law of the European Court of Justice*, in *THE EUROPEAN COMMUNITY AND GATT* 107 (Meinhard Hilf et al. eds., 1986).

<sup>133</sup> The Commission decision was based solely on the application of GATT provisions, despite the fact that the regulation allows the Commission to reject a complaint on grounds of "Community interest." 1984 O.J. L-252/1. Thus, it is unlikely the facts of the *Fediol* case will come again before the Court. The case itself will serve as a reminder to the Commission to include in any future rejections of complaints the discretionary ground of Community interest.

<sup>134</sup> Case C-69/89, *Nakajima All Precision Co. v. Council of the European Communities*, 1991 E.C.R. I-2069.

<sup>135</sup> The antidumping action was begun under Council Regulation No. 2176/84 of 23 July 1984, with the definitive duty being assessed under Council Regulation No. 2423/88 of 11 July 1988, which had come into effect during the course of the antidumping proceeding. *Id.* at I-2170.

<sup>136</sup> *Id.* at I-2178.

<sup>137</sup> *Id.*

C. The Application of the *International Fruit* Test to Other  
Agreements with Non-Member States

While the European Court of Justice consistently has found provisions of the General Agreement incapable of having direct effect in challenges to Member State and Community law, it *has* found directly effective rules in the provisions of other Community trade agreements. These decisions provide a useful comparison with the decisions addressing the General Agreement.

The first case in which the Court found a provision of a trade agreement to be directly effective was *Bresciani v. Amministrazione Italiana delle Finanze*.<sup>138</sup> An importer of raw cowhides from France and Senegal challenged Italian public health inspection duties imposed on imports on the grounds that they were charges "having an effect equivalent to customs duties," and therefore in violation of both Article 13(2) of the European Community Treaty (in respect of imports from France) and Article 2(1) of the Yaoundé Convention (as to imports from Senegal). The Court held that Article 2(1) of the Yaoundé Convention of 1963 confers on Community citizens "the right, which the national courts of the Community must protect, not to pay to a Member State a charge having an effect equivalent to customs duties."<sup>139</sup>

In its arguments before the Court in *Bresciani*, the Commission favored direct effect for Article 2(1) of Yaoundé Convention, because that provision "refers expressly and unconditionally to certain articles of the [European Community] Treaty," and was (in its 1969 version), "in terms so unrestricted, clear and precise as to have direct effect in the relations between the Member States and individuals."<sup>140</sup> Emphasizing the similarity of the language in the Yaoundé Convention and the EC Treaty, the Commission took the view, "that the inclusion in Article 2(1) of the first Yaoundé Convention of a reference to the rules of the Treaty prohibiting the imposition of charges having

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<sup>138</sup> Case 87/75, 1976 E.C.R. 129, 2 C.M.L.R. 62 (1976). Earlier cases had addressed non-GATT trade agreements, without specifically addressing the direct effects issue where such a determination was not necessary to the decision in each case. See Case 181/73, *Haegeman v. Belgian State*, 1974 E.C.R. 449, 459-561 (Court determined that Association Agreement with Greece was an "integral part of Community law," but avoided a determination on its direct effect by reviewing the Agreement and finding a countervailing duty on wine from Greece not inconsistent with its terms); Case 40/72, *Schroeder v. Federal Republic of Germany*, 1973 E.C.R. 125 (direct effect of Article 41 of the Association Agreement with Greece implied by the Court in determining that the Commission had discretion in interpretation of both the Agreement and Community regulation regarding the import of tomato concentrate from Greece).

<sup>139</sup> 1976 E.C.R. at 142.

<sup>140</sup> *Id.* at 134.

equivalent effect vests the article with the same authority as the provisions to which it refers.”<sup>141</sup>

In addressing the direct effect question, the *Bresciani* Court followed the analysis first set forth in *International Fruit*, looking to “the spirit, the general scheme and the wording of the Convention and of the provision concerned.”<sup>142</sup> The effect of the Yaoundé provision drew strength from the fact that it was concluded within the framework of Article 228 of the EC Treaty. The “imbalance between the obligations assumed by the Community towards the Associated States, which is inherent in the special nature of the Convention, does not prevent recognition by the Community that some of its provisions have a direct effect.”<sup>143</sup> The inclusion in the Yaoundé Agreement of a dispute settlement framework did not prevent direct effect, because the abolition of charges having equivalent effect “must, on the part of the Community, proceed automatically.”<sup>144</sup> Thus, there was created a mandatory treaty obligation, providing benefits for Member State nationals as well as for the ACP (African, Caribbean and Pacific) States.

The Court went on to review the Yaoundé Convention and its explicit reference to Article 13 of the EC Treaty, finding that, “the Community undertook precisely the same obligation towards the Associated States to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other.”<sup>145</sup> This obligation was viewed as specific, and without any implied or express reservation on the part of the Community, and therefore “capable of conferring on those subject to Community law the right to rely on it before the courts.”<sup>146</sup>

Thus, the Yaoundé Convention was implicitly distinguished from the GATT in regard to its negotiation and conclusion under Article 228 of the EC Treaty, its specific reference to Article 13 of the EC Treaty, and its precise language. Neither the imbalance of the obligations assumed by the Community, as opposed to those assumed by the ACP States, nor the inclusion of specific dispute settlement measures

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<sup>141</sup> *Id.* at 135.

<sup>142</sup> *Id.* at 139.

<sup>143</sup> *Id.* at 140.

<sup>144</sup> *Id.* at 141.

<sup>145</sup> *Id.* at 141-42.

<sup>146</sup> *Id.* at 141-42.

(found to be evidence of a lack of direct effectiveness in regard to the General Agreement in *International Fruit*) prevented direct effect.<sup>147</sup>

Although other cases before the European Court of Justice during the 1970's involved arguments that national measures were inconsistent with international obligations, none was decided on the basis of those obligations, thereby avoiding the direct effects issue.<sup>148</sup> The next case directly to address the issue was *Polydor v. Harlequin Record Shops*.<sup>149</sup> An English copyright licensee brought an infringement action against the British importer of records purchased from the Portuguese licensee. The defendant alleged that enforcement of U.K. copyright law would violate the free trade agreement between the Community and Portugal, Article 14(2) of which prohibited quantitative restrictions on imports. On an Article 177 referral from the Court of Appeal, it was determined that the language of the free trade agreement, which was identical to the language of Articles 30 and 36

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<sup>147</sup> Although the *Bresciani* Court avoided specific comparison with the analysis of the General Agreement in *International Fruit*, Advocate General Trabucchi specifically addressed the difference between Yaoundé Article 2 and GATT Article XI, stating:

In contrast to what was observed in connexion with Article XI of GATT, which prohibits the introduction of import and export quotas for products originating in the territory of another of the contracting parties, the provision under consideration here makes the power to derogate from it subject to substantive rules and to well-defined procedural requirements. . . . Recourse to the clause is permitted only as an exceptional measure, in case of serious difficulties and on clearly defined conditions, expressed in terms comparable to those of the safeguard clause in Article 226 of the EEC Treaty. Moreover, even when such exceptional measures are adopted by Member States, they must be the subject of prior authorization by the Community, and this ensures that the legality of the application of the derogative provision is always subject to review by this Court.

*Id.* at 148-149.

<sup>148</sup> Case 65/77, *Razanatsimba*, 1977 E.C.R. 2229, [1978] 1 C.M.L.R. 246 (in challenge by Madagascan national to French requirement of nationality on basis of Lomé Convention Article 62 calling for non-discriminatory treatment of ACP State nationals by Member States, Court concluded that Article 62 does not require general application of reciprocal bilateral obligations from other treaties with ACP States and that by itself it did not require nondiscrimination in professional licensing); Case 52/77, *Cayrol v. Rivoira*, 1977 E.C.R. 2261 (French prohibition on importation of Spanish table grapes upheld in challenge based on Free Trade Agreement with Spain, finding that the import restrictions were not inconsistent with the terms of the Agreement); Case 225/78, *Procureur de la République v. Bouhelier*, 1979 E.C.R. 3151 (French certification requirement for export of watches upheld against challenges based on Association Agreement with Greece and Free Trade Agreements with Spain and Austria, finding that the Agreements either did not contain prohibitions of such restrictions on exports or were not in effect at the time of the exports in question, even though the *Chatain* case, *infra*, had found the same requirement to be prohibited by Article 34(1) of the EC Treaty as a measure having an effect equivalent to a quantitative restriction); Case 65/69, *Procureur de la République v. Chatain*, 1980 E.C.R. 1345, [1981] 3 C.M.L.R. 418 (case decided on basis of EC Treaty provisions where provision of Free Trade Agreement with Switzerland was raised in defense against French criminal charges based on intercompany pricing rules).

<sup>149</sup> Case 270/80, *Polydor Ltd. v. Harlequin Record Shops Ltd.*, 1982 E.C.R. 329, [1982] 1 C.M.L.R. 677.

of the EC Treaty that earlier had been found to be directly effective,<sup>150</sup> was not directly effective because of the different purposes of the agreements.

The Commission, despite arguing in favor of direct effect for provisions of the Yaoundé Convention in *Bresciani*, took a different position in *Polydor*. It focused on the argument that the "aims" of the international agreement were different from those of the EC Treaty, and on the reciprocity argument that the Community would suffer by granting direct effect to agreements that may not be granted similar effect in the courts of the other parties to those agreements.<sup>151</sup>

The *Polydor* decision noted the "well-established case-law of the Court," providing that restrictions on importation of a product "lawfully . . . placed on the market . . . constitute a measure having an effect equivalent to a quantitative restriction for the purposes of Article 30 of the [EC] Treaty," and are thus prohibited.<sup>152</sup> It then determined that "whether the same interpretation must be placed on Article 14(2) of the Agreement" must be determined "in the light of both the object and purpose of the Agreement and of its wording."<sup>153</sup> The purpose of the free trade agreement was found to be "to eliminate progressively the obstacles to substantially all their trade," "to liberalize trade in goods between the Community and Portugal," and to abolish "customs duties and . . . charges having equivalent effect in

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<sup>150</sup> Case 78/70, *Deutsche Grammophon mbH v. Metro-SB-Großmärkte GmbH*, 1971 E.C.R. 487, [1971] 1 C.M.L.R. 631.

<sup>151</sup> The Court stated:

The Commission is of the opinion that the concept of direct effect, as developed in Community law, must not as such be transposed to the field of the Community's international relations, for two reasons. The first is based on the different nature and aims of international agreements. The second reason is that it is necessary to maintain in the context of these free-trade agreements a balance of the advantages and disadvantages which may exist between the parties to an international treaty.

With regard to the different nature and aims of international agreements, the Commission emphasizes that those agreements do not provide for any harmonization of law or for a common policy. Nor do they lay down rules for the judicial settlement of disputes by virtue of which the provisions of the treaties are interpreted in a manner binding on all the contracting parties.

As regards the need to maintain a proper balance of advantages and disadvantages between the parties to an agreement, that balance is substantially different if private parties can enforce an international agreement within the Community whilst they cannot do so in other contracting States. Indeed, the stage may be reached at which non-member countries may obtain all the rights of Community membership without having to assume the corresponding obligations. That is particularly true with regard to the agreements between the Community and the former EFTA countries.

1982 E.C.R. at 343.

<sup>152</sup> 1982 E.C.R. at 346. This case law includes Case 119/75, *Terrapin (Overseas) Ltd. v. Teranova Industrie*, 1976 E.C.R. 1039, [1976] 2 C.M.L.R. 482, and Case 78/70, *Deutsche Grammophon mbH v. Metro-SB-Großmärkte GmbH*, 1971 E.C.R. 487, [1971] 1 C.M.L.R. 631.

<sup>153</sup> 1982 E.C.R. at 346.

trade.” In other words, the purpose of the agreement was “expressed in terms . . . similar to those of the EEC Treaty.”<sup>154</sup>

The Court went on to find, however, that similarity of terms was not in itself sufficient reason for applying Community law principles to issues of protection of industrial and commercial property rights in the context of a free trade agreement.<sup>155</sup> The Court found that the purpose of the EC Treaty in the creation of a common market and the purpose of the free trade agreement with Portugal in the creation of a free trade area were sufficiently different that, “a prohibition on the importation into the Community of a product originating in Portugal based on the protection of copyright is justified in the framework of the free-trade arrangements established by the Agreements by virtue of the first sentence of Article 23” even “in a situation in which their justification would not be possible within the Community.”<sup>156</sup> Thus, identical language can have very different meaning when found in agreements having similar, but distinguishable, purposes.

The European Court next faced the issue of direct effect of a trade agreement in *Pabst & Richarz v. Hauptzollamt Oldenburg*.<sup>157</sup> Tax rebates under the German spirits monopoly law, meant to temper adjustments bringing that law into conformity with Community law, were challenged as discriminatory and therefore in violation of Article

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<sup>154</sup> *Id.* at 347.

<sup>155</sup> *Id.* at 348.

<sup>156</sup> *Id.* at 349. Once again, important comparisons with both *International Fruit* and *Bresciani*, not addressed in the Court's decision, were raised in the discussion by the Advocate General. The Opinion of Advocate General Mrs. Rozés distinguishes *Bresciani* by first noting a *rejection of a reciprocity analysis* (i.e., the “imbalance” of obligations in the Yaoundé Convention). It then notes that in the Yaoundé Convention, “the Member States had intended to assume the same obligations towards the African States and Madagascar as they had assumed towards each other and it was as a result of that reference that the Court was able to hold that the provision conferred personal rights on individuals.” Advocate General Rozés found specific contrast with the analysis of the GATT in *International Fruit*, summarizing as follows:

By way of contrast to [*International Fruit*], the issue in this case is not whether, just as Community law prevails in principle over national law, international commitments entered into by the Community take precedence over the acts of its institutions (for example, a regulation of the Council of Ministers), but whether commitments entered into by the Community with non-member countries must be regarded by the national courts as being of the same nature and having the same scope as those entered into by the Member States *inter se*, in other words whether the classical international legal order is identical to the Community legal order. Everyday reality shows that that is unfortunately not so.

*Id.* at 355.

As such, Advocate General Rozés' analysis (1) follows a dualist perspective of international legal jurisprudence for the Community, (2) emphasizes the concept of primacy of Community law first developed in Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425, and (3) finds both of these conclusions to be “unfortunate.” 1982 E.C.R. at 355.

<sup>157</sup> Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, 1982 E.C.R. 1331, [1983] 3 C.M.L.R. 11.



53(1) of the Association Agreement between the Community and Greece.<sup>158</sup> Relying in large part on its similarity to the language and function of EC Treaty Article 95, the Court found Article 53 of the Association Agreement to be directly effective,<sup>159</sup> noting that the wording of Article 53(1) is “similar to that of Article 95 of the [EEC] Treaty, [and] fulfils . . . the same function as that of Article 95.”<sup>160</sup>

After *Pabst & Richarz*, an attempt to draw useful conclusions from the decisions of the European Court of Justice might reasonably have led to the assumption that agreements directly tied to the EC Treaty were capable of providing rules of direct effect, while less directly connected agreements were not. Thus, the Yaoundé Agreement, institutionalizing arrangements favoring former colonies and related countries and specifically provided for in the EC Treaty, was the source of directly effective rules in *Bresciani*. Similarly, an association agreement preparing a non-member country for membership in the Community provided a directly effective rule in *Pabst & Richarz*. On the other hand, a free trade agreement, as considered in *Polydor*, was not capable of providing direct effect because its connection to the constitutional framework of the EC Treaty was more tenuous. Further, an agreement such as the General Agreement on Tariffs and

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<sup>158</sup> “Neither Contracting Party shall impose, directly or indirectly, on the products of the other Contracting Party any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.” The refunds were also challenged on the basis of Article 95 of the EC Treaty in regard to raw spirit coming from France and Italy. 1982 E.C.R. at 1344.

<sup>159</sup> This time the Commission had argued in favor of direct effectiveness of the provision. *Id.* at 1342.

<sup>160</sup> *Id.* at 1350.

It accordingly follows from the wording of Article 53(1) . . . and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. In those circumstances Article 53(1) must be considered as directly applicable from the beginning of the third year after the entry into force of the Agreement, on which date all measures conflicting with that provision was, [sic] by virtue of its third subparagraph, to be abolished.

Accordingly . . . an importer of spirits from other Member States may rely before a national court on the first subparagraph of Article 53(1) of the Association Agreement with Greece against the application of national measures of tax relief for spirits, . . . if such measures have the effect of according less favourable treatment to such spirits than to similar domestic products.”

*Id.* at 1350-51.

Advocate General Rozés would have gone so far as to find that, from prior case law on Article 95, “the reasons why the Court found that the first paragraph of Article 95 of the Treaty had direct effect apply *mutatis mutandis* to Article 53(1) of the Agreement signed in Athens with Greece.” *Id.* at 1359. Thus, a direct connection would have been made between the direct effect of the EC Treaty itself (the constitutional law of the Community) and the direct effect of provisions of treaties entered on behalf of the Community.

Trade, to which the Community was not even officially a contracting party and which has no direct tie to the constitutional framework of the EC Treaty, was also incapable of having directly effective provisions.

Such a rationale for the direct effects jurisprudence of the European Court in international agreements was proved useless in the 1983 case of *Hauptzollamt Mainz v. Kupferberg*.<sup>161</sup> An importer of port wine from Portugal challenged the German monopoly equalization duty as being in violation of Article 95 of the EC Treaty and Article 21(1) of the free trade agreement between the Community and Portugal. The Court held Article 21(1) of the free trade agreement directly effective. Determining that agreements concluded under Article 228 of the EC Treaty are binding on the institutions of the Community and on Member States, the Court found it "incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements."<sup>162</sup> The logic of direct effect for the provisions of the free trade agreement came from intra-Community law. Member State obligations arising from agreements concluded by the Community institutions create not only rights running to the non-member countries with whom the agreement was negotiated but also to the Community itself "which has assumed responsibility for the due performance of the agreement."<sup>163</sup> Thus, the free trade agreement with Portugal, through Article 228 of the EC Treaty, was a directly effective, integral part of Community law.

Not only did *Kupferberg* dispel the notion that the Court's direct effects jurisprudence was based on the type of agreement involved, but it also removed several other rationales for determining the direct effect of provisions of agreements binding on the Community. The decision hinged in large part on the necessity for uniformity in the interpretation of Community law.<sup>164</sup> In doing so, it specifically rejected as determinative factors in considering direct effect (1) the prin-

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<sup>161</sup> Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG*, 1982 E.C.R. 3641, [1983] 1 C.M.L.R. 1.

<sup>162</sup> *Id.* at 3662.

<sup>163</sup> *Id.* at 3662.

<sup>164</sup> The court stated:

It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States, . . . . Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.

*Id.* at 3362-63.

cipal of reciprocity; (2) the presence in the agreement of an institutional framework for dispute settlement; and (3) the presence of a safeguard clause in the agreement.

The Court rejected a reciprocity test that would find that a Community agreement may have a direct effect in the legal order of one contracting party only when the other party recognizes such an effect:

According to the general rules of international law there must be *bona fide* performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation 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>165</sup>

As to the presence of a separate dispute settlement mechanism in an agreement, the Court ruled that, "the mere fact that the contracting parties have established a special institutional framework for consultations and negotiations *inter se* in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement."<sup>166</sup> Further, on the issue of safeguard clauses, the Court determined that such clauses "apply only in specific circumstances" and "do not affect the provisions prohibiting tax discrimination."<sup>167</sup> Thus, the presence of provisions that had seemed so important to the Court's finding of no direct effect in GATT cases such as *International Fruit*, *Schlüter*, and *Dürbeck* were no longer determinative in the Court's analysis of the free trade agreement with Portugal.<sup>168</sup>

Like the analysis in *International Fruit*, the *Kupferberg* decision addressed the entire agreement prior to consideration of the specific provision claimed to be directly effective. As to the free trade agreement with Portugal, as a whole, the Court found neither its nature nor its structure to prevent a trader from reliance on its provisions before a court within the Community.<sup>169</sup> The Court then considered Article

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<sup>165</sup> *Id.* at 3663-64. Compare the position of the Commission in *Polydor*, *supra* note 149 and accompanying text with the position of Advocate General Mrs. Rozés in *Bresciani*, *supra* note 156.

<sup>166</sup> *Kupferberg*, 1982 E.C.R. at 3664.

<sup>167</sup> *Id.*

<sup>168</sup> Michel Waelbroeck, *Effect of GATT Within the Legal Order of the EEC*, 8 J. WORLD TRADE L. 614, 617 (1974).

<sup>169</sup> 1982 E.C.R. at 3665.

21 specifically, finding that it, "imposes . . . an unconditional rule against discrimination in matters of taxation," and as such, "may be applied by a court and thus produce direct effects throughout the Community."<sup>170</sup>

The 1987 case of *Demirel v. Stadt Schwäbisch Gmünd*<sup>171</sup> further eroded the notion that any differences between association agreements and free trade agreements were useful in determining direct effect status of their provisions. The Court found that provisions of the Association Agreement with Turkey were *not* directly applicable in a challenge to national measures. A Turkish national was ordered expelled by decision of the German City of Schwäbisch Gmünd as not entitled to remain with her Turkish husband. The deportation was challenged as contrary to prohibitions on restrictions on the free movement of persons contained in Articles 7 and 12 of Association Agreement with Turkey, combined with Article 36 of the Additional Protocol.

The *Demirel* Court considered the Agreement generally as setting out "aims" and "guidelines" as opposed to "detailed rules," finding that, "[o]nly in respect of certain specific matters are detailed rules laid down by the protocols annexed to the Agreement, later replaced by the Additional Protocol."<sup>172</sup> At the same time, the decision implied further erosion of the analysis employed in regard to the GATT in *International Fruit*, by appearing to recognize that even though the agreement, as such, may lack the characteristics of direct effect, some "detailed rules" in the protocols may be entitled to direct effect. This implication is furthered by the Court's more elaborate discussion of specific provisions. In other words, unlike *International Fruit*, where the Court stopped after finding that the agreement as such was incapable of direct effects, here the Court went on to the specific provisions. The subsequent analysis of specific provisions limits the extent to which this gloss on *International Fruit* may be extended, however, as the provisions considered by the Court were found to be "not suffi-

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<sup>170</sup> *Id.* It is important to note that, while acknowledging the possibility of finding directly effective rules in the free trade agreement involved, the *Kupferberg* decision at the same time distinguished those rules from similar directly effective rules arising from the EC Treaty. The Court specifically noted the language differences between Article 21 of the EEC-Portugal Free Trade Agreement and Article 95 of the EC Treaty, and the different purposes of the two treaties, noting that "the interpretations given to Article 95 of the Treaty cannot be applied by way of simple analogy to the Agreement on free trade." *Id.* at 3666. Further, the Court ultimately found no discrimination within the prohibitions of Article 21 of the Free Trade Agreement. Thus, while winning the decision on direct effect, the plaintiff lost the judgment.

<sup>171</sup> Case 12/86, 1987 E.C.R. 3719, [1989] 1 C.M.L.R. 421.

<sup>172</sup> *Id.* at 3752.

ciently precise and unconditional to be capable of governing directly the movement of workers.”<sup>173</sup> However, the Court’s extended inquiry, after first finding the agreement as a whole lacking in indicia of direct effect, indicated an evolution beyond the more limited approach of *International Fruit*.

The Court has continued to find directly effective provisions in bilateral trade agreements after *Kupferberg* and *Demirel*. In *Sevince v. Staatssecretaris van Justitie*,<sup>174</sup> direct applicability was acknowledged for a decision of the Council of Association provided by the Association Agreement with Turkey. In *ONEM v. Bahia Kziber*,<sup>175</sup> the Court recognized the direct effect of the national treatment provisions of the Co-operation Agreement between the EC and Morocco.<sup>176</sup>

#### D. The Direct Effects of International Agreement Provisions After Kupferberg and Demirel

For an outsider, it is difficult to draw from the case law of the European Court of Justice any clear tests applicable to direct effect questions that might arise in future cases involving international agreements of the Community. Pierre Pescatore, a former judge of the European Court, has suggested that the analysis applied to the GATT in *International Fruit* and *Schlüter* in comparison to that applied to the Yaoundé Convention in *Bresciani* and the EEC/Portugal Free Trade Agreement in *Kupferberg*, represent distinctly different approaches to the same issue.<sup>177</sup> The GATT cases reflect a “context approach” without analysis of the specific provisions alleged to have direct effect. Discussion is restricted to “the general characteristics of GATT – which in short is described as a forum for commercial negotiations rather than a set of binding rules.”<sup>178</sup> The *Bresciani* and *Kupferberg* cases, on the other hand, demonstrate a “textual approach,” with “the question of direct applicability . . . discussed on the basis of individual provisions in given agreements.”<sup>179</sup> Pescatore finds this analytical distinction problematic:

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<sup>173</sup> *Id.* at 3753.

<sup>174</sup> Case C-192/89, 1990 E.C.R. I-3461, [1992] 2 C.M.L.R. 57.

<sup>175</sup> Case C-18/90, 1991 E.C.R. I-199.

<sup>176</sup> See Fernando Castillo de la Torre, *The Status of GATT in EEC Law: Some New Developments*, 26 J. WORLD TRADE 35, 35 n.1 (Oct. 1992).

<sup>177</sup> Pierre Pescatore, *Treaty-making by the European Communities, in THE EFFECT OF TREATIES IN DOMESTIC LAW*, 177, 184-88 (Francis G. Jacobs & Shelley Roberts eds., 1987).

<sup>178</sup> *Id.* at 186-87.

<sup>179</sup> *Id.* at 187-88.

A comparison of these two lines of approach shows that they lead to contradictory results in so far as identical clauses . . . are said to confer rights on individuals whenever the clauses are examined on their own merits, whereas the same clauses may be said to be without effect for individuals whenever an international instrument is approached in an indiscriminate way without regard for individual clauses.<sup>180</sup>

Noting that Article 31 of the Vienna Convention on the Law of Treaties<sup>181</sup> "suggests a progression from text to context and not the reverse,"<sup>182</sup> Pescatore finds a need to reconcile these cases through the consistent application of a textual approach to all international agreements.<sup>183</sup>

Despite the concerns raised by Pescatore, the distinction between a textual and a contextual approach might be supportable if the Court considers the nature of the agreement being addressed of overriding importance. However, the *Kupferberg* analysis, finding directly effective rules in a free trade agreement, constitutes a rejection of distinctions based solely on the type of agreement.<sup>184</sup>

Other distinctions that might have carried weight after *International Fruit* similarly have been weakened or rejected by subsequent decisions.<sup>185</sup> Once a context analysis is discredited, reliance on the preamble and the general flexibility of the General Agreement<sup>186</sup> is not possible in denying direct effect to a specific provision. Neither is reliance on vagueness and ambiguity in derogation provisions or provisions addressing the settlement of disputes sufficient to negate the

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<sup>180</sup> *Id.* at 187.

<sup>181</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>182</sup> Pescatore, *supra* note 177, at 188.

<sup>183</sup> The application of this method shows that international treaties and agreements contain in varying proportions flexible elements and well-defined obligations. It may be true that the latter are relatively more numerous in free trade agreements than in a system like GATT, but even here we find a certain number of precise commitments which by their essence and in view of the purpose of the General Agreement are not negotiable, such as the rule on non-discriminatory commercial treatment of imported goods, the prohibition of using internal taxation for protective purposes, freedom of transit and the effect of consolidated tariff concessions. In other words, those obligations, being precise and unconditional, fulfil the criteria for direct applicability which the Court has consistently followed in many other fields.

*Id.*

<sup>184</sup> See *supra* notes 161-68 and accompanying text.

<sup>185</sup> For an exhaustive rejection of the possible criteria after *International Fruit* see Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397 (1983).

<sup>186</sup> Joined Cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1227 [1975] 2 C.M.L.R. 1. See *supra* notes 100-08 and accompanying text.

specificity of other provisions.<sup>187</sup> The Court ignored the presence of a dispute settlement provision as justification for denying direct effect in *Bresciani*<sup>188</sup> and specifically rejected such an argument in *Kupferberg*.<sup>189</sup> The *Kupferberg* decision also rejected reliance on the principle of reciprocity to deny direct effect to a provision of a Community agreement.<sup>190</sup> Thus, the fact that another party to the agreement might not allow private parties to assert rights derived from the agreement in its courts should not prevent a finding of direct effect.<sup>191</sup> Further, the *Kupferberg* decision eliminated the argument that safeguard clauses weaken other provisions of an agreement sufficiently to deny them direct effect.<sup>192</sup> In essence, the *Kupferberg* judgment compels the textual analysis propounded by Pescatore. The *Demirel* decision, by implying that an agreement lacking indicia of direct effects on the whole may yet contain directly effective provisions, seems to make an argument favoring a contextual approach even more difficult.<sup>193</sup>

#### E. The Banana Cases: The Continuing Challenge

On February 13, 1993, the Council of Ministers, by qualified majority vote, adopted Regulation No. 404/93, establishing a common organization of the Community market in bananas.<sup>194</sup> Prior to that regulation, some Member States provided preferential outlets for bananas from ACP States while others had more liberal import rules, thus preventing the free movement of bananas within the Community. Regulation 404/93 was designed to replace this system with a single market for bananas.<sup>195</sup> Germany, which previously had benefited from an arrangement allowing it to import an annual quota of bananas free of customs duty, brought an action against the Council under Article 173 of the EC Treaty, seeking a declaration that the tariff quotas established by the regulation were void.<sup>196</sup>

As part of its argument, Germany alleged that the regulation infringed the GATT and was therefore unlawful regardless of the direct

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<sup>187</sup> But see Meinhard Hilf, *The Application of GATT Within the Member States of the European Community, With Special Reference to the Federal Republic of Germany*, in *THE EUROPEAN COMMUNITY AND GATT* 153, 176-77 (Meinhard Hilf et al. eds., 1986).

<sup>188</sup> See *supra* note 144 and accompanying text.

<sup>189</sup> See *supra* note 166 and accompanying text.

<sup>190</sup> See *supra* note 165 and accompanying text.

<sup>191</sup> *Id.*

<sup>192</sup> See *supra* note 167 and accompanying text.

<sup>193</sup> See *supra* notes 171-73 and accompanying text.

<sup>194</sup> 1993 O.J. (L 47) 1.

<sup>195</sup> Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973, 5054-57.

<sup>196</sup> *Id.*

effect status of the GATT because "compliance with GATT rules is a condition of the lawfulness of Community acts."<sup>197</sup> Both the Council and the Commission argued that GATT provisions cannot be asserted in a challenge to Community legislation "except in the special case where the Community provisions were adopted to implement obligations entered into within the framework of GATT."<sup>198</sup>

Repeating the oft-stated position that "the provisions of GATT have the effect of binding the Community,"<sup>199</sup> the Court refused to waiver from its *International Fruit* analysis, even as applied to an Article 173 challenge by a Member State.<sup>200</sup> Once again, the Court reiterated that GATT provisions cannot be directly applicable in Community law because the GATT (1) is "based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements,'" (2) is too flexible in "conferring the possibility of derogation," (3) is too flexible in "the measures to be taken when confronted with exceptional difficulties;" and (4) is too flexible in its provisions dealing with the settlement of conflicts between the contracting parties.<sup>201</sup>

By simply parroting *International Fruit*, without any acknowledgment of subsequent decisions considering international agreements

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<sup>197</sup> *Id.* at I-5071.

<sup>198</sup> *Id.* at I-5071-72.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at I-5073.

<sup>201</sup> These factors are from the summary of the Court in the *International Fruit* decision at para. 21, which is quoted in the Opinion of Advocate General Gulmann at Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973, I-5024, para. 139. The opinion of the Court elaborated on this language as follows:

It is settled law that GATT, which according to its preamble is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements', is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

The Court has recognized that those measures include, for the settlement of conflicts, depending on the case, written recommendations or proposals which are to be 'given sympathetic consideration', investigations possibly followed by recommendations, consultations between or decisions of the *contracting parties*, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under GATT and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

It has noted that where, by reason of an obligation assumed under GATT or of a concession relating to a preference, some producers suffer or are threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation.

*Id.* at I-5072-73 (citations omitted).



other than the GATT, the Court clearly took the position that within the Community, GATT rules are, at best, "soft" law:

The special features noted above show that the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.<sup>202</sup>

Noting the special circumstances of *Fediol* and *Nakajima*,<sup>203</sup> the Court, first finding no directly applicable obligation flowing from the GATT itself, states that "it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules."<sup>204</sup>

Advocate General Gulmann's opinion was consistent with the Court's decision but went further in noting the political and legal quandary created by the result.<sup>205</sup> In particular, he noted that the Court's position, though "not . . . in itself an infringement of international law," failed to "help secure respect for international obligations."<sup>206</sup> His opinion raises no obstacle to the Court departing from its position in *International Fruit*, noting that the effect of the GATT in the Community legal order is not settled in the GATT itself, and is thus, "a matter 'for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the Framework of its jurisdiction under the [EC] Treaty.'"<sup>207</sup> The Advocate General's position is summarized when he states:

It is thus established that the question of the effects of GATT within the Community legal order is to be determined by the Court. That decision is essential. It has great importance in principle and in practice. To accept the German Government's view would strengthen the impact of GATT in the Community legal order and help to ensure the Community institutions' respect for the agreement even if, where appropriate, the

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<sup>202</sup> *Id.* at I-5073.

<sup>203</sup> *Supra* notes 125-37 and accompanying text.

<sup>204</sup> 1994 E.C.R. at I-5073-74.

<sup>205</sup> 1994 E.C.R. at I-4980 (Opinion of Advocate General Gulmann).

<sup>206</sup> *Id.* at I-5021:

[U]nless a contrary intention may be deduced from the agreement in question there is no requirement for the judicial institutions of the internal legal systems to enforce international commitments. Such legal enforcement is of course possible and will help to secure respect for international obligations, but it will not be in itself an infringement of international law if the contracting parties' legal systems do not contain rules giving the judicial institutions jurisdiction for such enforcement.

<sup>207</sup> *Id.* at I-5022 (quoting from Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG*, 1982 E.C.R. 3641, [1983] 1 C.M.L.R. 1.)

Court were to restrict its review to cover more obvious infringements of GATT. However, such an acceptance might also mean a perceptible change in the possibilities for the competent institutions of the Community to safeguard the Community's interests within the legal framework laid down in GATT. In my view the Court should not come to a decision on the question at issue here without serious consideration of the views expressed by the Council and the Commission.<sup>208</sup>

Thus, the Advocate General (1) raises concern about the role of the direct effects doctrine in developing respect for international law; (2) finds final authority on the question of direct effect to reside with the Court; and (3) counsels substantial deference to the other principal institutions of the Community in exercising this authority.

Two aspects of *Germany v. Council* represent significant developments in the Court's direct effects jurisprudence and GATT obligations. First, direct effect was claimed by a Member State bringing the case under Article 173 of the EC Treaty, rather than by a private party in an action referred to the Court by a national court through the Article 177 preliminary ruling process.<sup>209</sup> The Court found this distinction insufficient to require any divergence from the *International Fruit* position.

Second, by the time the case was decided by the Court, the preferential Community policy on banana imports already had been the subject of formal dispute resolution proceedings in the GATT. The pre-regulation restrictions on banana imports in France, Italy, Portugal, Spain and the U.K. were found inconsistent with the quantitative restriction prohibitions of GATT Article XI and in violation of the most-favored-nation requirements of Article I in a panel report presented to the GATT Council at its meeting in June 1993.<sup>210</sup> At the same meeting, the Council established a panel to examine complaints by five Latin American nations against the new Regulation 404/93 banana regime, which went into effect on July 1, 1993.<sup>211</sup> The second report was presented to the Council on March 23, 1994, and found inconsistencies with the Community's Article II schedules of concessions and violations of the most-favored-nation requirement of Article

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<sup>208</sup> 1994 E.C.R. at I-5022. See also U. Everling, *Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts*, 33 COMMON MKT. L. REV. 401, 403 (1996) ("The Bananas Judgment of the Court of Justice briefly and categorically rejected all arguments based on the respect for international obligations and for vested rights of traders.").

<sup>209</sup> Belgium and The Netherlands supported Germany's position. 1994 E.C.R. at I-5051.

<sup>210</sup> *Russia applies for GATT membership: Panel rules against EC members' restrictions on bananas*, 100 GATT Focus, July 1993, at 2.

<sup>211</sup> *Id.* at 4.

I and the national treatment requirement of Article III.<sup>212</sup> Adoption of both panel reports was blocked by the Community Member States and the ACP states who are the recipients of the preferential regime.

Six days after the second panel report was presented to the GATT Council, the parties to the banana dispute entered into a "Framework Agreement," by which some states waived further GATT dispute settlement against the European Community, in exchange for an enlarged tariff quota and lower tariff for non-traditional and third country banana imports.<sup>213</sup> Implementation of the Framework Agreement has been neither expeditious nor complete.<sup>214</sup> Germany instituted proceedings before the European Court challenging the Agreement, but the Court found no need to respond to the request for an opinion under EC Treaty Article 228(6) because the agreement became effective before the Court's decision.<sup>215</sup>

Proceedings from the Finanzgericht (Finance Court) Hamburg present another angle on the direct effect challenge and the banana regime.<sup>216</sup> A German importer contracted in 1991 and 1993 to receive weekly shipments of bananas from Ecuador until 1996. When the quota system was introduced by Council Regulation 404/93, the licenses available to the importer were no longer sufficient to cover all the bananas contracted for. Thus, the importer was forced to sell in third countries at lower prices and was faced with financial collapse. The importer's financial situation further deteriorated as a result of Commission Regulation 2478/95 of March 1, 1995, which is based on Regulation 404/93 and further devalued the licenses for third country bananas.<sup>217</sup>

The Finanzgericht Hamburg found both regulations to be contrary to the GATT and, though valid under Community law per the European Court's decision in *Germany v. Council*,<sup>218</sup> not to be ap-

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<sup>212</sup> Panel report on EC banana import regime presented, 108 GATT Focus, June 1994, at 5. Further proceedings were initiated under the WTO Dispute Settlement Understanding in 1996. See WTO Dispute Panel Begins Hearing on EU Banana Regime Complaint by U.S., 13 Int'l Trade Rep. (BNA)No. 36, at 1423 (Sept. 11, 1996).

<sup>213</sup> Costa Rica - Columbia - Dominican Republic - European Community - Nicaragua - Venezuela: Framework Agreement on Banana Imports, March 29, 1994, reprinted at 34 I.L.M. 1 (1995).

<sup>214</sup> Everling, *supra* note 208.

<sup>215</sup> Case C-3/94 Opinion on request by the Federal Republic of Germany for an opinion pursuant to Article 228(6) of the Treaty establishing the European Community, 1995 E.C.R. I-4579.

<sup>216</sup> Case C-182/95, T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas Decision of the Finanzgericht Hamburg of May 19, 1995, AZ: IV 119/95 H.

<sup>217</sup> 1995 O.J. (L/49) 1.

<sup>218</sup> Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973, 5054-57.

plied in Germany on constitutional grounds. The court determined (1) that the Federal Republic of Germany, as a member of GATT, is bound by the provisions of the GATT; (2) that the Finanzgericht has jurisdiction to review conflicts between the validity of Community regulations and the Federal Republic's obligations under the GATT in such proceedings for interim measures; (3) that Article 234 of the EC Treaty gives GATT precedence over Community law which conflicts with the GATT;<sup>219</sup> and (4) that the Community provisions in conflict with the GATT are not to be applied in Germany.<sup>220</sup> Based on these determinations, the court issued an interim injunction requiring that a license be issued to the importer,<sup>221</sup> pending the submission to the Court of Justice of questions including the relationship under Article 234 of Articles I, II and III of the GATT to the two challenged regulations.<sup>222</sup> On appeal to the Bundesfinanzhof, the injunction was suspended.<sup>223</sup> On November 26, 1996, the Court of Justice ruled that national courts may not order interim relief against Community measures and that such relief is available only before the Court of Justice in an action initiated by a Member State.<sup>224</sup>

Other references to the Court of Justice for a preliminary ruling remain effective, however, as does the appeal of the Bundesfinanzhof's decision to the Bundesverfassungsgericht (Federal Constitutional Court). In a second decision on a very similar set of facts, the Finanzgericht Hamburg again suspended customs duties and referred the matter for a preliminary ruling.<sup>225</sup> Upon appeal to the Bundesfinanzhof, this time the suspension of duties was not reversed

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<sup>219</sup> Article 234 ¶ 1 reads as follows:

The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 234, *supra* note 4. The European Court has held elsewhere that an international agreement entered by a Member State prior to the creation of the European Community may take precedence over Community legislation, at least until the Member State exercises its obligation to bring its international obligations into conformity with its Community obligations under Article 234. Case C-158/91, *Ministère Public et Direction du travail et de l'emploi v. Levy*, 1993 E.C.R. I-4287.

<sup>220</sup> Request for preliminary ruling from the Finanzgericht Hamburg, Case No. C-182/95-1 at 14.

<sup>221</sup> *Id.* at 1.

<sup>222</sup> *Id.* at 2.

<sup>223</sup> Preliminary Ruling Request of the Finanzgericht Hamburg on its decision of May 19, 1995, translated for the European Court of Justice at Case C-182/95-1, June 12, 1995.

<sup>224</sup> Case C-68/95, *T. Port GmbH & Co. v. Bundesanstalt für Landwirtschaft und Ernährung*, as reported in *FINANCIAL TIMES*, Dec. 3, 1996, at 16.

<sup>225</sup> Preliminary Ruling Request of the Finanzgericht Hamburg on its decision of Aug. 29, 1995, translated for the European Court of Justice at Case C-364/95-1, Nov. 28, 1995.

and has been allowed to stand, again subject to appeal to the Bundesverfassungsgericht on German constitutional issues.<sup>226</sup> Thus, the question of direct effect and the banana regime is before the Court of Justice on the initiative of both the German government and a German importer. Given the Maastricht judgment of the Bundesverfassungsgericht,<sup>227</sup> the European Court's role in these cases remains further complicated by the conclusion of the Finanzgericht Hamburg that German officials are "prohibited from applying in Germany Community law which has been adopted ultra vires."<sup>228</sup>

#### F. Legal Rationales For and Against Direct Effect of GATT in Community Law

To this observer, the case law of the European Court of Justice creates confusion and uncertainty. The ambiguity with which the Court criticized the GATT in *International Fruit*, combined with the Court's decisions finding directly effective provisions in other international agreements of the Community, seem to leave European direct effects jurisprudence at least as flexible as the GATT system it considers.<sup>229</sup> In the GATT system, this flexibility is seen as contributing to the "soft" nature of legal rules, thereby rendering them incapable of direct effect. The same analysis applied to the European Court's direct effects jurisprudence concerning international agreements could easily lead one to the conclusion that EC law on this issue is itself every bit as "soft" as any part of the GATT system. This leads further to an incongruity that may best be resolved by European Court review of both the position of the GATT in EC law and the Court's own discussion of direct effects as applied to international agreements. The decision in *Germany v. Council* indicates, however, that the Court is unwilling to take on this challenge.

Although it would be presumptuous for an outsider to suggest a resolution of this incongruity, some observations are appropriate on

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<sup>226</sup> See *Rechtmäßigkeit des "Bananen"-Zolls zweifelhaft*, Nationale Gerichte, 2/96 EWS at 49.

<sup>227</sup> Federal Constitutional Court Decision Concerning the Maastricht Treaty of Oct. 12, 1993, translated in 33 I.L.M. 388 (1994).

<sup>228</sup> Preliminary Ruling Request of the Finanzgericht Hamburg in Case C-364/95-1, *supra* note 225, at 3. The European Court of Justice extended its decision in *Germany v. Council*, when it ruled that the Banana Regulation (No. 404/93) did not breach "essential procedural requirements" or the importers' right to property. Case C-466/93 Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft, 1995 E.C.R. I-3781.

<sup>229</sup> To one commentator, the issue of flexibility goes not to direct effects, but to the initial question of whether the agreement is binding at all. H.G. Schermers, *Community Law and International Law*, 12 COMMON MKT. L. REV. 77, 81 (1975). Thus, if the agreement is binding, flexibility is no longer an argument against its provisions having direct effect.

why it is troublesome. In making such observations, it is not difficult to determine where to begin. *International Fruit* is the consensus choice as the starting point. It is more difficult, however, to know just where to go from *International Fruit*. This is in part because the European Court has – consistently without elaboration – bound itself ever more tightly to the no-direct-effects position of *International Fruit* in subsequent GATT cases, while at the same time discussing other international agreements in language that only weakens the rationales stated or implied in *International Fruit*. In the commentary, this has resulted in a list of suggested rationales so long and sometimes so ephemeral that the debate often takes on the quixotic nature of wind-mill jousting.

Certain distinctions fail because they are illogical or inappropriate in a modern legal system. For example, despite the deference recommended by Advocate General Gulmann in *Germany v. Council*,<sup>230</sup> the position of the Commission before the Court of Justice should not control the outcome. The Commission negotiates, but does not conclude, international agreements.<sup>231</sup> Giving it complete deference in the interpretation of such agreements would be an inappropriate delegation of judicial duties to the executive branch.

Neither should the Court's direct effects jurisprudence be controlled by a distinction based on whether it is a Community or a Member State measure that is being challenged. The only cases in which a measure has been found violative of a directly effective international agreement have been challenges to Member State measures,<sup>232</sup> and no challenge to a Community measure has been successful in demonstrating direct effect.<sup>233</sup> However, the consensus position is that international agreements hold a position in Community law that, while below that of the EC Treaty itself, is superior to secondary Community legis-

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<sup>230</sup> See 1994 E.C.R. I-4973, I-5022.

<sup>231</sup> Treaty Establishing the European Community, *supra* note 4, art. 228.

<sup>232</sup> See, e.g., Case 87/75, *Bresciani v. Amministrazione Italiana delle Finanze*, 1976 E.C.R. 129, 2 C.M.L.R. 62; Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, 1982 E.C.R. 1331, [1983] 3 C.M.L.R. 11; *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KGaA*, 1982 E.C.R. 3641, [1983] 1 C.M.L.R. 1.

<sup>233</sup> See, e.g., *Joined Cases 21 to 24/72, International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, [1975] 2 C.M.L.R. 1; Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, 1973 E.C.R. 1135; Case 38/75, *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen*, 1975 E.C.R. 1149, [1976] 1 C.M.L.R. 167; Case 112/80, *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, 1981 E.C.R. 1095; and Case 270/80, *Polydor Ltd. v. Harlequin Record Shops Ltd.*, 1982 E.C.R. 329, [1982] 1 C.M.L.R. 677.

lation as well as national law.<sup>234</sup> Thus, whether the measure challenged is that of the Community or a Member State should not be the decisive factor.

Other distinctions have been shown to be inappropriate in the above discussion. The type of agreement does not control the direct effect decision.<sup>235</sup> Neither does the concept of reciprocity. *Kupferberg* specifically rejected the argument that the position of other parties to the international agreement should influence its status in the Community.<sup>236</sup> While international law may require reciprocity in granting direct effect where such is the clear intention of the parties from the inception of an agreement, it does not require it where such an intention is not clear, and the fact that one party may not grant direct effect does not prevent another from doing so.<sup>237</sup>

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<sup>234</sup> See, e.g., Karl Meesen, *The Application of Rules of Public International Law within Community Law*, 13 COMMON MKT. L. REV. 485, 500 (1976). See also Case C-61/94, *Commission v. Germany* (Sept. 10, 1996) ("the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements").

<sup>235</sup> See *supra* notes 160-63 and accompanying text. See also Bebr, *supra* note 94, at 63 ("Kupferberg suggests that neither the legal nature of an agreement nor the intensity of its link with the Community are relevant for the direct effect of an agreement."); Maresceau, *supra* note 132, at 124-25 ("It remains difficult without more precise indications of the Court to explain why direct effect is on principle refused to GATT while in *Kupferberg* a completely opposite stand was taken in relation to trade agreements concluded between the Community and third States."); Pescatore, *supra* note 177, at 186 ("international treaties and agreements contain in varying proportions flexible elements and well-defined obligations. It may be true that the latter are relatively more numerous in free trade agreements than in a system like GATT, but even here we find a certain number of precise commitments which by their essence and in view of the purpose of the General Agreement are not negotiable, such as the rule on nondiscriminatory commercial treatment of imported goods, the prohibition of using internal taxation for protective purposes, freedom of transit and the effect of consolidated tariff concessions. In other words, those obligations, being precise and unconditional, fulfil the criteria for direct applicability which the Court has consistently followed in many other fields."). But see Ulrich Everling, *The Law of External Economic Relations of the European Community*, in THE EUROPEAN COMMUNITY AND GATT 85 (Meinhard Hilf et al. eds., 1986) ("it should be pointed out that importance should be attributed to the structure of the agreement. In considering whether an agreement has direct effect, should account not be taken of its proximity to the Community and its aims? In the judgment in *Polydor v. Harlequin Record Shops*, the difference between the Community, which has integration as its object, and a free trade area is stressed. Is not also the further distinction between a free trade area and the world-wide regulation of trade of importance?").

<sup>236</sup> See *supra* note 165 and accompanying text. See also Bebr, *supra* note 94, at 71; Petersmann, *supra* note 185, at 429.

<sup>237</sup> Edmond L. M. Völker, *The Direct Effect of International Agreements in the Community's Legal Order*, 1983 LEGAL ISSUES OF EUROPEAN INTEGRATION 131, 137.

The presence or absence of a dispute settlement system in the agreement does not control the direct effects analysis.<sup>238</sup> Similarly, the presence of a safeguard clause in the agreement will not prevent direct effect for other of its provisions.<sup>239</sup> Nor is a comparison of specific language in an international agreement with directly effective language of the European Community Treaty decisive.<sup>240</sup> Finally, *Germany v. Council* made clear that neither the EC Treaty Article under which the action is brought before the Court, nor the fact that the party bringing the action is a Member State rather than an individual, would be sufficient distinguishing factors to determine the result.<sup>241</sup>

If distinguishing legal criteria are to determine the direct effect of provisions of a given international agreement, only two possible crite-

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<sup>238</sup> See *supra* notes 188-89 and accompanying text. See also Bebr, *supra* note 94, at 61; Hilf, *supra* note 187, at 179 ("The GATT dispute settlement procedures could support the direct applicability of GATT law as they are more effectively organized than those found in agreements that have been declared directly applicable by the Court of Justice of the European Communities."); Petersmann, *supra* note 185, at 432 ("GATT's dispute settlement procedures under Article XXIII have often been recommended as a model and have amply proven their effectiveness in the approximately 75 complaints which have been lodged by GATT contracting parties under Article XXIII GATT. . . . It is therefore surprising that the Court invokes Article XXIII, i.e., an effective legal instrument for the maintenance of rule of law in international trade, as a justification for its own refusal to control observance of GATT obligations by the Community and its Member States in legal proceedings instituted by private parties."). But see Maresceau, *supra* note 132, at 122 ("The putting into motion of the GATT mechanism of dispute settlement seems indeed more to amplify the tendency towards non-direct effect of GATT. The GATT dispute settlement procedure as it has further been worked out in the *Understanding regarding notification, consultation, dispute settlement and surveillance* (28 Nov. 1979) and in the *Ministerial Declaration* of 29 Nov. 1982 with its strong emphasis on conciliation and consensus has not enhanced the arguments in favour of direct effect. One comes, therefore, to the somewhat paradoxical situation that to a large degree the elaborated dispute settlement procedure of GATT also constitutes one of the obstacles to its direct effect.").

<sup>239</sup> See *supra* note 191 and accompanying text. See also Waelbroeck, *supra* note 168, at 617 ("No international treaty imposes unconditional obligations. . . . Even the EEC Treaty authorizes, in certain cases, the unilateral adoption by Member States of safeguard measures. . . . [As to the EEC Treaty and GATT,] there is only a difference in degree, and not in substance, between the two.").

<sup>240</sup> See *supra* note 150 and accompanying text. See also Bebr, *supra* note 94, at 67-68. But see Petersmann, *supra* note 185, at 435 ("If treaties are binding upon the Community under international law and contain 'precise, complete and unconditional' provisions, which are 'self-executing' according to the rules of interpretation of international law and capable of being directly applied by domestic courts, Community Law requires their direct application by the Court of Justice which must ensure their uniform application in the entire Community."); Waelbroeck, *supra* note 168, at 617 ("According to domestic practice, the direct effects of a provision of an international treaty presuppose that the obligation imposed upon the State is clear, complete and unconditional. However, the importance of this condition must not be exaggerated. The courts do not consider that it is necessary that the provision in question be absolutely incapable of any derogation.").

<sup>241</sup> See *supra* notes 194-209 and accompanying text.



ria remain from the language of the European Court's decisions: (1) policy grounds for judicial abstention, and (2) promotion of uniform interpretation of Community law. The Court, however, clearly did not rely on either of these grounds in its most recent decision (*Germany v. Council*), but rather, simply followed *International Fruit* without clear elaboration.

#### IV. POLICY CONSIDERATIONS IN THE DIRECT EFFECTS DEBATE

*Germany v. Council* represents a clear policy choice by the European Court of Justice in the face of what now appear to be difficult legal arguments. It has been aptly stated that the Court "pushes the supranational nature of EC law to its limits, since Member States, which are formally GATT Members but cannot participate in GATT dispute settlement proceedings . . . , cannot invoke GATT provisions before the Court of Justice either."<sup>242</sup> The fact that Member States (unlike private individuals) are subjects of international rights and duties, adds a constitutional dimension to the decision.<sup>243</sup> By holding that Member States may not assert rights arising out of the international agreements to which they are parties, the Court further reinforces the transfer of authority from the Member States to the Community institutions.

The policy choice made by the court is likely to face a further test when, unlike the banana case,<sup>244</sup> a case follows a panel decision under the new dispute settlement rules of the World Trade Organization. Whereas GATT Council adoption of the panel reports in the banana case was blocked by the Community and its Member States, that possibility no longer exists. Thus, a panel (or Appellate Body) decision against the Community in a new dispute will result in a decision the Court cannot as easily dismiss. If GATT law is indeed binding on the Community and the Member States,<sup>245</sup> then a formal, adopted decision of the Dispute Settlement Body will be difficult to reject "without undermining the authority of the whole dispute settlement procedure."<sup>246</sup>

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<sup>242</sup> Fernando Castillo de la Torre, *The Status of GATT in EC Law, Revisited: The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements*, 29 J. WORLD TRADE, Feb. 1995, at 53, 58 (Feb. 1995).

<sup>243</sup> *Id.* at 59.

<sup>244</sup> See *supra* notes 194 to 228.

<sup>245</sup> Joined Cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1226, [1975] 2 C.M.L.R. 1.

<sup>246</sup> Castillo de la Torre, *supra* note 242, at 64.

The result of *Germany v. Council* is, as a matter of policy, consistent with the traditional European position that the GATT system, and its rules are matters for the policy-making institutions of the Community and not for the Court.<sup>247</sup> European officials and commentators rather consistently have opted for a negotiation-oriented approach to the GATT, over the adjudication-oriented approach often favored by U.S. commentators.<sup>248</sup> The Council Directive implementing the Uruguay Round agreements specifically states that "by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts."<sup>249</sup> This rejection of direct effect in favor of a negotiation-orientation, however, presents problems when one attempts to reconcile it with the expanded and much-hardened rules resulting from the Uruguay Round. The Court's analysis in *International Fruit* at least implies that "hard law" is to be given direct effect. One thus has to question whether the *International Fruit* result necessarily holds for the agreements resulting from the Uruguay Round and its substantial evolution of the rules of the multi-lateral trading system. The rule-oriented adjudication model embraced in the Uruguay Round Dispute Settlement Understanding alone indicates a clear choice over the alternative power-oriented negotiation model.<sup>250</sup>

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<sup>247</sup> But see the opinion of Advocate General Gulmann, stating that the ultimate decision on direct effect is for the Court, giving weight to the positions of the other institutions. *Supra* note 208.

<sup>248</sup> See, e.g., Ronald A. Brand, *Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement*, 27 J. WORLD TRADE, Dec. 1993, at 117, 120-22.

<sup>249</sup> Council Decision 94/800/EC, 1994 O.J. (L 336) 1, 2. The Commission originally recommended even more limiting language: "whereas these are intergovernmental agreements and it is therefore necessary to ensure that they cannot be directly invoked in Member State or Community courts by private individuals who are national or legal persons." Uruguay Round of Multilateral Trade Negotiations, COM(94)414, final, *quoted in* Castillo de la Torre, *supra* note 242, at 65. A reciprocity argument was presented in favor of such language:

It is already known that the United States and many other of our trading partners will explicitly rule out any such direct effect. Without an express stipulation of such exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries.

Canada took a similar, but much clearer, position in its implementing legislation: "No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement." World Trade Organization Agreement Implementation Act of Dec. 15, 1994 ch. 47 § 6, 1994 S.C. 3 (Can.).

<sup>250</sup> Professor Jackson has developed the distinction between "power-oriented" and "rule-oriented" diplomacy. See, e.g., John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1571-

According to Professor Jackson, prudence dictates that political officials avoid systems in which direct effect is granted to international rules, particularly in systems where those rules achieve higher status than municipal legislation.<sup>251</sup> Thus, in the European Community for example, where primacy accompanies direct effect,<sup>252</sup> he finds significant danger in granting direct effect to treaty rules. The policy arguments against such direct effect (Jackson refers to it as "Direct Applicability Higher Status" or DAHS) include:

- (1) the "democratic deficit:" Treaties generally are negotiated by a few persons in a representative capacity, and do not (particularly in states like the United States) result from the same democratic process as domestic legislation.
- (2) inflexibility: Treaty rules (particularly if negotiated in a multilateral context in which amendment is difficult) place rigid constraints on the ability of national legal systems in responding to the needs of their citizens by requiring that they act and legislate only in a manner consistent with those treaty rules.
- (3) "inhibition on future treaty making:" The fear that treaties will tie the hands of national legislatures will tend to constrain governments from entering into treaties as a general rule.<sup>253</sup>

Jackson does note, however, that some circumstances weigh in favor of DAHS, including (1) situations in which national officials and citizens are worried about weak domestic structures and find that DAHS provides external insurance that human rights and market economic mechanisms will be respected, and (2) national systems in which the courts and officials are allowed to ameliorate the problems of direct effect.

The U.S. system, with its well-developed later-in-time rule,<sup>254</sup> provides some of the amelioration of which Jackson writes. Even so, U.S. politicians have not left the matter to the courts, but rather, have enacted statutory prohibitions on the direct effect of GATT provisions.<sup>255</sup> Thus, the landscape remains dictated more by political concerns than any desire for coherence in international legal structures.

Jackson's reluctance to embrace direct effect draws strength in that, by removing inhibitions to entering treaties generally, states are

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72 (1984); John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L., Mar.-Apr. 1978, at 93, 98-101.

<sup>251</sup> Jackson, *Status of Legal Treaties in Domestic Legal Systems: A Policy Analysis*, *supra* note 33, at 340.

<sup>252</sup> *Supra* note 95 and accompanying text.

<sup>253</sup> Jackson, *Status of Legal Treaties in Domestic Legal Systems: A Policy Analysis*, *supra* note 33, at 315-16, 326, 330-34, 338.

<sup>254</sup> *Supra* notes 18-19 and accompanying text.

<sup>255</sup> *Supra* notes 74-77 and accompanying text.

encouraged to enter agreements, thus promoting the development of international norms through the treaty process. At the same time, however, it risks the creation of treaties having little or no real impact. Carried to the extreme, the complete absence of direct effect would result in more treaties with no one having the need or incentive to abide by any of them.

On the other side, a complete direct effect with primacy system (DAHS in Jackson's terms) risks the possibility that few, if any, new rules will be developed through the treaty process or that states will enter treaties while specifically denying direct effect in their implementation. States will be unwilling to bind themselves inflexibly to rules that cannot be adjusted to meet domestic needs in the future.

Ultimately, the need is for balance. Direct effect has its value. It is through the observance and application of international law that its effectiveness is enhanced. If what we call international law has no real effect on people's lives, then its value is substantially diminished. If it has real effect on people's lives, but those people have no access to its application, this also diminishes its value.

A June 1995 Internet discussion on the list server of the International Economic Law Interest Group of the American Society of International Law provides a glimpse of the views on direct effect, as well as the seeming bipolar problem its choices present.<sup>256</sup> Excerpts from that discussion include the following:

Amy Porges: Viewed statically, direct effect is a nice thing, but viewed dynamically, if all national systems "constitutionalized" trade via direct effect the most likely result would be that any further progress internationally would become suddenly much more difficult, and international decisionmaking would become much stickier and more politicized.

Joel Trachtman: As Weiler and Porges point out, there is a tradeoff between direct effect on the one hand, and willingness to legislate on the other hand. This is a corollary of the principle that hard law is not necessarily good law. However, while direct effect is not necessarily good, it is also not necessarily bad. While we may not be ready to constitutionalize trade law, we might be ready to "legislationalize" it, at least to some extent, someday.

Werner Meng: Is effectiveness in foreign policy always a convincing argument against private positions? Why can exporters not claim a freedom by law? Why should states be free to violate international law without any consequence in national law? Why is the eagerness to retain the bargaining chip available (opening markets) so important that individual rights are not effectively granted nor protected on the side of the exporters. You know about the answer of "Constitutional Economics:"

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<sup>256</sup> The Internet address of the list server is [asilielg@cali.kentlaw.edu](mailto:asilielg@cali.kentlaw.edu).

because the lobbies of industries competing with imports are stronger than that of the exporters and because the body politic wants to be free to cater to their needs if necessary.

Even if one does not accept that explanation everybody knows that in the international trade area the individual is not considered as being a subject but rather as an object of foreign policy. Lawyers should challenge this attitude.<sup>257</sup>

Direct effect also can enhance multiple party compliance with the terms of a treaty by generating predictability in its application.<sup>258</sup> If courts and decision-makers in one state know the courts of another state are likely to grant direct effect to the terms of a treaty between the two states, then those courts and decision-makers can be more comfortable in their own application of the same treaty provisions. This of course raises the opposing reciprocity argument: a municipal legal system should not grant direct effect to treaty provisions when it is possible that treaty partners may not do the same. To do so would place its own citizens and government at the disadvantage of having the rules applied against them at home and yet not being available for application abroad. As noted earlier, the European Court of Justice has specifically rejected the negative reciprocity argument as being inappropriate in the modern international legal order.<sup>259</sup>

As Jackson notes, direct effect also tends to protect the rights of individuals, particularly in human rights and market economy enhancing treaties. Thus, the growing relationship between individuals and international law will have limited significance absent some level of direct effect in domestic legal systems. The initial challenge is to determine whether the choice is simply between the polar extremes of direct effect with primacy (Jackson's DAHS) and no direct effect, or whether some compromise solution is possible. The ongoing debate indicates the problems (and benefits) of each extreme. The desire to have both (1) flexibility for states in their relations with their subjects and with other states, and (2) predictability and effectiveness of international rules which, once agreed-upon, will be applied to (and on behalf of) all those whom they affect, creates tensions not easily resolved.

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<sup>257</sup> Internet list server discussion of June 15 and 25, 1995 (Copy on file with the author).

<sup>258</sup> In Jackson's words, "disrespect for international law is increased when international norms are not effective." Jackson, *Status of Legal Treaties in Domestic Legal Systems: A Policy Analysis*, *supra* note 33, at 323.

<sup>259</sup> *Supra* notes 164-65 and accompanying text.

## V. CONCLUSIONS

One of the most important and challenging issues in international law is the manner in which we address the relationship between the individual and the international legal system.<sup>260</sup> The traditional framework, in which we set a “sovereign” government between the individual and the development *and* application of the rules, is no longer sufficient in all circumstances.<sup>261</sup> The governmental duty to provide citizen security can no longer be defined solely in reference to feudal concepts. The economic and technological interdependence of people requires fresh approaches to the way in which we view the development of the legal framework that allows us to live together globally. The fact that governments feel insecure or threatened by the application of international legal rules to them is not sufficient reason to preclude that development. The purpose of government is not to perpetuate traditional power structures, it is to provide security and economic development for its citizens. If that security and development can be provided better through the application of global rules – particularly if doing so can lead to a strengthening of the global legal framework – then the institutions of government should welcome the application of those rules.

The concept of direct effect of international economic law carries great significance in the development of the relationship between the individual and international law. Governmental institutions cannot ignore the importance of this concept to the developing global legal framework. The European Community has provided a laboratory in which the direct effects doctrine can be studied and debated.<sup>262</sup> The supranational model created for the application of Community law within its Member States provides much to be emulated in the global system. While the global system is not yet ready for the wholesale application of these developments, it is important that we realize the need to move in a similar direction. Not doing so will, at best, cause the legal framework to lag behind economic and political developments and, at worst, lead to a complete failure to deal with changing relationships in the international system.

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<sup>260</sup> See Ronald A. Brand, *Semantic Distinctions in an Age of Legal Convergence*, 17 U. PENN. J. INT'L ECONOMIC L. 3 (1996).

<sup>261</sup> See Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685 (1995).

<sup>262</sup> Professor Weiler lists the doctrine of direct effect and the doctrine of supremacy as the first of four legal doctrines “that fixed the relationship between Community law and Member State Law” in Europe. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991).