
The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques

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Abstract

It has been clear since a seminal ECJ ruling in the 1970s that the European Community is attached to a model of automatic treaty incorporation whereby the full panoply of Community law enforcement tools are available for the enforcement of Community Agreements. In the decades since, a rich body of case law has emerged concerning this growing body of treaty law to which the Community has become party. Much of this jurisprudence is testament to a maximalist approach to treaty enforcement which shares parallels with the approach to internal Community law. Most recently, however, the Intertanko ruling indicates that the ECJ is not averse to employing judicial avoidance techniques to preclude review where it is Community action that is challenged. The current trajectory of treaty enforcement is thus indicative of a twin-track approach whereby the ECJ is reluctant to transpose the maximalist approach to treaty enforcement which characterizes its contribution where action at the Member State level is challenged. Such a trajectory, built in accordance with the defensive submissions of the Community's political institutions, raises significant questions about the EU's much-vaunted commitment to international law.

1 Introduction

With the exponential growth in treaty-making, an increasing focus on compliance has, not surprisingly, developed.¹ This has naturally also contributed to an increasing

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¹ Recent examples of a burgeoning literature include U. Beyerlin *et al.* (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (2006); G. Ulfstein

emphasis on the enforcement role of domestic courts. Thus, calls for a greater treaty enforcement role for domestic courts have been heard in areas such as human rights,² labour rights and standards,³ the environment,⁴ and trade.⁵ In addition to the advocates of greater domestic judicial enforcement of particular sectors of treaty law, we have also witnessed an account of the role of domestic courts emerge that sees their application of international law 'as the keystone of international law'.⁶ They are viewed as providing the judicial and coercive enforcement procedures which are found wanting at the international level and are encouraged to use all means to ensure compliance with international law.

Domestic courts, however, find themselves in radically different constitutional set-ups as far as their ability to ensure compliance is concerned. With regard to treaty law, we can distinguish between two core approaches. The first can be referred to as the non-automatic treaty incorporation model, whereby treaties do not automatically become part of the domestic legal order upon entry into force for the state concerned. Rather they become part of the domestic legal order only where the legislature so provides, and this takes place on an *ad hoc* basis. The treaty or the incorporated part of the treaty will however retain the domestic law hierarchical status of the incorporating legislation.⁷ Even absent legislative incorporation courts in such legal orders usually apply a powerful canon of construction by which they seek to read domestic law consistently with the states' international law obligations. But a role over and above this for domestic courts is conditional upon legislative incorporation. The most well-known adherent to this model is the United Kingdom, and it has wide currency in most of the other 52 Commonwealth states.⁸

In stark contrast is a model which can be labelled automatic treaty incorporation, whereby duly ratified treaties are considered to become part of the domestic legal order

(ed.), *Making Treaties Work* (2007); Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 72 *U Chicago L Rev* (2005) 469; Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', 19 *EJIL* (2008) 725.

² B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997); Heyns and Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23 *Human Rights Q* (2001) 483.

³ Thomas *et al.*, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications', in J.-C. Javillier and B. Gernigon (eds), *Les Normes Internationales du Travail: un patrimoine pour l'avenir* (2004), at 249.

⁴ United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (2006); M. Anderson and P. Galizzi (eds), *International Environmental Law in National Courts* (2002).

⁵ A call associated most closely with the work of Petersmann. Early examples include his *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) and 'National Constitutions, Foreign Trade Policy and European Community Law', 3 *EJIL* (1992) 1; a recent example is Petersmann, 'Multilevel Judicial Trade Governance without Justice: On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System', in M.E. Janow *et al.* (eds), *WTO: Governance, Dispute Settlement and Developing Countries* (2007), at 959.

⁶ B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993), at 9.

⁷ Community law is treated differently where the relevant state is a member.

⁸ It is not confined to current or former Commonwealth states. The Scandinavian countries are usually considered representatives of non-automatic treaty incorporation: see Buergenthal, 'Self-executing and Non-Self-Executing Treaties in National and International Law', 235 *Recueil des Cours* (1992) 303, at 363–367.

upon their entry into force and courts are empowered to enforce them. Arguably the most well-known adherent to this model is the US because its Constitution, now well over two centuries old, expressly provides that 'treaties . . . shall be the supreme law of the land'.⁹ In the years since, variants of this early path-breaking express treaty incorporation clause have been adopted in constitutions across large parts of the globe.¹⁰ And unlike the US constitutional text, long interpreted as only according such supremacy over earlier in time federal legislation,¹¹ many of the new constitutional provisions were not to remain wedded to the later in time rule.¹² However, courts in such legal orders will in principle only apply treaties, other than as an interpretative aid, subject to a threshold test being satisfied. Courts, scholars, and practitioners use various labels, frequently interchangeably, to refer to this threshold test. The dominant phrasing has traditionally been that of whether a treaty is 'self-executing', the language long employed by the US Supreme Court.¹³ The dominant label employed in Europe, undoubtedly influenced by the jurisprudence of the ECJ, is probably now that of 'direct effect'. And satisfying this hurdle, whatever label we assign it, is of critical significance to the practical impact that a treaty will have domestically. Lofty sounding constitutional provisions proclaiming treaty supremacy in the domestic legal arena or, in their absence, equivalent judicial assertions will be of little consolation to the litigant in a court which has rejected the directly effective or self-executing status of a particular treaty or treaty provision. This is an outcome which litigants in US courts have been increasingly faced with, most recently and controversially with respect to the Vienna Convention on Consular Relations and the UN Charter.¹⁴ The judicial recalcitrance to accord treaty provisions self-executing status in the US has generated a voluminous literature,¹⁵ but we have also seen courts elsewhere employ the relevant threshold test in a haphazard manner.¹⁶ It is a test which ultimately can be employed as a judicial

⁹ US Constitution 1789, Art. VI, cl. 2.

¹⁰ An early account of this development was provided by Cassese, 'Modern Constitutions and International Law', 192 *Recueil des Cours* (1985) 335. A brief overview following the collapse of the Soviet Union was provided in Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National law', 7 *EJIL* (1996) 29, and Danilenko, 'Implementation of International Law in CIS States: Theory and Practice', 10 *EJIL* (1999) 51.

¹¹ See L. Henkin, *Foreign Affairs and the US Constitution* (1996), at 209–211.

¹² Cassese, *supra* note 10, at 402–412.

¹³ Paust, 'Self-Executing Treaties', 82 *AJIL* (1988) 760, at 766.

¹⁴ On the Vienna Convention litigation see Simma and Hoppe, 'From LaGrand and Avena to Medellín – a Rocky Road Toward Implementation', 14 *Tulane J Int'l and Comp L* (2006) 7. The litigation has recently culminated in the Supreme Court rejecting the self-executing nature of Art. 94 of the UN Charter (*Medellín v. Texas*, 128 S Ct 1346 (2008)).

¹⁵ For a recent contribution see Vazquez, 'Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties', 122 *Harv L Rev* (2008) 599.

¹⁶ To give merely one example, Belgian courts have traditionally been considered to adopt a bold stance on the direct effect determination. However, a detailed study of judicial practice identified a spate of Supreme Court rulings rejecting the direct effect of various provisions of human rights conventions on the basis that the obligations are created only for the contracting parties. The authors conclude that Belgian courts use the direct effect test in a non-transparent manner: Vandaele and Claes, 'L'effet direct des traités internationaux – Une analyse en droit positif et une théorie du droit axée sur les droits de l'homme', 34 *Revue belge de droit international* (2001) 411, at 451.

avoidance technique which protects domestic administrative and legislative action from review *vis-à-vis* treaty norms.

This article is concerned with the evolving jurisprudence pertaining to treaties to which the European Community is a party (Community Agreements). To this end, a first section revisits the foundational ruling of the ECJ which attached the Community firmly to the automatic treaty incorporation mast. The section that follows briefly explores the bold judicial practice in cases involving Community Agreement-based challenges to Member State action. The final section provides an assessment of the emerging jurisprudence concerning challenges to Community action. Whilst there are indicators that a bold approach to treaty enforcement would apply equally where Community action was challenged, the rare and recent occurrence of a Community Agreement-based legality challenge which appeared cogent has led the political institutions successfully to invoke before the ECJ avoidance techniques to shield a Community measure from review.

2 The Automatic Incorporation of Treaties into the Community Legal Order: Revisiting *Haegeman*

The watershed moment pertaining to the legal effect of Community Agreements was provided by the seminal 1974 *Haegeman* ruling.¹⁷ A Belgian court had put several questions to the ECJ concerning the Greek Association Agreement. The aspect of the case which concerns us here is the establishment of jurisdiction. The ECJ underscored its jurisdiction to give preliminary rulings concerning the interpretation of acts of the Community institutions (which is expressly provided for in Article 234 TEC), followed by the assertion that as the Agreement was concluded by the Council under Articles 300 and 310 TEC it was ‘therefore . . . an act of one of the institutions of the Community within the meaning of . . . Article [234]’.¹⁸ A single sentence recital then held that ‘[t]he provisions of the Agreement . . . form an integral part of Community law’.¹⁹

The significance of these few sentences of the ECJ can be considered across two connected axes. The first concerns the implications for the external relations constitution of the Community, and the second the implications for the external relations constitutions of the Community’s Member States.

A Implications for the External Relations Constitution of the Community

The *Haegeman* ruling constituted judicial acknowledgment that the Community was firmly attached to a model of automatic treaty incorporation. This is evident from the unreasoned assertion that once a Community Agreement comes into force its provisions form an integral part of Community law. The language of being a part of domestic

¹⁷ Case 181/73, *Haegeman* [1974] ECR 449.

¹⁸ *Ibid.*, at para. 4.

¹⁹ *Ibid.*, at para. 5.

law had already been used in the seminal *Costa* judgment, where the ECJ held that the Treaty of Rome 'became an integral part of the legal systems of the member states . . . which their courts are bound to apply'.²⁰ And, thus, if one read *Haegeman* alongside *Costa*, then it would follow that whatever is an integral part of Community law is also an integral part of the legal systems of the Member States which their courts are bound to apply. The conclusion which would seem to flow inexorably from this is that such Agreements are capable of possessing those two central distinguishing attributes of Community law: direct effect and supremacy. These, in short, were the immediate constitutional implications of this seminal judgment.

As the case arose via a preliminary ruling, the Court clearly felt obliged to provide some textual evidence for its jurisdiction. The procedure for the conclusion of a Community Agreement requires the Council to conclude agreements, and this takes place in the form of an act of the Council. In this sense one can say that we do have an Act of one of the institutions at issue. But commentators were quick to point out that there is a distinction between the Community Agreement and the measure passed by the Council to conclude the Agreement, and that it was the latter, not the former, that the Court interpreted.²¹ And indeed it was the Agreement itself, rather than the Council Act, which the Court asserted was an act of the Community institutions.

It is true that Article 300(7) TEC does provide that Community Agreements are binding on the Community institutions and Member States. But the Court did not invoke this as a constitutional anchor for its jurisdiction in *Haegeman*. One suspects it was felt that this would do even more violence to the text than basing preliminary rulings jurisdiction on the act concerning conclusion of the agreement.²² There was, arguably, a textually more faithful means with which to have resolved *Haegeman* but which would have very different ramifications. The Court has express preliminary ruling jurisdiction in cases concerned with the validity of acts of the Community institutions, as was the case in *Haegeman*. The Advocate General had argued that the Court had preliminary ruling jurisdiction as to the interpretation of Community Agreements only where the interpretation was relevant to the validity of an act of a Community institution or the interpretation to be given to such an act. Such an approach would have countenanced challenges to Community acts via the preliminary ruling procedure, whilst rejecting cases seeking interpretations where national measures are being challenged. On this account individuals would have a limited role as enforcers of Community Agreements in challenges to action at the Member State level.²³ The Court's textually contentious conclusion however co-opted national courts and individuals

²⁰ Case 6/64, *Costa v. ENEL* [1964] ECR 585.

²¹ Hartley, 'International Agreements and the Community Legal System: Some Recent Developments', 8 *ELRev* (1983) 383, at 390–391.

²² A stronger textual argument would be to hold that for preliminary rulings jurisdiction we are still dealing with interpretation of the Treaty within the meaning of Art. 234(1)(a) as the ECJ would be interpreting the requirements resulting from Art. 300(7), namely what it means for a Community Agreement to be binding on the Member States.

²³ They would at least still be able to draw to the Commission's attention alleged Member State breaches for the purposes of infringement proceedings.

into ensuring Member State compliance with Community Agreements. *Haegeman* is in a sense, then, the external relations counterpart of *Van Gend en Loos*:²⁴ just as *Van Gend en Loos* co-opted individuals and national courts into the enforcement game with respect to Treaty provisions, later extended to secondary measures, so *Haegeman* co-opted them with respect to Member State compliance with Community Agreements. This outcome strengthens international law by putting at the disposal of litigants the powerful and evolving enforcement tools of Community law.

B Implications for the External Relations Constitutions of the Member States

The ramifications of the *Haegeman* ruling were of great significance for the external relations constitutions of the Member States. This is most transparently so for those states attached to the non-automatic model of treaty incorporation. For the three Member States wedded to such an approach at the time of the *Haegeman* ruling, Denmark, Ireland, and the UK, the effect of this jurisprudence converts them into automatic treaty incorporation states for a particular category of treaties, namely, Community Agreements. In such states it is no longer the domestic legislature which determines the role of domestic courts in treaty enforcement. Rather it is a role that the ECJ has assumed for itself. And this is of momentous constitutional import for those states and any other state wedded to the non-automatic incorporation model which contemplates EU accession.

The impact of automatic treaty incorporation would also be of serious consequence for those states already familiar with automatic treaty incorporation. First, the direct effect determination, the traditional preserve of the national court, would not be their prerogative for Community Agreements. This is of critical significance, for whilst national courts have often been guilty of shielding their domestic legal order from the impact of treaties, there would be an important category of treaties for which they no longer had free reign. A second and related point is that endowing Community Agreements with the attributes of Community law would logically include a hierarchically superior status to domestic law. The later in time rule which remains the default rule in, for example, Germany and Italy would have to give way not only to 'Community law proper',²⁵ but also to Community Agreements. Indeed, the logical implication of the assimilation of such Agreements to Community law is that, on the ECJ's reasoning with respect to Community law proper, their status would be superior to that of the domestic Constitution itself.

3 Embracing Maximalist Treaty Enforcement in Challenges to Domestic Action

Judicial pronouncements of the nature of those in *Haegeman* are to be found in many legal orders, and indeed are often consecrated in constitutional text, but whether the

²⁴ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

²⁵ This phrasing is borrowed from Bourgeois, 'The Effects of International Agreements in European Community Law: Are the Dice Cast?', 82 *Michigan L Rev* (1984) 1250, at 1260.

logical implications are to be found in judicial practice is a different matter. The judicial stance which emerged in Community law was markedly different, for the ECJ was quick to demonstrate that *Haegeman* constituted far from empty judicial rhetoric.

A Early Indicators of Maximalist Treaty Enforcement: From Bresciani to Kupferberg

Within two years of *Haegeman*, the ECJ had held in its *Bresciani* ruling that a customs duty prohibition in an Association Agreement concluded with a large number of African states conferred rights that national courts must protect.²⁶ In effect *Bresciani* laid bare the implications of *Haegeman*: Community Agreements, like the EC Treaty and secondary measures, could be used in domestic courts to challenge Member States' measures. This being the very first case explicitly accepting that Community Agreements could be so used, it was striking that no Member State had intervened. When the direct effect of the EC Treaty itself had first arisen in *Van Gend en Loos*, three of the then six Member States intervened, two contested jurisdiction, and all three contested direct effect. And yet, 13 years to the day later, the Court accorded direct effect to a very similar provision of a Community Agreement without any argument to the contrary from the Member States.

Several years later, however, and the emerging construct had become sufficiently perturbing for them to turn out in force to contest the direct effect of a bilateral Trade Agreement in the *Polydor* case.²⁷ The Court avoided the direct effect issue by rejecting the substantive reading sought of the relevant provision by a litigant in the domestic court. And yet, curiously, within months the ECJ was able to pronounce affirmatively on the direct effect of the non-fiscal discrimination provision of the Greek Association Agreement with no Member State interventions.²⁸ The *Pabst* ruling was only the second occasion on which the Court had expressly found a Community Agreement provision directly effective. It did however concern an Association Agreement which prepared that country for Community accession.

That the accession dimension was not an essential factor in the direct effect determination was confirmed six months later in the seminal *Kupferberg* ruling.²⁹ The Member States had protested vigorously against the directly effective status of the bilateral Trade Agreement with Portugal. Their logic was simple and cogent. Despite the ECJ's assimilation of Community Agreements to Community law proper, there were crucial differences which warranted differential treatment. The Portugal Agreement contains no mechanism for ensuring uniform interpretation of its provisions and the Contracting Parties had built in a dispute resolution mechanism. Procedures which it was argued could not function if courts were allowed to determine the obligations. Furthermore, in articulating the absence of uniform interpretation, Member States drew attention to case law from certain contracting parties to the Community's free trade

²⁶ Case 87/75, *Bresciani* [1976] ECR 129.

²⁷ Case 270/80, *Polydor* [1982] ECR 329 (five Member States intervened).

²⁸ Case 17/81, *Pabst & Richarz* [1982] ECR 1331.

²⁹ Case 104/81, *Kupferberg* [1982] ECR 3641.

agreements with the EFTA countries which suggested that the Agreements were not directly effective therein. The Member States were implicitly striking at the very heart of a critical distinction between Community law proper and Community Agreements. The ECJ is the authoritative interpreter of the former, but at most it can only be the authoritative interpreter of the latter in the Community legal order; however, the latter, unlike the former, being international treaties, are binding on other Contracting Parties, and the ECJ is accordingly precluded from assuming the mantle of authoritative interpreter to this extent. Direct effect and supremacy were eventually accepted within a Community of states in which the central enforcement role was delegated to the national judiciary with the ECJ as the overseer keeping the construct together. Accepting a similarly exalted status for Community Agreements, where equivalent enforcement assurances from the other parties were absent, would be a much harder pill to swallow for the Member States.

The ECJ responded expressly to the powerful Member State submissions. It held that Community institutions are free to agree with Contracting Parties what effect the provisions will have in internal legal orders, and it is only if that question has not been settled that it would be for the ECJ to resolve. It has been suggested that this constitutes recognition that its role is only residual and that the ECJ acknowledged the primary role of the Community institutions and Contracting Parties.³⁰ Practical reality is a somewhat different matter, for treaties rarely explicitly address the issue of their internal legal effect. The Community institutions and the Member States are thus offered a way out, but it is an option which requires a radical alteration in the practice of treaty negotiations.

The ECJ also rejected the relevance of judicial reciprocity on the direct effect question, as well as giving short shrift to the argument concerning the special institutional framework of the Agreement. The latter was held not in itself sufficient to exclude all judicial application: ‘the fact that a court . . . applies . . . a provision . . . involving an unconditional and precise obligation . . . 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’.³¹ This, it has been pointed out, was classic direct effect reasoning, for with Community law proper the ECJ has always considered the absence of certain implementing measures irrelevant if the relevant provision is sufficiently clear, precise, and unconditional.³² Ultimately the Court concluded that the relevant provision constituted an unconditional rule against fiscal discrimination dependent only on a like product finding, which was thus directly effective.

In *Kupferberg*, then, less than 20 years after the seminal *Van Gend en Loos* judgment where the Court had boldly constructed its own vision of the nascent Community legal order in the face of contrary submissions from a large proportion of the then Member States, the Court had done the same with respect to its vision of the place of Community Agreements within that legal order. The direct effect test which emerged as the key conceptual frame for the domestic legal effect of Community law proper

³⁰ P. Koutrakos, *EU International Relations Law* (2006), at 226.

³¹ *Kupferberg*, *supra* note 29, at para. 20.

³² P. Eeckhout, *External Relations of the European Union* (2004), at 286.

had likewise established itself with respect to Community Agreements. The central question then becomes how the direct effect test will be applied in practice. Crucially the boldness with which the Court dispensed with the weighty Member State objections indicated a willingness to apply the increasingly flexible attitude to the direct effect determination which characterized its approach to Community law proper.

B Consolidating Maximalist Treaty Enforcement

In the years since the seminal pronouncements in *Kupferberg* we have seen many prominent manifestations of a maximalist approach to treaty enforcement in challenges to Member State action. Time and again when faced with difficult questions pertaining to Community Agreements the ECJ has adopted bold positions, even where such outcomes were textually contentious. Several prominent examples will be touched upon in this section.

1 Bringing Association Council Decisions to life

The *Sevince* judgment has been among the most significant of such rulings, for it brought to life the Association Council Decisions of the Turkey Agreement and has given rise to a large body of case law which has had an immeasurable impact on the lives of Turkish workers and their family members.³³ The case concerned a Turkish national challenging a residence permit refusal in a Dutch court which referred questions on Association Council Decisions. Germany had raised a powerful textual objection to jurisdiction: the Association Council is not a Community institution within the meaning of Article 234 but an autonomous institution. This objection did not trouble the Court, which held that the Decisions, being directly connected with the Agreement, formed from their entry into force an integral part of the Community legal system. And, furthermore, since the ECJ has jurisdiction to give preliminary rulings insofar as Agreements are acts adopted by the Community institutions, it likewise has jurisdiction over the interpretation of decisions adopted by authorities established by Agreements. That the latter proposition does not in itself follow from the former clearly did not trouble the Court.

Both Germany and the Netherlands argued that the relevant Association Council Decision provisions were not directly effective. The relevant provisions provided Turkish workers with certain entitlements depending on the length of their employment in the relevant Member State; and prohibited the introduction of new employment access restrictions to legally employed resident workers.³⁴ Embarking on its direct effect assessment, the ECJ commenced with the terms of the provisions, and merely paraphrased the first batch while referring to them as upholding 'in clear, precise and unconditional terms, the right of a Turkish worker', whilst the second batch were referred to as 'contain[ing] an unequivocal standstill clause'.³⁵ From here

³³ Case C-192/89, *Sevince* [1990] ECR I-3461.

³⁴ Respectively Art. 2(1)(b) of Decision 2/76 and Art. 6(1) of Decision 1/80, and Art. 7 of Decision 2/76 and Art. 13 of Decision 1/80.

³⁵ Respectively paras 7 and 8 of *Sevince*, *supra* note 33.

it was held that direct application was also confirmed by the purpose and nature of the Association Council Decisions and the Turkey Agreement. Crucially several arguments against direct effect were swept aside prior to the Court holding the relevant provisions directly effective. This included, *inter alia*, objections based on the fact that provisions calling for both Community and domestic implementing measures had not been pursued and that the two Decisions had not been published. That the Community institutions had not published the Decisions was certainly a powerful indicator of the non-judicially applicable status intended,³⁶ but for the ECJ this could not preclude their enforcement by a private individual *vis-à-vis* a public authority.

2 Social Security Non-Discrimination Provisions

The seminal *Kziber* judgment in 1991 is the fountain from which all later jurisprudential developments pertaining to social security provisions in Community Agreements have stemmed.³⁷ In this preliminary ruling France and Germany had argued that the equal treatment social security clause in the Morocco Cooperation Agreement (Article 41(1)) was not directly effective. The ECJ however held that it provided in clear, precise, and unconditional terms for a prohibition on nationality discrimination in social security for Moroccan workers and their family members. That it provided that the prohibition was subject to the following paragraphs of Article 41(1) which contained certain limitations was considered not to remove the unconditional character of the discrimination prohibition with respect to all other social security questions. And the fact that Article 42(1) foresaw Cooperation Council implementing measures which had not been forthcoming did not call into question the direct applicability of a text which is not subordinated in its execution or effects to any further implementing measures, nor did it condition the immediate applicability of the non-discrimination principle. The direct effect finding bore a stark resemblance, unmentioned by the ECJ, to the approach to internal Community law as evinced most famously in the *Reyners* ruling where the absence of explicitly textually envisaged implementation measures was not permitted to stand in the way of the direct effect holding of a fundamental legal provision of the Community.³⁸ In due course the ECJ responded affirmatively as to the direct effect of the counterpart provision in the other Community Agreements with which it has been faced.³⁹

³⁶ Indeed the Commission agent suggested that it served exactly this objective and that both the Council and Commission had considered the applicability of Association Council Decisions to require adoption of a legal act, that is transposition, to produce their effects: Gilsdorf, 'Les organes institués par des accords communautaires: effets juridiques de leurs décisions', *Revue du Marché Commun* (1992) 328, at 331–332.

³⁷ Case C–18/90, *Kziber* [1991] ECR I–199.

³⁸ Case 2/74, *Reyners v. Belgium* [1974] ECR 63.

³⁹ This took place with respect to the Algeria Cooperation Agreement in Case C–103/94, *Krid* [1995] ECR I–719 and *vis-à-vis* the Turkey Agreement in Case C–262/96, *Sürül* [1999] ECR I–2685 in the face of staunch opposition from the five intervening Member States. It has been noted that the effect of the *Kziber* ruling was that the Member States refused to include the social security non-discrimination clause in other bilateral agreements (with the exception of EFTA country agreements): Maresceau, 'Bilateral Agreements Concluded by the European Community', 309 *Recueil des Cours* (2006) 125, at 262. The relevant provisions were maintained in the Euro-Med Agreements, and the ECJ has confirmed the direct effect of the provision in the Moroccan Euro-Med Agreement: Case C–336/05, *Echouikh* [2006] ECR I–5223.

3 Provisions on Non-Discrimination as Regards Working Conditions, Remuneration, and Dismissal

Various Community Agreements contain provisions proscribing nationality discrimination of workers from the respective third states as regards working conditions, remuneration, and (sometimes) dismissal as compared to the relevant EU Member States own nationals. Such a provision was first held directly effective in the 1999 *El-Yassini* case concerning the Morocco Cooperation Agreement;⁴⁰ our concern here is with the recent *Simutenkov* ruling.⁴¹ The crux of the issue was whether the interpretation accorded to Article 39 TEC in the famous *Bosman* ruling,⁴² proscribing the use of EU/EEA Member State nationality limitation clauses by sports associations, could be transposed to the relevant provision of the Partnership and Cooperation Agreement (PCA) with Russia. Such an interpretative transposition of the *Bosman* ruling had recently taken place *vis-à-vis* the Europe Agreement with Slovakia. However, the *Kolpak* ruling⁴³ concerned an Association Agreement with a soon to be Member State which may have been viewed as justifying this bold transposition from internal Community law to a Community Agreement. Nevertheless, the Grand Chamber in *Simutenkov* did not allow the absence of an association with a view to gradual integration into the EC, present in the earlier *Kolpak* ruling, to justify a different interpretation of the counterpart provision in the Russia PCA. Thus less than 10 years after the *Bosman* ruling, which would then have appeared to be a clear example of a judgment in need of a fundamental freedoms underpinning to justify its boldness,⁴⁴ we find it being transposed to a 'mere' PCA. The judgment, as one commentator puts it, 'symbolizes the Court's active transposition of notions of EC substantive and constitutional law into Community bilateral agreements, regardless of their teleological variation'.⁴⁵

4 Treaty Enforcement Outside the Bilateral Trade-Related Sphere

One distinctive feature of the cases singled out for coverage thus far is that they have been concerned with bilateral Agreements, *Bresciani* being the single exception, with contracting partners with which the Community has at some level close relations and which broadly concern the trade sphere. The dearth of affirmative direct findings outside the narrow sphere of bilateral trade-related agreements is surprising, given

⁴⁰ Case C-416/96, *El-Yassini* [1999] ECR I-1209.

⁴¹ Case C-265/03, *Simutenkov* [2005] ECR I-2579.

⁴² Case C-415/93, *Bosman* [1995] ECR I-4921.

⁴³ Case C-438/00, *Kolpak* [2003] ECR I-4135.

⁴⁴ In *Bosman*, *supra* note 42, at para. 129, the ECJ had underscored that to accept the nationality clauses would deprive Art. 39 TEC 'of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community [would be] rendered nugatory'. Neither the Europe Agreements nor the Russia Agreement confer a fundamental right of free access to employment.

⁴⁵ Hillion, 'Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*', 45 *CMLRev* (2008) 815, at 832-833.

the breadth of the Community's treaty-making practice, but the ECJ has in fact rarely been faced with other Agreements. The recent *EDF* case was the first such occasion involving a challenge to action at the Member State level.⁴⁶ A judicial challenge had been brought in France against the French electricity provider because of discharges allegedly breaching a Community Agreement, the Mediterranean Sea Protocol to the Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention). The direct effect analysis, the ECJ asserted, would commence by an examination of the wording of the relevant provision. A single sentence followed, holding that it clearly, precisely, and unconditionally laid down a Member State obligation to subject discharges to prior authorization. A further sentence reiterated the Commission's view that the domestic authority discretion in issuing authorizations in no way diminishes the clear, precise, and unconditional nature of the discharge prohibition absent prior authorization. These two sentences were the extent of the direct textual analysis of the provision. The conclusion was, however, then bolstered by reference to the purpose and nature of the protocol. It was held to be clear from its Articles that its purpose was to prevent, abate, combat, and eliminate certain causes of pollution of the Mediterranean Sea, and that to this end Contracting Parties were required to take all appropriate measures. One cannot demur from this exposition of purpose, or the assertion which followed that the prior authorization requirement contributes to the elimination by Member States of pollution. This is to state the obvious. Here, however, it was followed directly by the assertion that direct effect can only serve the Protocol's purpose and reflect the nature of the instrument which is intended to prevent pollution resulting from the failure of public authorities to act. Clearly if such reasoning is to be employed when one looks to the purpose and nature of a Community Agreement, then it becomes difficult to conceive of provisions which should be deprived of this status. Treaties will frequently require action from public authorities, and accordingly would have their purposes, ultimately ensuring that states parties comply with the obligations enunciated therein, served by domestic courts policing compliance. To put it another way, if we operate at this level of abstraction then what Treaty will not have its purpose served by domestic judicial enforcement?

4 Maximalist Treaty Enforcement and Judicial Avoidance Techniques in Challenges to Community Action

The bulk of the Community Agreements case law which has emerged from Luxembourg has concerned challenges to action at the Member State level. It is not difficult, the cynic might suggest, to adopt a bold stance where the nature of the Agreements and provisions at issue is such that it is rarely likely that they will result in challenges to Community action. After all, it is not the Community which will be taking legislative

⁴⁶ Case C-213/03, *Pêcheurs de l'Etang de Berre v. Electricité de France* [2004] ECR I-7357. Infringement proceedings arose out of the same factual background: see Case C-239/03, *Commission v. France* [2004] ECR I-9325 where France was held in breach of its obligations under the Barcelona Convention and the Mediterranean Sea Protocol, and accordingly Art. 300(7) TEC.

or administrative action that restricts, for example, the employment or social security entitlements of foreign nationals and their family members.⁴⁷ The crucial question is thus how the ECJ has responded where Community Agreements are being invoked in challenges to Community action.

A The WTO Before the Community Courts: Judicial Avoidance Techniques or a Case Apart?

In well-known jurisprudence commencing with the full Court's *Portuguese Textiles* ruling, the ECJ has refused, subject to limited exceptions, to countenance WTO-based challenges to Community measures.⁴⁸ This has even been so where the litigant can point to a dispute settlement body (DSB) decision establishing that a Community measure is incompatible with WTO obligations.⁴⁹ Space constraints preclude a detailed defence of this heavily criticized line of jurisprudence,⁵⁰ but it is submitted that the core of the judicial reasoning advanced for precluding review is sound.⁵¹ That core is premised on the proposition that the WTO's dispute settlement understanding (DSU) permits, at least temporarily, alternatives other than full implementation of a ruling, including mutually agreed compensation and countermeasures, and that judicial intervention would deprive the Community of the DSU sanctioned room for manoeuvre enjoyed by its trading partners.⁵² In seeking to discredit the judicial reasoning, the critics have often cited the views of the eminent WTO scholar John Jackson to the effect that there is an international law obligation to comply with adopted dispute settlement reports.⁵³

⁴⁷ A recent ruling may well however have implications for the Common Visa List Regulation (Council Reg. 539/2001), OJ (2001) L81/1. In Case C-228/06, *Soysal*, judgment of 19 Feb. 2009, not yet published, the ECJ held that a directly effective standstill clause in an Additional Protocol to the Turkey Agreement precluded the imposition of a visa requirement on Turkish nationals seeking to provide services in Germany where no such requirement previously existed. The complication this poses for the Common Visa List Regulation arises because it lists Turkey as a country whose nationals must obtain a visa when crossing the EU's external borders and the German law implemented the Reg.

⁴⁸ Case C-149/96, *Portugal v. Council* [1999] ECR I-8395; Joined Cases C-27/00 and C-122/00, *Omega Air* [2002] ECR I-2569; Case C-491/01, *British American Tobacco* [2002] ECR I-11453.

⁴⁹ See Case C-377/02, *Van Parys* [2005] ECR I-1465, and Joined Cases C-120/06 P and C-121/06 P *FIAMM & Others v. Council and Commission* [2008] ECR I-6513.

⁵⁰ Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*', 3 *J Int'l Econ L* (2000) 441; Lavranos, 'The Chiquita and Van Parys Judgments: An Exception to the Rule of Law', 32 *LIEI* (2005) 449; Petersmann (2007), *supra* note 5; Van Den Broek, 'Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order', 4 *J Int'l Econ L* (2001) 411; chapters in part I of G. Zonnekeyn, *Direct Effect of WTO Law* (2008). Eeckhout has criticized the refusal to review where DSB decisions are involved: see Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations', *Walter Van Gerven Lectures* (2005), at 14-17.

⁵¹ For a recent defence see Antoniadis, 'The European Union and WTO Law: A Nexus of Reactive, Coactive and Proactive Approaches', 6 *World Trade Review* (2007) 45.

⁵² The role of countermeasures was first acknowledged in *Omega Air*, *supra* note 48, at para. 89.

⁵³ See Jackson, 'The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation', 91 *AJIL* (1997) 60, and Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy-Out"?', 98 *AJIL* (2004) 109. Critics citing this view include Eeckhout, *supra* note 50, at 16-17; Griller, *supra* note 50, at 453; Lavranos, *supra* note 50, at 456; Van den Broek, *supra* note 50, at 432-434.

This however does nothing to discredit the judicial reasoning. Even a cursory glance at the DSU provisions is clear testimony to the fact that they were faithfully recited in the relevant rulings. And in fact Jackson situates the DSU's temporary additional time within the context of the need for an escape valve to enable losing governments to improve the management of a domestically politically thorny situation.⁵⁴ What Jackson contests is the notion that compensation (or countermeasures) can constitute permanent resolution of a dispute, as the advocates of the efficient breach reading of the DSU suggest.⁵⁵ But there is no inconsistency between this reading and that proposed by the ECJ. Indeed, the ECJ itself has reiterated the DSU text on the temporary nature of compensation and this not being preferable to full implementation.⁵⁶

Criticism from within the Court itself has alleged that the judicial reasoning belongs to the political rather than the legal sphere.⁵⁷ But this does the reasoning a disservice. It defies legal rather than simply political logic for the contracting parties to put in place a dispute settlement regime which permits various temporary alternatives to implementation of a DSB decision if these options are in practical terms to be ruled out because traders have been accorded domestic judicial recourse. And, lest it be forgotten, the normal consequence of a successful challenge to a Community measure is *ex tunc* annulment. Whilst judgments could be issued which operate prospectively,⁵⁸ this would barely begin to address the tensions with the DSU remedial framework. It does not preserve the temporary (e.g. compensation or countermeasures) means of dispute closure which could follow from an adverse DSB ruling. Nor does it preserve the reasonable period of time for implementation which the DSU permits where immediate compliance is 'impracticable'.⁵⁹ The WTO, it should be noted, contracts out of general international law rules on remedies;⁶⁰ it is *lex specialis* in this respect with remedies in principle operating prospectively.

In addition, there is pre-DSB decision, DSU enshrined, room for manoeuvre which domestic judicial enforceability interferes with. Dispute settlement proceedings commence with consultations with a view to reaching a mutually agreed solution. And well over half of initiated consultations do not lead to a DSB decision: mutually agreed solutions constitute a large percentage of the disputes that do not lead to rulings, other forms of settlement have emerged, and cases have been dropped.⁶¹ Article 3.7 DSU itself expresses a clear preference for mutually agreed solutions between the parties

⁵⁴ Jackson (2004), *supra* note 53, at 122.

⁵⁵ In particular the views of Schwartz and Sykes, 'The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization', 31 *J Legal Stud* (2002) 179.

⁵⁶ E.g., *Portuguese Textiles*, *supra* note 48, at paras 38 and 40; *Van Parys*, *supra* note 49, at paras 44 and 48. The temporary nature of countermeasures was first noted by the ECJ in *Van Parys*, at para. 44.

⁵⁷ See the Opinion of Colomer AG in Case C-431/05, *Merck* [2007] ECR I-7001, at para. 79.

⁵⁸ As noted by Bourgeois, 'The European Court of Justice and the WTO: Problems and Challenges', in J.H.H. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (2000), at 71, 121.

⁵⁹ Art. 21.3 DSU.

⁶⁰ For consideration of the extent to which this is so see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 218–236.

⁶¹ Davey, 'The WTO Dispute Settlement System: the First Ten Years', 8 *J Int'l Econ L* (2005) 17, at 45–48.

over adjudication. Clearly domestic judicial enforcement would leave little scope for the Community to pursue the DSU enshrined preference for mutually agreed solutions even prior to adoption of reports.

Notwithstanding the principled stance against review *vis-à-vis* WTO norms, there is an emerging judicial receptivity to WTO norms in interpreting Community measures. A recent example is provided by a CFI ruling where provisions of the Anti-Dumping and Anti-Subsidy Regulations were expressly interpreted in accordance with their counterparts in the WTO's Anti-Dumping Agreement and Subsidies and Countervailing Measures Agreement.⁶² In addition there is evidence that the WTO is having an unacknowledged impact on the interpretation of Community norms. In a recent case the ECJ annulled a Community Tariff Classification Regulation due to its incompatibility with its parent Regulation.⁶³ This interpretation, as Bronckers pointed out, deviated from the traditional interpretation given by EC customs authorities, but was consistent with an Appellate Body ruling condemnation of that particular reading.⁶⁴

The Community's political institutions had made their stance against WTO norms being employed as review criteria crystal clear, most controversially via the preamble to the Council Decision concerning the conclusion of the WTO Agreements.⁶⁵ It would be naïve to suppose that the institutional stance is not of influence even if the ECJ was careful not to attribute a direct impact to the Council Decision.⁶⁶ But this should not lead us simply to accept accusations of political motivations or that judicial avoidance techniques were being employed. We must also ask why the political institutions have gone to such unprecedented steps in the WTO context. And the answer is surely that the judicially constructed doctrinal edifice exhibits a marked willingness to enforce Community Agreements such that a strong case to the contrary has to be made. This was provided, in particular, by the DSU as the ECJ duly recognized. In this sense the approach to the WTO need not be treated as constituting a direct challenge to the general judicial receptiveness *vis-à-vis* Community Agreements; rather it can be viewed as a very atypical Community Agreement for which the conventional judicial edifice is inappropriate.

B Indicators of Maximalist Treaty Enforcement: The Biotech and IATA Rulings

Despite the much-maligned WTO line of jurisprudence, two rulings left strong indicators that bold treaty enforcement would not be confined to challenges to Member State action. The first was in the *Biotech* case in which an annulment action was brought against the Biotech Directive.⁶⁷ Our concern here is with how the ECJ responded to the argument that the Directive breached the Convention on Biological Diversity (CBD),

⁶² Case T-45/06, *Reliance Industries v. Council and Commission* [2008] ECR II-2399.

⁶³ Case C-310/06, *FTS International* [2007] ECR I-6749.

⁶⁴ Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond', 11 *J Int'l Econ L* (2008) 885, at 889-890.

⁶⁵ Council Decision 94/800/EC, OJ (1994) L336/1.

⁶⁶ See *Portuguese Textiles*, *supra* note 48, at para. 48.

⁶⁷ Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079.

to which the Community is party, and the Council argument that a direct effect hurdle must be surmounted and that it was not satisfied by the CBD.

The Court sought to disassociate direct effect from review *vis-à-vis* obligations under a Community Agreement by holding: '[e]ven if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.⁶⁸ Direct effect and the language of individual rights with which it has been so closely associated could not, it seemed, be invoked to preclude review *vis-à-vis* treaty commitments. Alternatively, this could simply be read as rejecting the narrow approach to direct effect understood as the capacity of a provision to create individual rights enforceable before the courts, but not the broad notion of direct effect which focuses on mere justiciability or invocability of the provisions.⁶⁹ Direct effect is thus relevant on this reading, but individual rights are not. Admittedly such a distinction is artificial, for direct effect can simply be used as a label affixed to norms permitted to be used as criteria for review whether or not they can be said to confer individual rights. The key point is that a hurdle of provisions needing to create rights was rejected, and this can be read as embracing a more receptive approach to review of Community norms *vis-à-vis* Community Agreements. It is this message which was warmly received by the scholarly community. Thus for *Lenaerts* and *Corthaut* it fits their attempt to build a general theory of invocability of EU law round the primacy principle rather than the elusive direct effect doctrine,⁷⁰ and for *Cremona* the trend away from regarding direct effect as a condition of judicial review in direct actions is praised.⁷¹

The *Biotech* Directive did emerge unscathed from review *vis-à-vis* the CBD, but it was of marked significance that the Court had indicated that the preliminary question of 'invocability' as a review criterion would rarely prove an obstacle for Community Agreements. What better manifestation of this than having the full court assert, in *riposte* to the Council, that the absence of direct effect, understood in individual rights terms, will not stand in the way of the judiciary policing Community compliance with Community Agreements?

Some five years after the *Biotech* ruling, the ECJ's *IATA* ruling provided further evidence that the maximalist approach to treaty enforcement could be applicable in challenges to Community action.⁷² In *IATA* a Community Regulation concerning compensation for passengers in the event of a boarding refusal, cancellation, or long

⁶⁸ *Ibid.*, at para. 54.

⁶⁹ For the narrow and broad readings see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (2008), at 269–270.

⁷⁰ *Lenaerts and Corthaut*, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *ELRev* (2006) 287, at 298.

⁷¹ *Cremona*, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', in X. Xenopoulos (ed.), *FIDE 2006 National Reports* (2006) 319, at 352–353.

⁷² Case C–344/04, *IATA* [2006] ECR I–403.

delay of flights was challenged on the grounds of, *inter alia*, an alleged incompatibility with the Montreal Convention on the Unification of Certain Rules for International Carriage by Air. In a single sentence the Grand Chamber concluded that the provisions invoked 'are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise'.⁷³ This conclusion was not prefaced by any actual analysis of the nature and broad logic of the Convention, nor of the unconditionality or precision of the provisions invoked. Conceptually it was of clear constitutional significance for it represents an approach to Community Agreements which takes as its starting point their capacity to be used as criteria for legality review. The judgment is premised on a clear presumption of invocability such that no reasoned justification, other than passing reference to Article 300(7) and the maxim that provisions of Community Agreements are an integral part of Community law, is actually required. The interpretation of the substantive scope of the Montreal Convention provisions put forward did however preserve the validity of the Regulation.⁷⁴

C *The Intertanko Ruling and the Allure of Judicial Avoidance Techniques*

The *Intertanko* case presented the ECJ with a prime opportunity to demonstrate that its bold approach to treaty enforcement would not be a conveniently one-sided commitment applicable where domestic action was being challenged.⁷⁵ Several shipping organizations challenged the Ship-Source Pollution Directive,⁷⁶ alleging that it provided a stricter standard of liability – serious negligence – for accidental discharges than permitted by the MARPOL Convention of which it was accordingly in breach, and that this also breached the right of innocent passage in UNCLOS. In support of this argument they invoked the unequivocal voice of the former President of the International Tribunal for the Law of the Sea.⁷⁷ The Council, the European Parliament, and four of the intervening Member States argued that UNCLOS did not satisfy the criteria for use as a review criterion of Community action.

The Grand Chamber outlined a twin-pronged test for review *vis-à-vis* international rules in preliminary rulings. The first was that the Community be bound by the relevant rules; and the second that the nature and broad logic of a treaty not preclude review and that its provisions appear unconditional and sufficiently precise. The MARPOL Convention fell at the first hurdle on the grounds, *inter alia*, that there had not been a full transfer of Member States' powers to the Community.

⁷³ *Ibid.*, at para. 39.

⁷⁴ An interpretation which has come in for criticism: Balfour, 'Further Comment on Case C-344/04, The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport, Judgment of the Court (Grand Chamber) of 10 January 2006', 44 *CMLRev* (2007) 555.

⁷⁵ Case C-308/06, *Intertanko* [2008] ECR I-4057.

⁷⁶ European Parliament and Council Directive 2005/35/EC, OJ (2005) L255/11.

⁷⁷ Mensah, 'Sovereign Rights in Legislation of Member States under UNCLOS and MARPOL', the Eighth Cadwallader Memorial Lecture (2005).

Turning to UNCLOS, the ECJ underlined that it binds the Community and forms an integral part of the Community legal order. The assessment which followed concluded that its nature and broad logic precluded validity review. The essence of the reasoning was that UNCLOS does not in principle grant independent rights and freedoms to individuals. Rather it seemed the ECJ was suggesting that the rights and freedoms, as well as obligations, attach to the flag state. It was conceded that some UNCLOS provisions did appear to attach rights to ships. However, it was held not to follow that those rights are thereby conferred on the individuals linked to those ships. Nor did the ECJ consider doubt to be cast on its analysis by the fact that Part XI of UNCLOS involved natural and legal persons in the exploration and use of the sea-bed and ocean floor, since the case at issue did not concern such provisions. It was accordingly held that ‘UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States’.⁷⁸

The most striking aspect of the *Intertanko* ruling is that the language of individual rights has reared its head as a mechanism to preclude review. It was with the establishment of this criterion as the second prong in a two-part test that the GATT had first been rejected as a review criterion for Community law.⁷⁹ Over 35 years on, despite the emergence of a rich body of case law – including with respect to Community Agreements – which dissociated the invocability of Community law from an individual rights conceptualization,⁸⁰ and the individual rights criterion has been read into the exploration of whether the nature and broad logic of a Community Agreement precludes review. It is difficult not to acknowledge the convenience in its resurrection when it is Community legislation being challenged, especially when it is equally difficult to envisage how, were review to have been conducted, a substantive scope interpretation of the UNCLOS provisions could have left the Directive intact.⁸¹ We may well ask whether the seemingly self-evident answer to the second step of the analysis, the actual review which the judgment avoids, is influencing the answer to the first step as to the capacity of the Agreement itself to form a review criterion *vis-à-vis* Community law.

It is surprising then that one respected commentator has asserted that ‘[t]he conclusion that UNCLOS . . . sets out rights and duties among states and is not capable of being applied directly by individuals is clearly correct’.⁸² It may be axiomatic that UNCLOS sets out rights and duties among states, but it does not follow that it is not capable of being applied directly by individuals, much less that this is a clearly correct conclusion. The ECJ opted to resurrect the individual rights criterion; however, it could equally have opted to ignore individual rights and to explore whether the nature or broad logic of UNCLOS precluded review. To resort to the argument that the absence of individual rights is a manifestation of the nature or broad logic of an Agreement precluding review is for the ECJ to endow itself with a safeguard argument which

⁷⁸ *Intertanko*, *supra* note 75, at para. 64.

⁷⁹ Joined Cases 21–24/72, *International Fruit* [1972] ECR 1219.

⁸⁰ See generally Lenaerts and Cortbaut, *supra* note 70.

⁸¹ See however the AG’s attempt, *supra* note 75.

⁸² Denza, ‘A Note on *Intertanko*’, 33 *ELRev* (2008) 870, at 875.

could often be invoked to reject review of Community measures *vis-à-vis* Community Agreements when politically contentious challenges arise. After all, it will commonly be the case that a Community Agreement can be interpreted as not establishing 'rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'. It is essential to probe further and ask whether this is even the right question to ask. For which Agreement establishes rules intended to apply directly and immediately to individuals? And how are we to discover this intention? Are we concerned here with the intention simply of the drafters of the Agreement invoked? And if so how is this to be weighed against the intentions which could be read into Article 300(7) TEC?

Denza suggests that the Advocate General, for whom review was possible *vis-à-vis* UNCLOS, failed 'to distinguish properly between rights . . . given to ships and enforceable by the flag state and rights capable of being relied on by individuals or enterprises before national courts'.⁸³ It is surely because such a distinction would be in marked tension with the extant jurisprudence dissociating invocability and review from individual rights conferral that no such distinction was defended. That the Advocate General was wrong-footed by the ECJ ruling is not surprising considering that the recent *IATA* ruling provided no express support for the re-emergence of the individual rights analysis; indeed, a well-known co-authored piece by a judge of the ECJ relies on *IATA* in explicitly disavowing any link between individual rights and review of Community acts.⁸⁴ And if we look back to the *EDF* case, the language of individual rights did not even rear its head. The direct effect analysis started with the text of the provisions invoked and an assertion of their clarity, precision, and unconditionality. This was then bolstered by reasoning which seemed to amount to the proposition that direct effect could only serve the purpose of an instrument to prevent pollution.

Now UNCLOS is a treaty of astonishing breadth, so it becomes difficult simply to pinpoint a purpose as the ECJ sought to with the Mediterranean Sea Protocol; however, there is a section of this grand Treaty devoted expressly to 'innocent passage in the territorial sea'. Can one not then say that recognition of direct effect – or rather review of Community norms *vis-à-vis* UNCLOS – could serve the purpose only of ensuring innocent passage in the territorial sea? And that the UNCLOS provisions invoked on the right of passage⁸⁵ are clear, precise, and unconditional, and contribute to this purpose? Perhaps this is too narrow a manner in which to construe purpose and does not do justice to the reasoning in the *EDF* judgment. Nonetheless, if we transpose the judicial language employed in *Intertanko*, are we now to believe that the Mediterranean Sea Protocol established 'rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'? Whilst *EDF* shares with *Intertanko* an important trait – a multilateral

⁸³ *Ibid.*, at 875.

⁸⁴ Lenaerts and Corthaut, *supra* note 70, at 299.

⁸⁵ Arts 17, 19, and 211(4).

agreement was at issue⁸⁶ – it is the important distinction – a challenge to Member State rather than Community action – which may explain the contrasting outcomes.

The Council did contend that UNCLOS does not confer individual rights, including controversially resorting to logic employed in the WTO context such as: the absence of reciprocity, i.e. other national courts generally avoid interpreting UNCLOS; and that it has a variety of dispute settlement procedures which confer on contracting states a degree of flexibility. The ECJ, however, was not to be drawn on this issue. And so whilst the outcome of non-review might be viewed as similar to the ECJ's approach to the WTO, the thin reasoning is not. Undoubtedly, had the *Portuguese Textiles* reasoning been employed by analogy, the criticism would have been severe, given the idiosyncratic nature of the WTO dispute settlement system with its express preservation (if only temporarily) of outcomes which do not comply with DSB decisions which would be threatened if the Community Courts became, in effect, WTO courts of first instance. UNCLOS does not operate in this fashion and, as the Advocate General emphasized, it does not establish exclusive interpretive competence on the part of other institutions, nor does it provide its contracting states, in general terms, with flexibility or opportunities to derogate.⁸⁷ The thin reasoning advanced in *Intertanko* therefore constitutes a thoroughly unsatisfactory basis for not engaging with the specific UNCLOS provisions at issue. Given the elaboration of its own recent case law, it is unconvincing for the ECJ to invoke formalistic reasoning which seeks to paint a picture of an inter-state treaty which is not concerned with the protection of individual rights. Rather, it behoves the Court to provide reasoned and credible justification, as it did in the WTO context, as to why the nature of a particular Agreement is such as in principle to preclude review, given that we have seen time and time again the maximalist treaty enforcement logic take hold where Member State action has been challenged.

One important issue which now arises is whether the *Intertanko* ruling excludes other types of UNCLOS litigation. It has been suggested that actions by the Member States and the Community institutions do not appear to be *a priori* excluded.⁸⁸ This is reminiscent of the GATT era debate where many commentators did not view the rejection of individual GATT challenges to Community measures as a bar to annulment actions by the Member States and institutions.⁸⁹ They, of course, were proved wrong by the German challenge to the Community bananas regime which was famously rebuffed by the ECJ.⁹⁰ An alternative outcome would have been difficult to sustain,⁹¹ and we can expect the same result should Member States or the institutions seek to challenge a Community measure for alleged incompatibility with UNCLOS. It may well be, however, that the

⁸⁶ Albeit UNCLOS is a vastly broader Agreement to which few states are not party.

⁸⁷ AG's Opinion, *supra* note 75, at paras 57–58.

⁸⁸ Boelaert-Suominen, 'The European Community, the European Court of Justice and the Law of the Sea', 23 *Int'l J Marine and Coastal L* (2008) 643, at 709.

⁸⁹ A view bolstered by extrajudicial observations from a judge of the ECJ: see Everling, 'The Law of the External Economic Relations of the European Community', in M. Hill *et al.* (eds), *The European Community and GATT* (1986), at 85, 98.

⁹⁰ Case C-280/93, *Germany v. Council* [1994] ECR I-4973.

⁹¹ Eeckhout, *supra* note 32, at 249.

infringement procedure could, as appears to be the case with the WTO,⁹² still be used.⁹³ This might be viewed as leaving Article 300(7) with some role to play *vis-à-vis* UNCLOS, but equally it is likely to generate accusations of double standards.

The key question which now arises is whether the *Intertanko* ruling marks a watershed moment that will shape the future trajectory of Community Agreements litigation. The ruling raises a central issue as to the commitment to this external body of Community law, and that is how the Community Courts will respond to challenges to legislative action where international law compliance considerations have arguably been insufficiently accommodated in the legislative process. Where this occurs we can expect a politically charged scenario whereby the legislative institutions seek to defend their legislative output and where those Member States in the majority, if majority voting applied in the legislative process, will be tempted to offer supporting submissions. This is likely to include, as in *Intertanko*, resorting to that classic of avoidance techniques of calling for rejection of a relevant treaty as a review criterion for Community action. Such a strategy has significant ramifications. De Búrca has recently drawn attention to the 'conventional self-presentation of the EU as an organisation which maintains particular fidelity to international law and institutions',⁹⁴ a general perception fed by legal, political, and judicial pronouncements of the EU and bolstered by academic and popular commentary.⁹⁵ It is this image which the ECJ risks jeopardizing with its emerging case law. The professed fidelity to international law which is at stake should leave the Community institutions with little doubt that the forthcoming judgments pertaining to international law will be scrutinized especially closely by a broad audience.⁹⁶ It might be argued that if the EU is to continue to preach the virtues of compliance with international law,⁹⁷ then it behoves the Community institutions to uphold the image of the EU as 'a virtuous international actor which maintains a distinctive commitment to international law and institutions'.⁹⁸ Immunizing Community action from review *vis-à-vis* Community Agreements, the outcome in

⁹² Based on the fact that successful infringement proceedings were brought against Germany for non-compliance with a Community concluded GATT Agreement: Case C-61/94, *Commission v. Germany* [1996] ECR I-3989.

⁹³ This possibility is arguably confirmed by Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635 and especially by the assertion at para. 121 of jurisdiction to assess Member State compliance with UNCLOS. Thanks go to Marise Cremona for drawing my attention to this point.

⁹⁴ de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', *Jean Monnet Working Paper* (2009), at 57.

⁹⁵ *Ibid.*, at 64.

⁹⁶ In the wake of the recent *Kadi* ruling (Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351) Goldsmith and Posner produced a comment piece entitled 'Does Europe Believe in International Law? Based on the Record, it has no Grounds to Criticize the U.S.', *Wall Street J.*, 25 Nov. 2008.

⁹⁷ Upon the execution of Mr Medellin the EU called on the US to introduce a moratorium on the death penalty and for the federal and state level to take the necessary legislative measures to give effect to ICJ decisions: EU Presidency Declaration 12431/08 Brussels, 11 Aug. 2008.

⁹⁸ The quotation is drawn from de Búrca, *supra* note 94, at 1.

Intertanko which had been sought by the Council and European Parliament, will damage the image of the EU which the Community institutions have been at pains to build.

Political expedience may lead the EU's political institutions to lose sight of these implications in their zeal to protect the product of the frequently arduous supranational legislative process. The ECJ has at its disposal the tools to act as the counterweight to what may be the short-sighted political interests that can occasionally reign; in effect to bolster the EU's much vaunted commitment to international law. By dint of their increasing stature, origins, and a framework within which they operate which propagates a normative commitment to international law, the Community Courts could be viewed as bearing a special onus in contributing to this commitment. In this era of a 'Global Community of Courts',⁹⁹ engaged in a transnational constitutional dialogue, the stakes are particularly high. And the ECJ's contribution in *Intertanko* can be read as offering courts dubious grounds on which to immunize domestic measures from review *vis-à-vis* binding treaty norms.

5 Conclusion

The role of domestic courts in ensuring compliance with treaty law is a subject which has generated growing scholarly attention. The Community Courts have an important part to play in this respect as the expanding treaty-making practice of the Community and the extensive body of case law demonstrate. This article has identified the emergence of a twin-track approach to the treatment of Community Agreements. When invoked in challenges to Member State action the ECJ has all too often adopted the boldest of stances, often in the face of powerful Member State submissions, in a manner which shares a marked parallel with the maximalist treaty enforcement logic that characterises the treatment accorded to 'Community law proper'. Challenges to Community action, although uncommon, have in contrast led to a judicial willingness to acquiesce in the submissions advanced by the Community's political institutions in order to shield Community action from review. This stance was not only appropriate in the case of the WTO but was also the subject of convincing judicial articulation grounded in the idiosyncratic nature of the DSU. The recent treatment accorded to UNCLOS in *Intertanko* is an altogether different matter, for here patently unsatisfactory judicial reasoning was advanced to preclude review. It is not unreasonable to suggest that the use of avoidance techniques by a judicial actor with such a high profile, in an era of increasing judicial dialogue and borrowing, could contribute to treaty enforcement reluctance on the part of domestic courts. With the entry into force of the Lisbon Treaty, Article 3(5) TEU now reads: 'the Union . . . shall contribute to . . . the strict observance and the development of international law'. This supplies litigants with a potentially powerful additional argument to invoke when faced with Community action which is dubious from the perspective of its compliance with Community Agreements. And the Community Courts have been supplied with a powerful textual anchor upon which to ground a bolder stance where Community action is challenged.

⁹⁹ Slaughter, 'A Global Community of Courts', 44 *Harvard Int'l LJ* (2003) 191.