

Michigan Law Review

Volume 82
Issue 5 *Issue 5&6*

1984

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Recommended Citation

Pieter V. van Themaat, *The Impact of the Case Law of the Court of Justice of the European Communities on the Economic World Order*, 82 MICH. L. REV. 1422 (1984).

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THE IMPACT OF THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES ON THE ECONOMIC WORLD ORDER

*Pieter VerLoren van Themaat**

I. INTRODUCTION

Among Europeans, Eric Stein is generally considered to be *the* outstanding expert on European Community law in the United States. Now we Europeans flatter ourselves, of course, with the opinion that there are outstanding experts on Community law within Europe as well. Nevertheless, in my opinion, the reason why so many students and scholars from Europe have gone to Ann Arbor for post-graduate studies or research work on European Community law lies mainly in the fact that Eric Stein has always been appreciated as a great scholar in international law and the law of international organizations, as well as an outstanding practitioner of the comparative legal method. Moreover, in all these fields of research he has always used the "case-method," a practice-oriented approach about which European lawyers still have much to learn from their American counterparts.

The idea to honor Eric Stein by a "Festschrift" could therefore be considered a tribute to the impact of his many publications and discussions with European lawyers on European scholarship and European law practice. In fact, the idea of a "Festschrift" at the end of a long and distinguished career that includes both practical and academic experience, is more common in Europe than it is in the United States. The present special issue of the *Michigan Law Review*, moreover, seems to have been conceived in such a way that it can contribute meaningfully to the ongoing discussions between American and European lawyers, in which Eric Stein has participated so actively and, as we all hope and expect, to which he will continue to contribute after his retirement.

My choice of topic has been influenced by such considerations, as well as by considerations of practical convenience. I am confronted daily with an amazing variety of cases brought before the Court of Justice of the European Communities. The Court's computer can rapidly produce a list of decisions that are relevant to any chosen subject, but a topic exploring the impact of European Economic Community (EEC) case law on the outside world has the advantage that the total list of relevant decisions remains just under one hundred cases. Moreover, I was able to consult two recent exhaustive studies on my chosen subject, even though my focus will be more

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on the external impact of the Court's case law than was the case in these studies.¹ Finally, my choice of topic was influenced by the fact that the relationship between European Community law and the economic world order was a subject I discussed with Eric Stein during my last study trip to the United States in 1978. This exchange constituted the penultimate step in the preparation of my recent book on international economic law.²

II. THE IMPACT OF THE COURT'S CASE LAW ON THE ECONOMIC WORLD ORDER

A. *The Court's Emerging Position*

During 1983, a number of events made the Court of Justice of the European Communities more aware than ever of the impact of its existence and its case law on the outside world. It held discussions with experts from the Association of South East Asian Nations (ASEAN) and with members of the newly-created Court of Justice of the Organization of Arab Petroleum Exporting Countries (OAPEC), who wished to benefit from its experience in working methods. The International Court of Justice invited our Court for a similar discussion on working methods and our Court itself invited the Strasbourg Court for Human Rights for a new exchange of experiences. Contacts were renewed with the Andean group, whose newly inaugurated Court of Justice is modeled to a large extent (as are its other institutions) on the example given by the European Communities. One of the USSR's trading monopolies succeeded in part in its request for interim measures under articles 185 and 186 of the EEC Treaty, with regard to provisional antidumping measures taken by the Commission against nickel imports from the Soviet Union.³ Finally, a recent Court order admitted the intervention of a non-Member state that was directly interested in two cases pending before the Court.⁴ New antidumping cases were also brought before the Court by companies from the United States.⁵

The great number of cases decided by the Court during the last few

1. See A. LEENEN, *GEMEENSCHAPSRECHT EN VOLKENRECHT* (Europese Monografieën No. 30, 1984) (containing summary in English); Pescatore, *Die Rechtsprechung des Europäischen Gerichtshofs zur indergemeinschaftlichen Wirkung völkerrechtlicher Abkommen*, in *VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE — FESTSCHRIFT FÜR HERMANN MOSLER 661* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht vol. 81, 1983) [hereinafter cited as *MOSLER FESTSCHRIFT*]. Both studies contain references to abundant literature on the subject. With regard to GATT in particular, see Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 *COMMON MKT. L. REV.* 397 (1983) (containing references to further literature and state practice).

2. See P. VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* (1981).

3. Order of the President of the Court in *V/O Raznoimport v. Commission of the Eur. Communities* (Case No. 120/83) (Ct. J. Eur. Comm. July 19, 1983), 26 *O.J. EUR. COMM.* (No. C 228) 6 (Aug. 25, 1983).

4. *Chris Intl. Foods Ltd. v. Commission of the Eur. Communities* (Nos. 91, 200/82), 1983 *E. Comm. Ct. J. Rep.* 417 (concerning import restrictions under article 115 of the EEC Treaty on bananas originating from Jamaica and Windward Islands).

5. *Allied Corp. v. Council of the Eur. Communities* (Case No. 53/83) (Ct. J. Eur. Comm. filed Mar. 31, 1983).

years is an indication that its functioning does not share in the general stagnation from which the Communities, like many other international organizations, have been suffering for some time. One even gets the impression that stagnation of the ability of responsible authorities to provide political solutions to problems increases the need for peaceful settlement of conflicts by adjudication, but this interesting point will not be addressed in this article.

B. *The Relation of the Court's Case Law to the Economic World Order*

The case law of our Court of Justice may have an impact on the economic world order in various ways. First, the Community itself, or the Community together with the EEC Member States, participates in a growing number of international treaties. These treaties, concluded under articles 228 or 238 of the EEC Treaty, include commercial agreements, agreements of economic assistance and cooperation, agreements establishing an association with a third state, a group of states or an international organization (such as the Conventions of Yaoundé and Lomé covering about half of the developing countries) and free-trade-area agreements, as concluded with the member states of the European Free Trade Association (EFTA).

Second, the Community has taken over the responsibility for the application of a number of multilateral agreements concluded by the Member States before its existence. The leading example of this category of treaties is the General Agreement on Tariffs and Trade (GATT). Another example of great practical importance in the case law is the Brussels Convention on Tariff Classification.⁶

Third, the case law of the Court takes into account a number of multilateral treaties or conventions in areas where the Community has not or has not so clearly been substituted for the Member States. Leading examples here are the European Convention on Human Rights and some of the International Labor Organization (ILO) conventions. In the case law, one also finds references to the New York convention on temporary imports of motorcars, the United Nations Educational, Scientific and Cultural Organization (UNESCO) convention on the imports of educational, scientific or cultural objects, the Food and Agriculture Organization (FAO) convention on the protection of plants, the Universal Postal Union and preexisting international fishery agreements.

In all of those categories of cases, the application or interpretation of the relevant treaties naturally interests non-European states that are parties to those treaties. They are directly interested in judgments involving conflicts with these third states or with one or more of their subjects (in particular private companies or state-trading monopolies), and are indirectly interested in judgments interpreting international agreements. The latter type of judgment, as a sort of "collective state practice" of the European Community and its Member States, may have an impact on the state practice of

6. Convention on Tariff Classification, Dec. 15, 1950, Protocol of Amendment, July 1, 1955, 347 U.N.T.S. 127.

third states, on the practice of other international organizations or on dispute settlement arrangements.

Such an impact may result in part from the principle of reciprocity. To the extent that this principle does not apply (in particular in relation to developing countries), the impact on state practice may result from the mere fact that the development of public international case law in its present state mainly results from decentralized judgments by national courts and only rarely results from compulsory international jurisdiction or arbitration. For this reason the comparative law method, of which Eric Stein is such a master, is of growing interest with regard to the case law on public international law. Two lists of our Court's published case law on international treaties are annexed to the cited article of Pescatore.⁷ The first mentions forty-one judgments on a great variety of international agreements, and the second mentions the thirty-seven judgments that were affected by the Brussels Convention on Tariff Classification. The most significant judgments, some of which were rendered after the publication of Pescatore's lists, will be discussed in the third part of this article. The development of our case law goes on in these fields.

A fourth category of selected cases deals with the impact of internal Community law on the activities of private companies or nongovernmental organizations established outside of the Communities. There are three reasons why I include this fourth category in my essay. The first is that "governing multinational or transnational corporations" is again one of Eric Stein's fields of specialization. The second reason is that, as the Court's case law in this respect proves, the European Community, like the United States, but unlike the EEC Member States or most of the other states of the world, is powerful enough to participate effectively in the control of international restrictive business practices. The third reason is that the experience of the Community seems to support the opinion that such an effective control of international restrictive business practices (or of the activities of multinational corporations in general) is only possible insofar as multinational corporations are considered as (passive) subjects of rights and duties under public international law.

Finally, the case law of the Court, like European Community law in general, may be of direct or indirect interest to non-Member States from the point of view of comparative law, even with regard to its internal aspects. It is of direct interest with regard to the division of powers concerning external relations between the Council of Ministers and the Commission and between the Community and the Member States. The case law may also be of indirect interest as a model for other regional organizations whose member states, like those of the European communities, have a high degree of interdependence and homogeneity of economic and political systems. I mentioned already the influence of the institutional framework of the European Community on the institutional framework of the Andean Group of countries. Community law may be of further indirect interest for the worldwide North-South dialogue, since the European Community has experience with North-South problems within the Community itself, within the Lomé Convention, and by virtue of its agreements with a great number

7. See Pescatore, *supra* note 1, at 687-89 app.

of other developing countries or regional organizations of such countries all over the world. The Community may even serve as a model for worldwide arrangements on subjects of substantive law. A striking example of such an influence of the Court's case law has been pointed out in an interesting article by Fikentscher and Straub⁸ on the United Nations' "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices."⁹ In particular, the provision regarding restrictions of parallel imports by the use of trademarks has been clearly influenced by the Court's abundant case law in this area.¹⁰

A still more indirect interest that third countries may have in the case law of the Court lies in the use of the comparative legal method both by the Court itself and by scholars inside and outside of the Community. The Court has made its own contributions to three institutional problem areas in which Eric Stein has always been interested: problems of modern federalism, general problems of economic and political integration and general problems of global and regional international organizations. Eric Stein excelled in his interest in this aspect of the Court's case law, which cannot be neglected by any scholar doing research in those areas.

What is less known to the outside world is the regular use the Court itself makes of the comparative legal method. The Court has a pool of experts in comparative law at its disposal, but the studies of this pool are not published. To the extent that the Court of Justice uses the method of comparative law for the interpretation of Community law, it must itself take full responsibility for the conclusions it draws. Similarly, the same attitude is taken by the Advocates-General in their opinions. Nevertheless, the Advocate-General opinions contain comparative law conclusions more often than do the judgments of the Court itself, and the former's conclusions generally reflect the high quality studies of the pool of experts. Of course, this comparative law method is mainly concerned with a comparison of national legal concepts in the Member States, but it is not only, or even mainly, limited to the only provision in the EEC Treaty that explicitly refers to "general principles common to the laws of the Member States."¹¹ As a matter of fact, the very first application of the method which I found in the case law was in *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community*,¹² dealing with the interpretation of a former judgment. The opinion of the Advocate-General, Maurice Lagrange, particularly analyzed the legal practice of Belgium and France, these being the only Member States with a case law on this issue. This comparison was made possible by article 37 of the ECSC

8. Fikentscher & Straub, *Der RBP-Kodex der Vereinten Nationen: Weltkartellrichtlinien* (pts. 1-2), 1982 GRUR Int. 637, 727.

9. G.A. Res. 35/63, 35 U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/RES/35163 (1980).

10. See Fikentscher & Straub, *supra* note 8, at 735 n.125. The example is even more striking, because the Court itself is hesitating to apply this case law in relations with third countries, as will be shown in my discussion of the *Polydor* case, note 49 *infra* and accompanying text.

11. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 215, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty] (noncontractual liability of the community).

12. (Case No. 5/55), 1955 E. Comm. Ct. J. Rep. 135.

Statute of the Court of Justice, which corresponds with article 40 of the present EEC Statute of the Court. He also analyzed, however, the practice of the International Court of Justice and the Permanent Court of International Justice before drawing his own conclusions, to which I referred in my written observations in the recent *Alvarez* case.¹³

Other recent cases in which the comparative law method has been employed involve the confidential character of a firm's correspondence with its external lawyers in antitrust procedures, the extent of fiscal privileges in cases of bankruptcy, the principle of unjust enrichment and the concept of the relevant market. In fact, the cases employing the method are so numerous that dealing with them would call for another article. In some cases, the comparative law research has also been extended to the legal practice in third states and particularly to the legal practice in the United States, for example in antitrust and antidumping cases. In contrast, I found no clear indications that the Court took into account the vast American experience under the interstate commerce clause of the U.S. Constitution, which has been the object of several important comparative law studies in European literature.¹⁴ The few examples in this last category are only brief indications of the ways in which the case law of the Court may have an impact on the present and future economic world order.¹⁵

III. THE COURT'S CONTRIBUTION TO THE APPLICATION AND INTERPRETATION OF PUBLIC INTERNATIONAL LAW

In this part of my article I will deal with the legal foundation of the Court's powers in this field, the legal effects within the Community of the various categories of the relevant rules and principles of public international law applied by the Court, and the Court's lack of a clear general concept on the relationship between Community law and public international law in terms of monistic or dualistic theories.

In conformity with the focus of this essay, I will not deal extensively with the impact of general rules or principles of general public international law on intra-Community relations as such, nor with the question of the specific nature of internal Community law relative to general public international law.¹⁶ I will limit my remarks on these questions to some com-

13. Order of the Court in *Alvarez v. European Parliament* (Case No. 206/81 bis) (Ct. J. Eur. Comm. Sept. 29, 1983) (interpretation).

14. See, e.g., W. ROTH, *FREIER WARENVERKEHR UND STAATLICHE REGELUNGSGEWALT IN EINEM GEMEINSAMEN MARKT — EUROPÄISCHE PROBLEME UND AMERIKANISCHE ERFAHRUNGEN* (Münchener Universitätschriften, Reihe der Juristischen Fakultät, vol. 36, 1977); P. SLOT, *TECHNICAL AND ADMINISTRATIVE OBSTACLES TO TRADE IN THE EEC — INCLUDING A COMPARISON WITH INTERSTATE TRADE BARRIERS IN THE USA 125-46* (1975); Barents, *Artikel 95 en de gemeenschappelijke markt*, 31 SEW 438 (1983) (containing an extensive comparison with American case law on fiscal barriers under the interstate commerce clause).

15. I dealt with a number of aspects of this last category in my recent book, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW*, the major part of which is based on a comparative study of the law of international organizations. See P. VERLOREN VAN THEMAAT, *supra* note 2, at 379 (referring to *STUDIES OVER INTERNATIONAAL ECONOMISCH RECHT* (pts. 1-3) (P. VerLoren van Themaat ed. 1977-1982)).

16. On this subject, see A. LEENEN, *supra* note 1, at 142; Everling, *Sind die Mitgliedstaaten*

ments on cases, which indicate the ways in which written or unwritten rules or principles of general public international law *have* had an impact on intra-Community relations.

A. *The Legal Foundation of the Court's Power to Apply and Interpret Public International Law*

The question of conformity of Community acts or national acts with overriding rules or principles of relevant international treaties or unwritten public international law may arise and indeed has arisen in various kinds of procedures before the Court. In Commission actions against a Member State for failure to fulfill an obligation under article 169 of the EEC Treaty, a Member State may defend itself by invoking a multilateral treaty, which must be considered as binding for the Community. In actions of foreign natural or legal persons under article 173 or article 215 against Community decisions addressed to them or which are of direct and individual concern to them, these persons also may invoke, and in several cases have invoked, the attacked act's violation of rules or principles of public international law. In cases under article 177, in which national courts or tribunals ask for a preliminary ruling of the Court on the validity and interpretation of acts of the institutions of the Community, those national courts or tribunals may ask questions on the interpretation of international agreements and they regularly do so.

The decisions in which the Court has explicitly justified its power to apply or interpret international treaties or other overriding rules of public international law are rare. In *Haegeman v. Belgian State*,¹⁷ questions had been submitted to the Court with regard to the interpretation of the Agreement of Association, concluded with Greece under articles 228 and 238 of the EEC Treaty. In points three and four of this judgment, the Court said that the mentioned "Agreement was concluded by the Council under Articles 228 and 238 of the Treaty as appears from the terms of the decision dated 25 September 1961" and that "[t]his Agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177."¹⁸ The *Haegeman* Court then followed with the important opinions in points five and six that "[t]he provisions of the Agreement, from the coming into force thereof, form an integral part of Community law" and that "[w]ithin the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this Agreement."¹⁹

The interested observer will note several things. First, this judgment provides the legal foundation of the Court's competence in all cases where international obligations have been accepted by an act of the Council under the treaty-concluding powers provided for in articles 228 and 238 of the

der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht, in MOSLER FESTSCHRIFT, *supra* note 1, at 173.

17. (Case No. 181/73), 1974 E. Comm. Ct. J. Rep. 449 (Preliminary Ruling).

18. 1974 E. Comm. Ct. J. Rep. at 459.

19. 1974 E. Comm. Ct. J. Rep. at 460.

EEC Treaty. This competence applies even if the Member States themselves are co-partners in such agreements, like the so-called mixed agreement concerned in *Haegeman*. Second, the provisions of such agreements are considered to be an integral part of Community law. It seems to follow logically from these two statements that such an agreement can also be of interest for procedures under articles 169, 173 and 215, in which provisions of international agreements are invoked. In fact, the statement that the provisions of such agreements are considered to be an integral part of Community law means that the Commission under article 169 may bring a case of violation of such an agreement before the Court and conversely that a Member State may invoke such an agreement as a means of defense against an alleged violation of provisions of internal Community law. As we will see, the case law is in conformity with this second conclusion. Under articles 173 or 215 of the Treaty, a Member State or a natural or legal person may, under the conditions set out in those articles, bring an action of illegality before the Court against a Community act because of violation of such an agreement concluded by the Council. Third, the Court explicitly makes clear in this judgment that its case law in this respect will only be binding within the Community and not within the legal system of the other contracting parties.

Finally, note that the *Haegeman* judgment does not address the legal nature of the act of the Council. This fact and point 5 of the judgment seem to leave open the question of whether such an act, apart from its external effects, is also an act that transforms the agreement concerned into Community law (dualistic theory) or if it is to be compared with the Court's concept that Community law itself forms an integral part of the national law of the Member States (monistic theory). In this respect it is interesting to note that in the early years the act of the Council was a "decision" while in recent years it more often has the form of a "regulation." However, in my opinion, neither of these possible interpretations would affect the priority of international agreements over conflicting preceding or subsequent national or Community measures that results from the judgment concerned as well as from the whole body of the case law. Moreover, under both interpretations, the quoted points as a whole seem to make it possible for subjects of contracting third countries to invoke violations of an international agreement, as interpreted by the Court, by the Community or its Members States under the same conditions as those under which they may invoke violations of the internal Community law. They may do so before the Court itself, before national courts of the Member States or even perhaps before courts of their own country, insofar as Community law is considered to be the applicable law under conflicts of law principles.

In the cases of *International Fruit*,²⁰ *Schlüter*²¹ and particularly *Nederlandse Spoorwegen*,²² the *Haegeman* doctrine was also applied where "the

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

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

22. *Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen* (Case No. 38/75), 1975 E. Comm. Ct. J. Rep. 1439 (Preliminary Ruling).

Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles 111 and 113 of the Treaty."²³ These three cases concern GATT (*Nederlandse Spoorwegen* also concerns the Brussels Convention on Tariff Classification), and they establish the principle of substitution of the Community for the Member States in cases where the Community has obtained a joint or exclusive responsibility in areas covered by an international agreement to which Member States had adhered before the emergence of the Community responsibility. In such cases, therefore, no specific act of the Council is needed to this effect. Ground 16 of *Nederlandse Spoorwegen* draws the following conclusions from this doctrine of substitution:

Similarly, since so far as fulfillment 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.²⁴

It is interesting to note that, according to grounds 23-25, even the (nonbinding) classification opinions of the Customs Cooperation Council, established by a Convention of the same date as the Brussels Convention of 15 December 1950 on Tariff Classification, are deemed to be relevant for the interpretation of Community law in conformity with international obligations of the Community. Many later judgments of the Court apply this last point of view.²⁵

As mentioned by both Pescatore and Leenen in their cited studies,²⁶ the *International Fruit* case (in fact the third case in which this well-known multinational corporation contributed to the case law of the Court) gave rise to considerable controversy in the literature. In the next paragraph, I will examine this controversy insofar as it deals with the condition of "direct applicability," required by the Court (grounds 7 and 8 of the judgment) before invalidity of a Community measure because of violation of GATT rules can be relied upon before a national court. Kapteyn has noted a logical "gap" in the broad statements in grounds 4, 5 and 6 of the judgment.²⁷ In ground 4, the Court states correctly that, "According to the first paragraph of Article 177 of the EEC Treaty 'the Court of justice shall have jurisdiction to give preliminary rulings concerning . . . the validity . . . of acts of the institutions of the Community.'"²⁸ In ground 5 the Court then states that, "Under that formulation, the jurisdiction of the Court cannot be limited by the grounds on which the validity of those measures may be contested."²⁹ So far the reasoning of the Court is clear. But when the Court then adds in ground 6 that, "Since such jurisdiction extends to all

23. *International Fruit*, 1972 E. Comm. Ct. J. Rep. at 1227.

24. 1975 E. Comm. Ct. J. Rep. at 1450.

25. See Pescatore, *supra* note 1, at 689.

26. See A. LEENEN, *supra* note 1, at 220; Pescatore, *supra* note 1, at 643.

27. Kapteyn, *Gevoegde Zaken 21-24/72*, 21 SEW 487, 491-98 (1973).

28. *International Fruit*, 1972 E. Comm. Ct. J. Rep. at 1226.

29. 1972 E. Comm. Ct. J. Rep. at 1226 (emphasis added).

grounds capable of invalidating those measures, the Court is *obliged* to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law,"³⁰ Kapteyn rightly observes that such an *obligation* cannot be deduced logically from the lack of a *limitation* as put forward in the preceding ground. The judgment implicitly recognizes that rules of international law are *always* part of the legal system of the Community and Kapteyn is therefore of the opinion that the quoted sixth ground shows that the Court rejects a dualistic approach to the relationship between Community law and public international law. In view of the *Haegeman* judgment, I am not sure that this last opinion is correct, but I will return to this point in part III-C. The first step of Kapteyn's conclusion, however, is supported both by article 164 of the EEC Treaty, which says that "[t]he Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty" (and therefore not only *Community* law, I might add, but also other binding rules or general principles of the law), and by ground 7 of the judgment itself, which says that, "[b]efore the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be *bound* by that provision."³¹

The main reason why I deal with these preliminary problems raised by Kapteyn is that it seems to follow from the broad statements in considerations 6 and 7 of the *Internationale Fruit* judgment that these statements justify the application by the Court of *all* types of binding rules of public international law, including binding international customary law and binding general principles of international law. This might be one of the possible justifications for the Court's application of general principles of law found in the European Convention of Human Rights at a time when this Convention had not yet been completely accepted (the right of individual complaints included) by all of the Member States.³² In a similar way the Court found inspiration in the European Social Charter of 18 November 1961 and in Convention 111 of the ILO in grounds 26-28 of its *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*³³ judgment with regard to sex discrimination. As one can see from the complete body of relevant case law, many other multilateral agreements besides those mentioned here have been also applied by the Court.³⁴

B. *The Legal Effects Within the Community of the Various Categories of the Relevant Rules and Principles of Public International Law*

When the Court judges that an act (regulation, directive or decision) of

30. 1972 E. Comm. Ct. J. Rep. at 1226 (emphasis added).

31. *Internationale Fruit*, 1972 E. Comm. Ct. J. Rep. at 1226 (emphasis added).

32. *Nold v. Commission of the Eur. Communities* (Case No. 4/73), 1974 E. Comm. Ct. J. Rep. 491. Ground 13 of that opinion states that "fundamental rights form an integral part of the general principles of law, the observance of which it [the Court] ensures" and that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."

33. (Case No. 149/77), 1978 E. Comm. Ct. J. Rep. 1365, 1378 (Preliminary Ruling).

34. See Part II-B *supra* for examples.

the Community violates or may violate a rule, a multilateral agreement, a binding decision of a multilateral organization, or any other binding rule or principle of public international law, such a judgment is at least of indirect interest to third countries and, in a number of cases, also to their subjects. To the extent that these subjects have access to national courts or to the Court of Justice itself, they can eventually invoke such precedents. Nevertheless, the decisions that I will discuss below primarily produce effects within the Community.

The first general point that I have to discuss is the condition to be found in ground 8 of the *International Fruit* judgment,³⁵ which says: "Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts."³⁶ I submit that even from a general view of public international law, such a criterion is quite justified in cases where private persons invoke violations of rules of international law. As is well known, most international treaties provide only for rights and duties of states, but (in any case since the 1928 opinion of the Permanent Court of International Justice in the *Danzig* case³⁷) it has also been recognized that international treaties *may* be "self-executing" and that in such cases private persons can also invoke such treaties. The other possible justification for the condition is based upon the fact that the Court, as we have seen, considers binding international treaties to be part of the Community law. With this justification, it is logical that the Court applies the same criteria for "direct applicability" by national courts as it does with regard to acts of the Community itself. The main criteria are that the text of the rule concerned be sufficiently clear to enable national courts to apply the rule and an unconditional character of that rule. The Court often supplements the unconditionality test with two criteria — that the rule does not leave discretionary powers to the state and does not require rules of implementation — which Jackson in his well-known handbook on the GATT also recognizes as relevant to the question of the self-executing extent of GATT rules.³⁸ For a number of reasons to be found in grounds 20-26 of the judgment, the Court concluded in ground 27 of the *International Fruit* case, in conformity, I would think, with its usual standards, that article XI of GATT "is not capable of conferring on citizens of the Community rights which they can invoke before the courts."³⁹ With regard to article V of GATT, the Court came to a similar conclusion in its recent judgment concerning tax treatment of goods in transit from Italy to Austria.⁴⁰

It does not follow automatically from the denial of direct applicability of such agreements that no action is possible against such national measures

35. 1972 E. Comm. Ct. J. Rep. 1219.

36. 1972 E. Comm. Ct. J. Rep. at 1226.

37. Jurisdiction of the Courts of Danzig, 1928 P.C.I.J., ser. B, No. 15, at 17-18 (Judgment of Mar. 3).

38. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 106-07, 761-62 (1969).

39. 1972 E. Comm. Ct. J. Rep. at 1228.

40. *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze* (Case No. 266/81), 1983 E. Comm. Ct. J. Rep. 731 (Preliminary Ruling). For critical comments on these conclusions, see Petersmann, *supra* note 1, at 429-34.

or against Community measures that violate international agreements or other binding rules or general principles of international law; most of the cases in which the question of compatibility of national measures with international agreements was raised before the Court found their origin in private actions before national courts. It has to be remembered in this context that most of the international agreements whose binding character is generally recognized are only binding on states or — in the case of transfer of national powers to an international organization like the EEC — on international organizations. Therefore, the Commission may very well attack a national measure under article 169 of the EEC for violation of binding international norms and a Member State can very well defend itself against a reproach of violation of Community law by invoking binding international rules. This actually occurred in a case brought before the Court, *Commission of the European Communities v. The Netherlands*.⁴¹ On the other hand, a Member State could attack a Community measure for violation of international obligations under article 173, even if such obligations were not self-executing.⁴²

The much-discussed *Kupferberg* case⁴³ involved alleged incompatibility of a German tax measure with the interdiction of fiscal discrimination in article 21 of the Agreement between the EEC and the Portuguese Republic. The Court, in answer to preliminary questions submitted by a German court, first stated (ground 11) that according to article 228(2), agreements with non-Member State countries and international organizations “are binding on the institutions of the Community and on Member States. Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements.”⁴⁴

Second, referring to the *Haegeman* decision, the Court explained once more why the provisions of such an agreement form an integral part of the Community legal system (grounds 12 and 13). In ground 14 the Court added:

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 and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provi-

41. (Case No. 89/76), 1977 E. Comm. Ct. J. Rep. 1355.

42. Cases in which the Court declared national measures (potentially) incompatible with international agreements include *Procureur de la République v. Chatain* (Case No. 65/69), 1980 E. Comm. Ct. J. Rep. 1345 (Preliminary Ruling) (incompatibility with the Free-Trade-Agreement with Switzerland); *Rutili v. Minister for the Interior* (Case No. 36/75), 1975 E. Comm. Ct. J. Rep. 1219 (Preliminary Ruling) (incompatibility with principles of the European Convention of Human Rights); and *Charmasson v. Minister for Economic Affairs & Finance* (Case No. 48/74), 1974 E. Comm. Ct. J. Rep. 1383 (Preliminary Ruling) (incompatibility not only with Community law, but also with the Yaoundé Convention).

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

44. 1982 E. Comm. Ct. J. Rep. at 3662.

sions of agreements, to ensure their uniform application throughout the community.⁴⁵

In answer to observations from four governments of Member States who stressed differences between internal Community law and such international agreements (grounds 15 and 16), the Court said (ground 17):

It is true that the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall 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 Treaty⁴⁶

The Court (in ground 18) also answered the invoked principle of reciprocity:

[A]ccording 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 . . . 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.⁴⁷

With regard to the special dispute settlement committees provided for in the agreement, the Court said (ground 20):

The fact that a court of one of the parties applies to a specific case before it a provision of the agreement involving an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the joint committee does not adversely affect the powers that the agreement confers on that committee.⁴⁸

The question whether article 21 of the Agreement is unconditional and sufficiently precise to have direct effect is then examined and answered in the affirmative in grounds 23-26. As in the *Polydor* case,⁴⁹ in the *Kupferberg* case the Court was of the opinion (ground 30) that "the EEC Treaty and the Agreement on free trade pursue different objectives. It follows that the interpretations given to Article 95 of the [EEC] Treaty cannot be applied by way of simple analogy to the Agreement on free trade."⁵⁰ In grounds 37-

45. 1982 E. Comm. Ct. J. Rep. at 3662-63.

46. 1982 E. Comm. Ct. J. Rep. at 3663.

47. 1982 E. Comm. Ct. J. Rep. at 3663-64.

48. 1982 E. Comm. Ct. J. Rep. at 3664.

49. *Polydor Ltd. v. Harlequin Record Shops* (Case No. 270/80), 1982 E. Comm. Ct. J. Rep. 329 (Preliminary Ruling).

50. 1982 E. Comm. Ct. J. Rep. at 3666.

47, the Court then interpreted article 21 of the Agreement with regard to the specific case of alleged tax discrimination (with a negative outcome for the applicant in the national procedure).

Similarly, notwithstanding the same wording in articles 14 and 23 of the EC-Portugal Agreement and articles 30 and 36 of the EEC Treaty, the Court found in ground 18 of the mentioned *Polydor* case that the considerations which led to the well-known case law on insulation of national markets and artificial partitioning of the markets by the use made of industrial and commercial property rights within the Common Market are not applicable to the relationship between the Community and Portugal

It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the Community and Portugal, such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the EEC Treaty, inasmuch as the latter, as has been stated above, seeks to create a single market reproducing as closely as possible the conditions of a domestic market.⁵¹

A prohibition on the importation into the Community of a product originating in Portugal, which was based on the protection of copyrights, was therefore found to be justified in the framework of the free trade arrangement by virtue of the first sentence of article 23 (corresponding to article 36 of the EEC Treaty), even if a similar prohibition within the Community would not have been deemed justified under article 36 of the EEC Treaty.

C. *The Court's Lack of a Clear Doctrine Regarding the Relations Between Community Law and General Public International Law*

As Leenen notes,⁵² many authors share Pescatore's opinion that the discussed case law can only be explained within a (pragmatic) "monistic" theory. In contrast, Bleckmann and Maresceau are closer to the "dualistic" theory,⁵³ while Meessen, van Panhuys, Petersmann and Reuter⁵⁴ deny the possibility of a general answer to the question of the relationship between Community law and general public international law.

In my opinion, all of the relevant judgments can — under certain provisos — be explained very well in both of the conflicting theories. At first sight one can certainly be of the opinion that the integration of public international law into the binding Community law (for example, in the *International Fruit* case) is an expression of monistic concepts. I believe that one must admit, however, that a "dualistic" interpretation is also possible, under the two provisos that, (1) one admits that a "transformation" of public international law has taken place either by the "act" of the Council or once and for all by the EEC Treaty itself (for example, by article 164), and (2) that this transformation implies that binding rules and principles of public international law have priority even over subsequent acts of the

51. 1982 E. Comm. Ct. J. Rep. at 349.

52. See A. LEENEN, *supra* note 1, at 74-75.

53. *Id.* at 75-76.

54. *Id.* at 76.

Community itself. The fact that the Court deliberately left open this doctrinal question could be explained — again in my opinion — in several ways. First, the Court in its case law has never cared much about doctrinal questions. It has always left these doctrinal questions to the learned commentary on its case law. Second, it is well known that at least in two Member States (Germany and Italy) dualistic theories still have an important influence, not only in doctrine, but particularly in the case law of their Constitutional Courts and even in the relations between Community law and national law. Finally, the experience of the case law both of the Court of Justice itself and of the courts of Member States shows that in practice it is possible gradually to overcome difficulties in this respect, whatever the underlying doctrine may be.⁵⁵

From a more practical point of view, the following four observations could be made with regard to this issue. As I have indicated above, and apart from one's opinion on this monist/dualist issue, the case law of our Court establishes in any case the priority of binding public international law over both national law *and* Community law. This is true even in cases of Community legislation subsequent to an international agreement by which the Community is bound. I believe, in the second place, that the opinion of several authors — that the Court considers binding public international law as part of the Community law only as far as this public international law is also directly applicable — is based on a misunderstanding. This second criterion, as far as I can see, is only applied in preliminary rulings, where a national court wants to know to what extent it must apply public international law rules in actions engaged by private persons and how these rules then should be interpreted. In actions of the Commission against Member States under article 169, no such additional criterion has ever been used by the Court to my knowledge. Any observer will be struck, in the third place, by the fact that the Court always interprets international agreements on their own terms; it never attempts to interpret such agreements according to the significance of certain terms within the Community law. The *Polydor* case is a good example of this approach. Of course this approach does not eliminate the possibility that other contracting parties to these agreements may come to a different interpretation of the agreements concerned. This also has been recognized explicitly by the Court, for example, with regard to the "self-executing" character of certain provisions in international agreements, as we have seen. Finally, it should be mentioned that quite a number of international acts *have* been transformed into European Community law by detailed regulations. For example, this is the case with regard to the antidumping codes and other codes (for example, on government procurement) of GATT, with regard to tariff reductions resulting from multilateral negotiations within the framework of GATT, with regard to the UNESCO Agreement on Free Importation of Instruments for Academic Research, and with regard to the United Nations Conference on Trade and Development (UNCTAD) Code of Conduct for Liner Conferences. These last examples, in my view, show better than anything else that the Community practice with regard to the relations between Community

55. Since an Advocate-General does not participate in the deliberations of the Court itself, these explanations are nothing more than those of an interested outsider.

law and public international law is in fact rather differentiated and cannot be summarized in a single concept.

IV. THE IMPACT OF COMMUNITY LAW ON MULTINATIONAL CORPORATIONS AND OTHER SUBJECTS OF THIRD COUNTRIES

In light of other contributions to this issue on this subject, I will be very brief on the so-called "extraterritorial effect" of Community law, in particular, but not exclusively, of its articles 85 and 86. There are no clear indications that the Court has accepted the "effect-doctrine," i.e., the concept that articles 85 and 86 of the EEC Treaty may be applied as soon as a restrictive practice of non-Member State firms has the effect of "the prevention, restriction or distortion of competition within the Common Market"⁵⁶ or as soon as such a firm abuses its dominant position within the Common Market,⁵⁷ while at the same time such a practice may affect trade between Member States⁵⁸ (both articles). Indeed, in all cases where companies from third countries were involved,⁵⁹ either affiliated companies of the foreign companies or independent firms established within the Common Market were also involved in the practice concerned, or the restrictive practices themselves could be considered to have taken place within the Common Market. Therefore, the Court has not yet been obliged to take a position with regard to the question whether, for example, an agreement (e.g., on market-sharing or price-fixing) between companies, established all of them outside the Common Market, would come within the scope of article 85. The text of articles 85 and 86 would not exclude such an opinion. Moreover, the very broad wordings of ground 28 of the judgment in *Walrave v. Association Union Cycliste Internationale*⁶⁰ (dealing with articles 48 and 59 of the EEC Treaty on free movement of persons and services) seems to indicate that the Court does not exclude such a possibility. However, it is my submission that such cases are very unlikely to present themselves. Even when companies established in third countries have (alone or together) a dominant position within the Common Market, and therefore do not have to take account of competition from firms established within the Common Market, they normally will either have an agency, branch or subsidiary within the Common Market, or their acts constituting a prohibited practice will take place within the Common Market.

56. EEC Treaty, *supra* note 11, art. 85.

57. EEC Treaty, *supra* note 11, art. 86.

58. EEC Treaty, *supra* note 11, arts. 85-86.

59. See *Hoffmann-LaRoche & Co. v. Commission of the Eur. Communities* (Case No. 85/76), 1979 E. Comm. Ct. J. Rep. 461, 508; *United Brand Co. v. Commission of the Eur. Communities* (Case No. 27/76), 1978 E. Comm. Ct. J. Rep. 207, 268; *Instituto Chemioterapico Italiano SPA v. Commission of the Eur. Communities* (Nos. 6-7/73), 1974 E. Comm. Ct. J. Rep. 223, 245; *Europemballage Corp. v. Commission of the Eur. Communities* (Case No. 6/72), 1973 E. Comm. Ct. J. Rep. 215, 238; *Sandoz AG v. Commission of the Eur. Communities* (Case No. 53/69), 1972 E. Comm. Ct. J. Rep. 845; *J.R. Geigy AG v. Commission of the Eur. Communities* (Case No. 52/69), 1972 E. Comm. Ct. J. Rep. 787; *Imperial Chem. Indus. v. Commission of the Eur. Communities* (Case No. 48/69), 1972 E. Comm. Ct. J. Rep. 619, 666-68; *Béguelin Import v. S.A.G.L. Import Export* (Case No. 22/71), 1971 E. Comm. Ct. J. Rep. 949, 958.

60. (Case No. 36/74), 1974 E. Comm. Ct. J. Rep. 1405 (Preliminary Ruling).

Nevertheless, the case law shows that the Community is able to act effectively against restrictive practices of even powerful corporations established in third countries, which is one of the important points I want to stress here. I submit once more that this possibility exists on the one side because of the fact that the Community has sufficient "countervailing power" against even the most powerful multinational corporations to take effective measures against their restrictive business practices within the Common Market. On the other side, it exists because of the fact that such multinational corporations are considered as (passive) subjects of rights and duties under Community law. The latter fact, by the way, is also of importance for the legal protection by our Court of firms from third countries against whom antidumping measures have been taken by the Community. The Court's judgment, which at the time this article was written had not yet been rendered, in two 1982 cases involving three American producers of fertilizers, gives new clarifications on the possibilities of this legal protection.⁶¹

The second point I want to make here is that the whole body of the Court's case law (the case law with regard to purely intra-community practices included) shows that restrictive business practices can be important instruments of international trade restriction. Considering the economic reality, it cannot be expected that exporting countries will act effectively against such practices with regard to exports as long as their firms benefit from these practices. Nor can it be expected that importing countries will act effectively against restrictive practices of their national firms that aim at the restriction of competition from abroad.

Both points together might indicate that the UN Code of Conduct with regard to restrictive business practices, to which I referred in my introductory remarks, will never become really effective, as long as no effective international procedures of control have been set up (with direct applicability of the rules on multinational corporations) or at least as long as no binding obligations for both exporting and importing countries exist to act against such practices, with a possibility of supervision by an international body. Liberalization of international trade requires effective international control of restrictive business practices affecting such trade, and that control must protect everyone, not merely developing countries.

61. *Allied Corp. v. Commission of the Eur. Communities* (Nos. 239, 275/82) (Ct. J. Eur. Comm. Feb. 21, 1984, not yet published), *digested in* 1984 PROC. CT. J. EUR. COMM. No. 6/84a (Feb. 20-24). *See also* however, my January 10, 1984 opinion with reference to the earlier case law.