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Academy of European Law

Florence

Directed by
Antonio Cassese, Renaud Dehousse and Joseph H. H. Weiler

Collected Courses of the Academy of European Law

Recueil des cours de l'Académie de droit européen

1993

European Community Law

Vol. IV Book 1

European University Institute, Florence
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List of Principal Abbreviations
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ABl.	Amtsblatt
AC	Appeal Cases
ACP	Africa-Carribean-Pacific States; Pays d'Afrique, des Caraïbes et du Pacifique (Lomé Conventions)
Ad.L.Rev.	Administrative Law Review
AEL	*Collected Courses of the Academy of European Law*
A.E.L.E.	Association européenne de libre échange
AETR	Accord européen relatif au travail des équipages des véhicules effectuant des transports internationaux par route
AFDI	*Annuaire français de droit international*
A.I.E.A.	Agence internationale de l'énergie atomique
AJCL	*American Journal of Comparative Law*
AJIL	*American Journal of International Law*
All ER	All England Law Reports
Annuaire	*Annuaire* de la CEDH
Appl.	Application (European Commission of Human Rights)
ArchVR	*Archiv des Völkerrechts*
ASDI	*Annuaire suisse de droit international*
ASE	Agence spatiale européenne
ASEAN	Association of South-East Asian Nations
ATF	Recueil officiel des arrêts du Tribunal Fédéral Suisse
AYBIL	*Australian Yearbook of International Law*
BayVerfGH	Bayerischer Verfassungsgerichtshof
BEI	Banque européenne d'investissement
BERD	Banque européenne pour la reconstruction et le développement
BFH	Bundesfinanzhof
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BIRD	Banque internationale pour la reconstruction et le développement
BISD	Basic Instruments and Selected Documents of the GATT
Bull.EC Suppl.	*Bulletin of the European Communities, Supplement*
BVerfG (E)	Bundesverfassungsgericht (Collected Decisions)
BVerwG (E)	Bundesverwaltungsgericht (Collected Decisions)
BYbIL	*British Yearbook of International Law*
Cal. W. Int'l L.J.	*California Western International Law Journal*
Cambridge L.J.	*The Cambridge Law Journal*

Can. Y.B. Int'l L.	*Canadian Yearbook of International Law*
CCT	Common Customs Tariff
CE	Communautés européennes
CDE	*Cahiers de droit européen*
CDDH	Comité directeur des droits de l'homme
CECA	Communauté européenne du charbon et de l'acier
CEDH	Convention européenne des droits de l'homme
CEE	Communauté économique européenne
CEEA	Communauté européenne de l'énergie atomique
CES	Comité économique et social
CFCs	Chlorofluorocarbons
CIJ Rec.	Cour international de Justice Recueil
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJCE Rec.	Cour de Justice des Communautés européennes Recueil
CMLR	Common Market Law Reports
CML Rev.	*Common Market Law Review*
Colum.J.Trans.L.	*Columbia Journal of Transnational Law*
Colum. L. Rev.	*Columbia Law Review*
Com. Doc.	Document de la Commission européenne
Com.EDH	Commission européenne des droits de l'homme
Conseil Doc.	Document du Conseil européen
Corte Cost.	Corte Costituzionale
C.P.E.	Coopération politique européenne
CSCE	Conference on Security and Cooperation in Europe; Conférence sur la sécurité et la coopération en Europe
DB	*Der Betrieb*
Dec. E.P.	Declaration of European Parliament
Debs. PE	Débats du parlement européen
Dec.	Decision; décision
DHMM	Documents du Comité directeur des Mass Media
Dir.	Directive; directive
DÖV	*Die Öffentliche Verwaltung*
DR	Decisions and Reports of the European Commission of Human Rights
DS	Recueil Dalloz Sirey
DSU	Dispute Settlement Understanding (Annex 2 of the WTO Agreement)
DVBl.	*Deutsches Verwaltungsblatt*
EAEC/Euratom	European Atomic Energy Community
EBRD	The European Bank for Reconstruction and Development
EBU	European Broadcasting Union
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	*European Competition Law Review*

ECR	European Court Reports (Reports of the Court of Justice of the European Communities, Luxembourg)
ECSC	European Coal and Steel Community
ECOSOC	Economic and Social Council; Conseil économique et social
ECU	European Currency Unit; Unité monétaire européenne
EEA	European Economic Area
EEC	European Economic Community (Treaty)
EEE	Espace économique européen
EFTA	European Free Trade Association
EG	Europäische Gemeinschaft
EGMR	Europäischer Gerichtshof für Menschenrechte
EHRR	European Human Rights Reports
EIB	European Investment Bank
EIRR	*European Industrial Relations Review*
EJIL	*European Journal of International Law*
EKMR	Europäische Kommission für Menschenrechte
EL Rev.	*European Law Review*
EMIT Group	GATT Working Group on Environmental Measures and International Trade
EMRK	Europäische Menschenrechtskonvention
EMS	European Monetary System
EP	European Parliament
EPC	European Political Cooperation
EP Doc.	European Parliament Document
EP Debs	European Parliament Debates
EPIL	Encyclopedia of Public International Law
ESA	European Space Agency
EuGRZ	*Europäische Grundrechte Zeitschrift*
ERTA	European Road Transport Agreement
EUI	European University Institute
Eur. Bus. L. Rev.	*European Business Law Review*
Eur. Comm. H.R.	European Commission of Human Rights
Eur. Court H.R.	European Court of Human Rights
EuR	*Europarecht*
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
EWS	*Europäisches Wirtschafts- und Steuerrecht*
FAO	Food and Agriculture Organization
F.M.I.	Fond monétaire international
FIDE	Fédération internationale pour le Droit européen
Fordham Int'l. L.J.	*Fordham International Law Journal*
Foro it.	*Foro italiano*
Foro pad.	*Foro padano*
FRG	Federal Republic of Germany
Fs.	Festschrift
G.A. Res.	General Assembly (of the United Nations) Resolution; Résolution de l'Assemblée générale des Nations unies
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade; Accord général sur les tarifs douaniers et le commerce
GATT 1947	GATT concluded in 1947
GATT 1994	GATT incorporated into the 1994 Agreement on the WTO
Ga.J.Int'l. & Comp.L.	*Georgia Journal of International and Comparative Law*
Gazz Uff	Gazzetta Ufficiale
Giur. Cost.	Giurisprudenza Costituzionale
GNP	Gross national product
GRUR Int.	*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil*
GSP	General System of Preferences
GYIL	*German Yearbook of International Law*
Harv. Int'l L.J.	*Harvard International Law Journal*
Harv. L. Rev.	*Harvard Law Review*
HCR	Haut-Commissaire des Nations unies pour les réfugiés
HRLJ	*Human Rights Law Journal*
HR Rev.	*Human Rights Review*
IAEA	International Atomic Energy Agency
IAEO	International Atomic Energy Organization
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICJ Reports	International Court of Justice Reports
ICLQ	*International and Comparative Law Quarterly*
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ILO	International Labour Organization
IMF	International Monetary Fund
ITU	International Telecommunications Union
IUE	Institut universitaire européen
IYIL	*Italian Yearbook of International Law*
J. Common Mkt. Stud.	*Journal of Common Market Studies*
JCP	*Jurisclasseur périodique*
JDI	*Journal de droit international*
JOCE	Journal officiel de la Communauté européenne
JORF	Journal officiel de la République française
Journal of the ICJ	*Journal of the International Commission of Jurists*
JWT	*Journal of World Trade*
Law.Soc.Gaz.	*Law Society Gazette*
LDC	Less developed country
LIEI	*Legal Issues of European Integration*
LLDC	Least developed country
LQR	*Law Quarterly Review*
MEAs	Multilateral Environmental Agreements
MEP	Member of European Parliament
MFN	Most Favored Nation
Mich. L. Rev.	*Michigan Law Review*

Mich.J.Int'l L.	*Michigan Journal of International Law*
MLR	*Modern Law Review*
MPE	Membre du Parlement européen
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NILR	*Netherlands International Law Review*
NJ	*Nederlandse Jurisprudentie*
NJW	*Neue Juristische Wochenschrift*
NLJ	*New Law Journal*
NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
NYIL	*Netherlands Yearbook of International Law*
OAS	Organization of American States
OAU	Organization of African Unity
OCDE	Organisation de coopération et de développement économique
O.E.A.	Organisation des Etats américains
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal of the European Community
ÖJZ	*Österreichische Juristen-Zeitung*
O.L.P.	Organisation pour la libération de la Palestine
ONG	Organisation non-gouvernementale
O.N.U.	Organisation des Nations Unies
O.T.A.N.	Organisation du traité de l'Atlantique Nord
O.U.A.	Organisation de l'unité africaine
PE Doc.	Documents du Parlement européen
PCIJ Reports	Permanent Court of International Justice Reports
PLO	Palestine Liberation Organization
PPM	Process and Production Method
P.V.D.	Pays en voie de développement
QB	Queen's Bench (U.K. Law Reports)
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
RAE	*Revue des affaires européennes*
RBDI	*Revue belge de droit international*
RdC	*Recueil des Cours de l'Académie de droit international de la Haye*
RDE	*Rivista di diritto europeo*
RDH/HRJ	*Revue des droits de l'homme/Human Rights Journal*
RDI	*Rivista di diritto internazionale*
Reg.	Regulation; règlement
Res.	Resolution; résolution
R.F.A.	République fédérale d'Allemagne
RGDIP	*Revue générale de droit international public*
RHDI	*Revue hellénique de droit international*
R.I.C.R.	*Revue internationale de la Croix-Rouge*
RIDC	*Revue internationale de droit comparé*

R.I.S.	*Relations internationales et stratégiques*
RIW	*Recht der Internationalen Wirtschaft*
RMC	*Revue du marché commun*
RMT	*Rechtsgeleerd Magazjin Themis*
RSDIE	*Revue suisse de droit international et de droit européen*
RTDE	*Revue trimestrielle de droit européen*
R.T.D.H.	*Revue trimestrielle des droits de l'homme*
RUDH	*Révue universelle des droits de l'homme*
SEA	Single European Act
SEC	Securities and Exchange Commission, Decisions and Reports
Série A	Publication de la Com.EDH: Arrêts et décisions
Série B	Publication de la Com.EDH: Mémoires, plaidoiries, documents
SEW	*Social-Economische Wetgeving*
S.M.E.	Système monétaire européen
SPS	Sanitary and Phytosanitary Measures
Stb	Staatsblad van het koninkrijk der Nederland
Syr.J.Int.L. and Comm.	*Syracuse Journal of International Law and Commerce*
TBT	Technical Barriers to Trade
TIAS	Treaties and International Agreements Series
TPRM	Trade Policy Review Mechanism
TREMS	Trade Related Environmental Measures
TRIPS	Trade Related Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development 1992
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization; Organisation des Nations Unies pour l'éducation, la science et la culture
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
U.N.Jur.Y.B.	*United Nations Juridical Yearbook*
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNY	United Nations Yearbook
U. Pa. L. Rev.	*University of Pennsylvania Law Review*
US, USA	United States of America
U.S.C.A.	United States Courts of Appeals
USSR	Union of Sovereign Socialist Republics
Va.J.Int'l L.	*Virginia Journal of International Law*
Vand.J.Trans.L.	*Vanderbilt Journal of Transnational Law*
VN	*Vereinte Nationen*
WEU	Western European Union
WHO	World Health Organization

WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports
WTO	World Trade Organization
Yale J. Int'l L.	*The Yale Journal of International Law*
WuW	*Wirtschaft und Wettbewerb*
YB	Yearbook of the European Convention on Human Rights
YEL	*Yearbook of European Law*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZERP	Zentrum für Europäische Rechtspolitik
ZfZ	*Zeitschrift für Zölle und Verbrauchssteuern*
ZHR	*Zeitschrift für das gesamte Handelsrecht*
ZRP	*Zeitschrift für Rechtspolitik*

Après Maastricht: Une relance de l'Europe

CONFERENCE INAUGURALE DE M. EMILE NOEL

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Biographie

Né le 17 novembre 1922 à Constantinople (Turquie), de nationalité française, M. Emile Noël est ancien élève de l'Ecole normale supérieure de Paris (section sciences) et licencié en sciences physiques et mathématiques de l'université de Paris. Il est docteur *honoris causa* de l'université nationale d'Irlande, des universités d'Edimbourg, Urbino, Marmara (Turquie), Kyoto et Braga (Portugal). Secrétaire de la Commission des Affaires générales de l'Assemblée consultative du Conseil de l'Europe de 1950 à 1952, M. Noël a été, de 1952 à 1954, directeur du secrétariat de la commission constitutionnelle de l'Assemblée *ad hoc*, chargée d'élaborer un projet de traité de Communauté politique européenne. De 1954 à 1956, M. Noël a été le chef de cabinet de M. Guy Mollet, alors président de l'Assemblée consultative du Conseil de l'Europe, et en 1956-1957, chef de cabinet puis directeur adjoint du cabinet de M. Guy Mollet, président du Conseil en France. En 1958, il a été nommé secrétaire exécutif de la Commission de la Communauté économique européenne. De 1967 jusqu'en septembre 1987, il a été secrétaire général de la Commission des Communautés européennes. Il a été président de l'Institut universitaire européen de 1987 à 1993. M. Noël est professeur honoraire de l'Université libre de Bruxelles, de l'université Fudan à Shanghai et de l'université du Sichuan (République populaire de Chine). Il est secrétaire général honoraire de la Commission des Communautés européennes et président honoraire de l'Institut universitaire européen.

Principales publications

– «Comment fonctionnent les institutions des Communautés européennes», «Working Together», (Direction de l'Information des Communautés européennes) (1963 et diverses rééditions).

– *La fusion des institutions et la fusion des Communautés européennes* (Editions «Université de Nancy») (1965).

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Après Maastricht: Une relance de l'Europe (Discours prononcé le 28 juin 1993)

1. Je suis heureux de vous accueillir à l'Institut universitaire européen, pour cette quatrième session de l'Académie de droit européen. La consolidation de l'Académie et l'extension progressive de ses activités sont un grand encouragement pour l'Institut, et particulièrement pour les professeurs Cassese et Weiler, directeurs de l'Académie. Vous avez été sélectionnés parmi un nombre croissant de candidats, et une deuxième session de l'Académie, destinée aux juristes – universitaires et praticiens – des pays d'Europe centrale et orientale et de l'ancienne URSS se tiendra à l'automne prochain.

La coutume s'est instituée d'ouvrir la session par une communication sur l'«état de la Communauté», qui contribue à situer dans la réalité quotidienne les travaux sur le droit communautaire et ses développements. Cette année encore, le Traité de Maastricht sur l'Union européenne a été le fait dominant de l'actualité communautaire, mais, cette fois-ci, en tant qu'élément d'incertitude, voire de remise en cause.

2. La Communauté est en état de morosité et de langueur depuis de nombreux mois. Maastricht n'en est pas la seule cause, mais il a constamment servi d'élément de référence dans l'émergence ou la conjugaison des difficultés qui se sont accumulées. Les événements du mois dernier – l'approbation du peuple danois, lors du deuxième référendum, le vote positif de la Chambre des Communes, en troisième lecture – rendent aujourd'hui probable la ratification du Traité, lorsque les interminables procédures engagées à Londres et les autres procédures judiciaires seront achevées. Les conséquences négatives d'une année d'hésitation et d'atermoiements n'en seront pas effacées pour autant.

Le souci de ne pas gêner les processus référendaire ou parlementaire, à Copenhague et à Londres, a progressivement inhibé les institutions, y compris la Commission qui, depuis des mois, évite de prendre des initiatives tant soit peu audacieuses ou des positions novatrices (donc controversées). Le Parlement lui-même s'est largement cantonné dans le travail législatif courant, même s'il a en même temps critiqué la Commission pour son excès de prudence... Une attitude plus dynamique redeviendra bientôt possible, mais on ne sous-estimera pas les conséquences négatives de ce trop long silence sur l'opinion publique européenne.

3. La Communauté et ses Etats membres connaissent une situation de crise économique, la plus sévère depuis une vingtaine d'années: récession,

croissance du chômage, instabilité monétaire. Les institutions de la Communauté connaissent également une crise de confiance, la plus sérieuse depuis l'entrée en vigueur des Traités de Rome: les controverses sur le Traité de Maastricht ont fait éclater le consensus apparent sur l'intégration européenne, tandis que le système communautaire apparaissait (à tort parfois) incapable de répondre aux défis politiques (Yougoslavie, Europe centrale et orientale, ex-URSS) et de faire face à la crise économique et sociale.

Il vaut la peine d'examiner plus en détail ces différents éléments et les possibilités de réponse des Institutions européennes au cours des mois à venir. L'entrée en vigueur du Traité de Maastricht, après une trop longue attente, ne suffira manifestement pas pour éveiller la «belle Europe au bois dormant»... Des initiatives nouvelles, conjuguées avec sa mise en œuvre, permettront-elles une relance? Essayons d'entreprendre ensemble un tour d'horizon...

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4. Le référendum danois de juin 1992 a servi de détonnateur. Ses répercussions, directes et indirectes, ont été sans commune mesure avec l'importance même de l'événement – quelques dizaines de milliers de voix qui manquaient pour l'approbation du Traité. En décidant immédiatement de lancer un autre référendum en France, le Président Mitterrand a donné à l'événement danois la caisse de résonnance qui lui manquait. Le Premier ministre britannique devait faire chorus en liant la ratification britannique à celle du Danemark. Le projet d'union économique et monétaire, élément principal du Traité sur l'union européenne, cessait d'être un point d'ancrage pour devenir un élément d'incertitude. Sa remise en cause a servi de révélateur aux tensions qui existaient déjà, monétaires, économiques et sociales.

Faut-il rappeler ici le «septembre noir» de l'automne dernier, la livre sterling et la lire italienne sortant du mécanisme des taux de change du système monétaire européen, les dévaluations de la peseta et de l'escudo, l'attaque contre le franc français et le soutien donné à celui-ci par la *Bundesbank* ainsi que les dévaluations ultérieures qui se sont succédées jusqu'à ces derniers mois (dévaluation de la livre irlandaise, nouvelles dévaluations de la peseta et de l'escudo). Je ne parle ici que de ce qui a concerné les Douze. Non seulement le système monétaire européen a été durement secoué, mais la vraisemblance d'une union monétaire, même à terme, a été atteinte et les efforts vers une plus grande convergence des politiques économiques ont pu paraître abandonnés.

5. L'Allemagne et l'Europe avec elle ne finissent pas de payer le prix de l'unification allemande. La Communauté s'était contentée d'un appui symbolique à l'effort d'intégration et de reconstruction de l'Allemagne orientale, laissant (peut-être avec un «lâche soulagement») à la seule Allemagne le soin

d'en concevoir la méthode et d'en supporter la charge. Coûteuse illusion! La baisse d'activité économique des grands pays industrialisés frappe l'Europe plus fortement que les Etats-Unis et le Japon: récession en Allemagne, récession chez ses voisins et partenaires.

Les tensions monétaires ont accentué encore cette tendance dans tous les pays décidés à donner priorité au moyen et au long terme, c'est-à-dire à continuer de contenir l'inflation et de privilégier la solidité de leur monnaie. La baisse des taux d'intérêt allemands, aussitôt répercutée – et au-delà – dans les autres pays, n'a pas suffi jusqu'ici à provoquer une reprise.

6. La persistance et la croissance du chômage mettent en question le modèle économique et le modèle social européen. A taux d'activité équivalents, les pays européens créent bien moins d'emplois que les Etats-Unis ou le Japon, et ils continuent de privilégier la productivité par rapport à l'emploi, y compris dans les services, même là où il n'existe pas de concurrence internationale significative. Sans parler de *dumping* social, le fait qu'à quelques kilomètres de distance coexistent une zone de hauts salaires conjugués avec une large protection sociale et une zone (l'Europe centrale et orientale, l'ex-Union soviétique) où les coûts salariaux sont jusqu'à dix fois moins élevés provoque des transformations qui ne peuvent que s'accélérer: délocalisation d'activités dans ces pays voisins, qui disposent d'une main-d'œuvre hautement qualifiée et peu payée (situation souvent aggravée par des rapports de change artificiels), importations à bas prix qui perturbent des secteurs économiques fragiles. Ces mêmes phénomènes se reproduisent, à plus grande échelle parfois, dans les rapports avec les pays d'Asie qui sortent du sous-développement, Chine, Corée, Sud-Est asiatique. L'Europe prend à peine conscience de ce bouleversement et ne lui a pas trouvé de réponse jusqu'ici.

7. La poursuite des combats dans l'ex-Yougoslavie (et particulièrement en Bosnie) a dramatiquement affaibli la crédibilité politique de la Communauté. Celle-ci s'était engagée (au plus haut niveau, celui des chefs d'Etat ou de gouvernement) en juin 1991, dans la crise yougoslave, sans préparation ni véritable entente entre ses membres sur la politique à suivre. Les reconnaissances diplomatiques précipitées et en ordre dispersé et les atermoiements sur l'action à entreprendre en ont été la conséquence. L'ampleur de l'effort humanitaire de la Communauté et des Douze n'a pas suffi à effacer ce sentiment d'échec. Il faut en même temps reconnaître que ni les Douze ni la communauté internationale ne disposent de moyens adaptés aux réalités du drame de l'ex-Yougoslavie, guerre civile artificiellement transformée en conflit international, qui se déroule dans une zone surarmée, du fait de la politique de défense territoriale si longtemps suivie par les autorités yougoslaves en raison de la menace soviétique.

8. La prudence ou plutôt les hésitations communautaires se manifestent aussi dans les rapports internationaux. La plus grande partie des accords controversés de Blair House, entre les Etats-Unis et la Commission euro-

péenne sur les échanges agricoles, est encore en suspens plus de sept mois après. Seules ont été approuvées les dispositions qui réglaient un contentieux sur les oléagineux, où la Communauté avait été condamnée au GATT. On ne peut exclure le risque d'une crise ouverte entre la France et ses partenaires.

Avec les pays voisins d'Europe centrale et orientale, la Communauté n'a pas su jusqu'ici définir une politique cohérente. En associant la générosité dans les déclarations d'intention et dans les accords globaux à des mesures restrictives sur les principaux produits exportables de ces pays (produits agricoles, acier, textiles) elle a suscité des frustrations multiples, des insatisfactions et des mécontentements, que les principales autorités politiques ne cherchent plus à dissimuler. Certes, on ne peut nier les difficultés que plusieurs secteurs économiques connaissent chez les Douze, mais une approche plus claire et plus directe aurait été mieux comprise, combinant l'ouverture des marchés et des engagements précis – et réellement contrôlés – en matière de prix, de qualité voire de quantités des produits exportés.

9. Les négociations d'élargissement, engagées en plein marasme communautaire avec l'Autriche, la Finlande, la Norvège et la Suède, ne contribuent pas à clarifier cette situation. Ces pays satisfont pleinement aux critères politiques et économiques de l'adhésion (régime démocratique, respect des droits de l'homme, économie de marché) et certains d'eux sont plus à même de participer à l'union monétaire que plusieurs des Douze. Toutefois, le refus de prendre jusqu'ici en compte les conséquences d'un tel élargissement sur le fonctionnement des institutions et leur capacité de décision affaiblit la confiance dans l'avenir du système communautaire. Quelques-uns des milieux politiques des Douze ne dissimulent pas leur espoir qu'un élargissement rapide – aux quatre candidats actuels, puis à d'autres – pourra freiner les développements politiques et institutionnels de la Communauté au-delà du seul marché intérieur.

La Communauté continue d'ailleurs de reconnaître la vocation à l'adhésion de nouveaux pays. Elle vient de le faire au Conseil européen de Copenhague pour les six pays d'Europe centrale et orientale avec lesquels elle a déjà conclu ou elle s'apprête à conclure des accords d'association. Par contre, les Douze ont délibérément évité toute discussion approfondie entre eux sur ce que pourrait être le type d'organisation et le modèle institutionnel acceptables pour eux et dans lequel vingt ou vingt-cinq pays européens pourraient se retrouver pour mener des politiques et des actions cohérentes et efficaces. Nul ne conteste que des institutions qui ont été conçues pour six pays et qui fonctionnent difficilement à douze connaîtront freinage ou paralysie si leurs structures et leurs règles de fonctionnement sont simplement transposées de façon arithmétique à seize, vingt ou davantage. Nul ne conteste aussi que le système fortement centralisé des Douze (malgré les incantations sur la subsidiarité...) ne conviendrait absolument pas à un ensemble aussi hétérogène que la plus grande Europe. On feint également d'ignorer qu'il sera tout

à fait irréaliste de laisser nos voisins d'Europe centrale et orientale attendre les dix ou quinze années qui leur seraient nécessaires pour satisfaire aux critères d'adhésion, si ceux-ci étaient pris au sérieux. Les négociateurs du Traité de Maastricht ont délibérément voulu ignorer un élargissement imminent, mais celui-ci n'attendra pas.

10. Si préoccupante que soit la situation présente, elle comporte aussi des éléments positifs qu'il ne faut pas négliger, et qui permettent d'escompter un redressement ultérieur. Avant tout, le marché intérieur a été effectivement réalisé à la date prévue, pour l'essentiel, en ce qui concerne les marchandises, les services et les capitaux et son fonctionnement est satisfaisant. Seule, la libre circulation des personnes, qui dépend d'accords intergouvernementaux complexes, n'est encore que partielle. Le système monétaire européen a résisté aux chocs qu'il a subis. La Grande-Bretagne n'a pas été suivie dans ses demandes de le remettre en cause et les ministres des Finances, lors de leur récente réunion de Kolding, ont confirmé leur confiance en ses structures et son fonctionnement.

La Communauté a adopté, au Conseil européen d'Edimbourg, une «initiative européenne de croissance», certes d'ampleur trop modeste, mais qui est fondée sur des idées nouvelles, et vise des interventions plus ciblées et dynamiques que par le passé. L'ampleur même de la crise a conduit plusieurs des Douze à adopter des dispositions de grande ampleur, devant lesquelles ils hésitaient auparavant. L'exemple de l'Italie est éloquent. Depuis septembre dernier, l'Italie a pris un ensemble de mesures d'assainissement budgétaire, de lutte contre la fraude fiscale et de réformes économiques dont la nécessité n'est pas contestée, mais qu'aucun gouvernement n'avait pu ou voulu faire aboutir jusqu'ici. L'Italie sera bientôt, après le règlement de ses problèmes politiques, bien mieux préparée à l'union économique et monétaire qu'avant le «septembre noir».

Le Conseil européen de Copenhague a permis d'engager une réflexion en profondeur, entre chefs de gouvernements, sur la situation économique et sur l'emploi. Un renforcement de l'initiative de croissance est déjà acquis et la voie est ouverte pour des décisions à une prochaine session. Le même Conseil européen a clarifié – au moins partiellement – les intentions de la Communauté à l'égard de ses voisins d'Europe centrale et orientale: vocation à l'adhésion, création d'un espace de coopération politique, accroissement des possibilités d'accès au marché communautaire. Espérons que, sur ce dernier point, l'«intendance suivra», c'est-à-dire que les experts traduiront bien en mesures concrètes les orientations générales – et généreuses – du Conseil européen.

Il faut enfin signaler les récentes propositions françaises pour la convocation d'une «conférence sur la stabilité en Europe» afin d'aboutir à des accords qui garantiraient les droits des minorités et le respect des frontières

(après d'éventuels ajustements par accord mutuel). Peut-être cela aidera-t-il à prévenir, à l'avenir, des déchirements analogues à ceux de l'ex-Yougoslavie.

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11. Malgré ces correctifs, le paysage communautaire reste passablement désolé. La Communauté a besoin d'une relance. L'entrée en vigueur du Traité de Maastricht en donnera l'occasion, même si, à elle seule, elle ne suffira pas à provoquer le sursaut nécessaire. Le Traité de Maastricht a été littéralement usé par les reports successifs, les interminables controverses et les dérogations octroyées à deux pays, lesquelles ont (à tort) affaibli la crédibilité des engagements pris par les dix autres.

La Commission s'est engagée devant le Parlement à présenter, après la ratification, un programme de relance. Plusieurs chefs de gouvernement préconisent que se tienne alors une session extraordinaire du Conseil européen et la prochaine Présidence belge se déclare prête à la convoquer. Cette session extraordinaire devrait être l'occasion d'étudier le programme de relance et de prendre les premières décisions. Le programme devrait donner des réponses à nombre des déficiences que nous avons énumérées.

12. C'est dire que le contenu de la relance sera d'abord économique et social. A Copenhague, le Président Delors a présenté un vaste programme pour accroître la compétitivité de la Communauté, contribuer à accroître l'activité économique (par la mobilisation d'importants moyens sur les investissements d'infrastructures) et relancer l'emploi, par le renforcement des activités de service et l'allégement des charges qui alourdissent le coût du travail. Le Conseil européen extraordinaire de l'automne devrait conduire à de premières décisions sur un tel programme, dont l'ampleur est comparable à celle du projet du grand marché intérieur, qui avait permis un nouveau départ de la Communauté en 1985.

La relance devra être aussi monétaire. Il est essentiel que, malgré les retards de la ratification, les échéances du Traité de Maastricht soient respectées, et d'abord, la première d'entre elles, le passage à la deuxième étape de l'union économique et monétaire le 1er janvier 1994 et, à cette date, la création de l'Institut monétaire européen.

La date du 1er janvier 1994 est fixée de manière catégorique dans le Traité, sans aucune condition préalable ni procédure de modification. C'est dire que la reporter ébranlerait l'ensemble du calendrier. Par contre, un passage à la deuxième étape à la date convenue aurait aujourd'hui une valeur politique et symbolique bien supérieure à celle des mesures qu'il implique, la valeur d'un nouvel engagement vers l'union monétaire. Nombre des gouvernements et la Commission sont dès à présent favorables au strict respect du calendrier. A la même date devrait être institué l'Institut monétaire européen, structure plus forte que l'actuel Comité des gouverneurs des banques

centrales, qui sera appelé à préparer les décisions sur le passage à l'union monétaire et la mise en place de la Banque centrale européenne. Espérons que cette avancée politique majeure ne sera pas gâtée par des querelles subalternes sur le siège de l'Institut monétaire...

C'est à partir du passage à la deuxième étape que l'initiative monétaire peut être prise. Elle devrait être fondée sur le Traité de Maastricht et la volonté de consolider le marché unique, et elle serait à décider soit par les Dix (la Grande-Bretagne et le Danemark s'excluant d'eux-mêmes) soit par un «noyau dur» des Dix. Ce serait donc le *moment de vérité*, où les plus engagés se sépareraient des sceptiques.

Quel peut être son contenu? Au risque de simplifier, je viserai une deuxième étape lourde, musclée, par l'*anticipation* de mesures prévues à échéance plus lointaine ou même lors de la troisième étape: resserrement des marges de fluctuation, renforcement des engagements de soutien mutuel, extension du rôle de l'écu, par exemple.

Combinée avec le programme économique et social, l'initiative monétaire assurerait un développement équilibré de l'union *économique* et monétaire pendant la dernière étape.

13. Le programme de relance devrait aussi avoir un contenu politique et institutionnel. Il est temps de lever le tabou qui, depuis le Conseil européen de Lisbonne, interdit de parler des conséquences institutionnelles de l'élargissement, y compris de celui qui est en cours pour quatre pays. Une simple transposition arithmétique des dispositions actuelles affaiblirait gravement la Communauté. Les quatre pays candidats et leurs opinions publiques et parlementaires doivent savoir ce que seront les Institutions auxquelles ils vont participer. Attendre leur entrée effective pour convoquer (en 1996) une nouvelle conférence inter-gouvernementale reviendrait à abuser délibérément l'opinion sur ce qu'il sera alors possible de faire. Comment imaginer que des pays qui viendraient d'obtenir (difficilement pour certains) l'accord de leur Parlement ou de leurs citoyens sur l'adhésion à un traité pourraient accepter de le modifier substantiellement un an après?

Il serait possible de s'inspirer de la méthode suivie pour la négociation de l'Acte unique européen. L'Espagne et le Portugal, qui n'étaient pas encore membres de la Communauté (mais qui, il est vrai, avaient déjà signé les Traités d'adhésion) ont été invités, comme observateurs, à la Conférence intergouvernementale de 1985 et, en fait, ont participé pleinement à la négociation de l'Acte unique. Il s'agirait ici d'organiser, à côté des négociations d'élargissement, une conférence sur la réforme des Institutions dans la perspective de l'élargissement et d'y associer les Quatre, aux côtés des Douze.

Le Parlement a fréquemment annoncé qu'il n'approuverait pas les Traités d'adhésion s'ils n'étaient pas conjugués avec un renforcement des Institutions. C'est de sa part une preuve de lucidité, sinon de réalisme. Serait-il en

effet capable de résister à la pression politique qui s'exercera sur lui pour qu'il approuve des Traités d'adhésion une fois ceux-ci conclus? Il serait plus efficace que l'exigence institutionnelle soit reprise, dès cet automne, par quelques-uns des gouvernements et par la Commission.

14. Il semble possible d'utiliser encore à Seize le modèle communautaire présent. Les changements pourraient se limiter à l'assouplir les règles de vote dans le Conseil (quasi-élimination de l'unanimité), à revoir la structure de la Commission (moins de membres, renforcement de son caractère politique) et peut-être aussi celle du Parlement et à renforcer la position du Parlement (extension de la co-décision et allégement des procédures). Par contre, dans la perspective d'une extension à l'Europe centrale et orientale, c'est la nature même du modèle qu'il faudra revoir. Le système uniforme et centralisé de la Communauté ne peut convenir pour couvrir des situations aussi différentes, politiquement et économiquement, que celles des Douze (ou des Seize), de pays qui redécouvrent la démocratie et progressent lentement vers l'économie de marché, et des pays de la Méditerranée dès à présent candidats. La différenciation des engagements et des structures, à partir d'un acquis commun (le marché intérieur?) et l'existence d'un groupe davantage préparé à aller de l'avant sont probablement des éléments clés dans une recherche qui devrait être entreprise dès maintenant.

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La Communauté est aujourd'hui au creux de la vague, et elle fait face à une désaffectation d'autant plus grave que de larges secteurs de l'opinion publique sont devenus à la fois plus conscients de son existence et plus critiques à son égard. C'est la conséquence d'une inaction forcée, mais cela permet aussi d'espérer une remontée vigoureuse à la suite d'initiatives audacieuses et de décisions concrètes. Comme mot d'ordre pour les tout prochains mois, je proposerais de paraphraser l'appel fameux de Danton: «De l'audace, encore de l'audace, toujours de l'audace et l'Europe est sauvée».

La contribution de la Cour de justice à l'édification de l'ordre juridique communautaire

par

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Biographie et publications principales

Robert Kovar est né à Belfort le 17 mai 1935. Après des études de droit à la Faculté de Strasbourg et à l'Institut d'études politiques, puis à la Faculté de droit de Paris, il est assistant dans cette faculté de 1959 à 1961. En 1962 il est docteur en droit avec une thèse consacrée au *Pouvoir réglementaire de la CECA*. Nommé chargé de cours à la Faculté de Clermont-Ferrand au terme de son service militaire, il est reçu en 1964 au concours d'agrégation de droit public. Professeur à la Faculté de droit de Nancy de 1965 à 1970, il dirige le département juridique du Centre européen universitaire. De 1968 à 1969 il est vice-président de l'Assemblée de l'Université de Nancy II.

A partir de 1970, Robert Kovar est professeur de droit européen à la Faculté de droit de l'Université Robert Schuman de Strasbourg et à l'Institut d'études politiques. Directeur-adjoint de l'Institut d'études politiques il est élu en 1978 directeur de l'Institut européen d'études commerciales supérieures de l'université, puis président de l'université en 1981, fonction qu'il occupe jusqu'en 1983.

De 1980 à 1992 Robert Kovar est professeur au Collège d'Europe de Bruges, assumant la direction de sa dominante des études juridiques durant deux ans avant son élection à la présidence de l'Université Robert Schuman.

Il a donné des cours aux universités autonomes de Barcelone et de Madrid, aux universités de Montpellier et de la Sarre ainsi qu'à l'Institut des hautes études internationales de Paris et des conférences aux universités de Bruxelles, de Liège, de Bonn, de Rabat et de Salonique.

Robert Kovar a été secrétaire général de la Société française pour le droit international, il a appartenu au Comité national du Centre national de la recherche scientifique, au jury du concours d'entrée à l'Ecole nationale d'administration, il a présidé le jury d'agrégation en droit public algérien et détenu la chaire Jean Monnet.

Membre du comité de rédaction de l'*European Law Review*, du *Yearbook of European Law*, du comité scientifique des *Cahiers de droit européen*, Robert Kovar est co-responsable du *Répertoire de droit communautaire*. Il dirige avec le professeur D. Simon, l'Institut de recherche et d'étude des normativités en Europe, laboratoire associé du CNRS.

Ses publications ont porté sur le droit communautaire tant institutionnel qu'économique.

Docteur *honoris causa* de l'Université de Bruxelles, Robert Kovar est chevalier de la Légion d'honneur, commandeur des Palmes académiques, chevalier des Arts et Lettres.

Introduction

Personne aujourd'hui ne songerait à contester que la Communauté européenne possède un ordre juridique propre, présentant une structure spécifique, autonome par rapport tant au droit international qu'aux droits nationaux des Etats qui en sont membres. Les contestations qui peuvent subsister n'affectent plus la substance de l'ordre juridique communautaire.

Pour être assurément réconfortant ce consensus ne doit pas occulter les audaces des arrêts *Van Gend en Loos*[1] et *Costa*[2] sans lesquels rien n'aurait été possible. On ne s'étonne plus lorsque la Cour de justice affirme impérieusement que

> la Communauté constitue un nouvel ordre juridique de droit international au profit duquel les Etats ont limité, bien que dans des domaines restreints, leurs droits souverains et dont les sujets sont non seulement les Etats membres mais également leurs ressortissants.[3]

Pas davantage ne se montre-t-on surpris devant la vigueur de l'affirmation de la primauté du droit communautaire qui

> issu d'une source autonome ... ne pourrait..., en raison de sa nature spécifique originale, se voir judiciairement opposer un texte interne quel qu'il soit sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même; que le transfert opéré par les Etats de leur ordre juridique communautaire, des droits et obligations correspondant aux dispositions du traité, entraîne donc une limitation définitive de leurs droits souverains contre laquelle ne saurait prévaloir un acte ultérieur incompatible avec la notion de Communauté.[4]

Pourtant, dès ce moment, les principes fondateurs de l'ordre juridique communautaire qui rompent nettement avec les solutions traditionnelles du droit des organisations internationales, sont formulés de manière définitive.

On doit donc être particulièrement reconnaissant au président Lecourt d'avoir osé se demander avec une feinte naïveté «Quel eût été le droit des Communautés sans les arrêts de 1963 et de 1964 ?».[5]

On devine que l'auteur de cette question n'a guère de peine à répondre que sans les principes essentiels posés alors par la Cour de justice le devenir de la construction communautaire se serait infléchi dans le sens de sa banalisation et de son affaiblissement.

1 CJCE, affaire 26/62, *N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos c. Administration fiscale néerlandaise*, arrêt du 5 février 1963, Rec., 3 s.
2 CJCE, affaire 6/64, *Costa c. ENEL*, arrêt du 15 juillet 1964, Rec., 1141 s.
3 *Van Gend en Loos*, *supra* note 1.
4 *Costa c. ENEL*, *supra* note 2.
5 Lecourt, «Quel eût été le droit des Communautés sans les arrêts de 1963 et de 1964?», in *L'Europe et le droit, Mélanges en hommage de Jean Boulouis* (1991) 349 s.

Or, à l'origine de l'œuvre prétorienne de la Cour de justice rien n'était nécessairement certain. Le silence des traités sur des questions aussi fondamentales que la primauté et l'effet direct du droit communautaire,[6] mais également de toute clause générale relative à la distribution des compétences entre la Communauté et ses Etats,[7] ne pouvait manquer de contribuer à entretenir des doutes à cet égard.[8] Qui en 1963 aurait osé prétendre qu'il

> allait [...] de soi qu'un traité conférât des droits directs aux particuliers à l'encontre des Etats signataires et s'imposât de plein droit à leurs juridictions en dépit de l'ordre juridique interne?[9]

Qui n'aurait pas été préoccupé par la résistance exprimée par trois des six Etats membres intervenus dans l'affaire *Van Gend en Loos*.[10] Certes, le gouvernement néerlandais n'excluait pas la possibilité pour certaines dispositions du traité CEE d'avoir un effet direct dans l'ordre juridique étatique, mais il se refusait à la considérer comme d'une nature irréductible à celle des traités internationaux «classiques» subordonnant la reconnaissance de l'effet direct à «l'intention des parties et (aux) termes du traité».[11] De son côté, le gouvernement belge estimait que les dispositions du traité CEE qui pouvaient prétendre avoir un «effet interne direct» étaient «l'exception».[12]

Les arguments échangés devant la Cour de justice révélaient que les Etats étaient pleinement conscients de l'importance des enjeux pour le devenir de la Communauté. Avec une lucidité prémonitoire le gouvernement néerlandais exposait que la consécration de la doctrine de l'effet direct dans les conditions voulues par la Commission et avalisées par la Cour de justice «bouleverserait» le système voulu, selon lui, par les auteurs du traité. L'accession des ressortissants des Etats membres à la qualité de sujet de l'ordre juridique de la Communauté, associée à la mission communautaire assignée aux juridictions nationales représentaient pour lui la cause d'une mutation décisive entraînant une altération radicale du «système traité».

Pour avoir suscité la seule intervention de la principale intéressée, l'Italie, l'affaire *Costa*[13] a néanmoins permis de constater la profondeur des divergences de vue relatives à la primauté du droit communautaire. Fidèle au dualisme traditionnel de son système juridique, le gouvernement italien développait une argumentation tendant à faire obstacle à l'immédiatisation de la

6 A l'exception des indications partielles contenues dans l'article 189 CEE.
7 Le traité CEE procède de façon casuistique.
8 A.W. Green note que «The Treaties give seat guidance in solving the problem of a conflict between national law and community law», *Political Integration by Jurisprudence. The Work of the Court of Justice of the European Communities in European Political Integration* (1969) 321.
9 Lecourt, *supra* note 5.
10 *Supra* note 1.
11 Ibid.
12 Ibid.
13 *Supra* note 2.

primauté du droit communautaire voulue par la Cour de justice dans l'arrêt *Van Gend en Loos*.[14] Il en faisait l'aveu lorsque, après avoir dénié au juge interne le droit de saisir la Cour au titre de l'article 177 dès lors qu'il avait à connaître d'un conflit entre une règle nationale et une autre communautaire, il exposait que, même à la suite d'un arrêt de la Cour de justice constatant une infraction étatique dans le cadre des articles 169 et 170 CEE, la primauté reconnue au droit de la Communauté ne pouvait empêcher le maintien en vigueur de la norme étatique «jusqu'à ce que l'Etat, pour obtempérer à l'obligation prévue à l'article 5 (du traité CEE) prenne les mesures conformes à l'exécution de l'arrêt» de la Cour de justice.[15]

Ce retour de trente ans en arrière doit permettre de mieux comprendre les raisons qui ont décidé la Cour de justice à conférer à ses arrêts de 1963 et de 1964 le caractère de décisions de principe en explicitant la conception d'un ordre juridique protégé contre les tentations réductrices des Etats.

Cette jurisprudence souligne que «la notion de Communauté est inséparable de la naissance d'un nouvel ordre juridique»,[16] qu'elle se décide dès l'arrêt *Costa*[17] à ne plus qualifier d'«international», auquel la visée de l'intégration confère une complexion particulière.[18]

On s'est souvent interrogé sur la nature de l'ordre juridique communautaire alors même que cette entreprise peut avoir quelque chose de vain. Prudente, la Cour de justice a préféré le décrire en recensant ses composants essentiels que d'en déterminer la nature.[19]

Identifier ces composants élémentaires qui entrent dans la composition de l'ordre juridique communautaire doit être l'objectif prioritaire. En effet, ce sont eux qui

> attribuent à tout ordre juridique son individualité spécifique ... qui conditionnent les structures fondamentales, et, par elles, le profil propre et la morphologie propre de l'ordre juridique.[20]

14 *Supra* note 1.

15 Conclusions de l'avocat général Maurice Lagrange dans l'affaire *Costa c. ENEL*, *supra* note 2.

16 J. Boulouis et R.-M. Chevallier, *Grands arrêts de la Cour de justice des Communautés européennes*, tome 1 (5e édition) 206.

17 *Supra* note 2.

18 P. Pescatore, *Le droit de l'intégration* (1972).

19 Denys Simon observe que «les différentes dénominations adoptées par les instances judiciaires tendent toutes à accréditer l'idée d'un ensemble normatif autonome. Mais ces prises de position, pour importantes qu'elles soient, ne fournissent que des indications limitées quant à la nature de cet ordre juridique spécifique», in *L'interprétation judiciaire des traités d'organisations internationales. Morphologie des conventions et fonction juridictionnelle* (1981) 509.

20 L.-J. Constantinesco, *Traité de droit comparé* (1972) tome I, spécialement 213.

Ces éléments premiers sont déjà présents dans ces arrêts fondateurs que sont ceux rendus dans les affaires *Van Gend en Loos*[21] et *Costa*.[22] Ce sont: l'autonomie de l'ordre juridique de la Communauté, les transferts de compétences consentis à la Communauté, la primauté et l'effet direct du droit de la Communauté.

Si le socle de l'ordre juridique communautaire est posé dès 1963-1964, il était évident que

> l'établissement systématique de cet ordre juridique représente un processus [...] en marche et non pas une structure définitivement cristallisée.[23]

La dynamique inhérente aux traités instituant les Communautés et le caractère largement jurisprudentiel de l'édification de l'ordre juridique de la Communauté militaient en ce sens.

Après la phase initiale de l'établissement des fondations de l'édifice, la Cour de justice a entrepris progressivement mais aussi avec constance d'exploiter systématiquement les potentialités de ses premières décisions. L'entreprise a été possible grâce à l'utilisation de méthodes d'interprétation n'hésitant pas en cas de besoin à recourir à des approches systématiques et téléologiques.[24]

L'œuvre de la Cour de justice sera déterminante pour l'organisation d'un système cohérent, structuré et capable d'évolution.

Au moment où, malgré un scepticisme ambiant, le passage à l'Union européenne constitue un temps significatif de l'histoire de la construction européenne, il semble particulièrement indiqué de tenter restituer dans son ensemble l'apport de la Cour de justice.

On s'attachera donc à examiner successivement les conditions de la fondation de l'ordre juridique de la Communauté, puis celles de son développement à travers trente ans de jurisprudence.

21 *Supra* note 1.
22 *Supra* note 2.
23 L.-J. Constantinesco, *Actes officiels du Congrès international d'études sur la Communauté européenne du charbon et de l'acier* (1958) tome II, 236.
24 Sur ce point voir notamment l'ouvrage *supra* note 19 du professeur D. Simon.

Première partie

La fondation de l'ordre juridique communautaire

L'acte fondateur de l'ordre juridique de la Communauté a été l'affirmation de sa spécificité et de son autonomie.

Reconnue par l'arrêt *Van Gend en Loos*,[25] la spécificité de l'ordre juridique communautaire est l'expression du refus d'une assimilation des traités de Paris et de Rome aux «traités internationaux ordinaires»,[26] précisément parce qu'à la différence de ces derniers leur objet est de créer un ordre juridique dont les caractères sont irréductibles à ceux du droit international.[27] Cette fonction «constituante» des traités communautaires est au cœur de l'arrêt *Costa*.[28] Un peu plus tard, la Cour de justice insistera à nouveau sur cet aspect en jugeant que

> le traité ne se borne pas à créer des obligations réciproques entre les différents sujets de droit auxquels il s'applique mais établit un ordre juridique nouveau qui règle les pouvoirs, droits et obligations desdits sujets ainsi que les procédures nécessaires pour faire constater et sanctionner toute violation éventuelle.[29]

Ainsi s'engage un processus de «constitutionnalisation» de l'ordre juridique des Communautés.[30] Ce concept désigne «un processus circulaire» ou mieux en «spirale», dans lequel le traité est interprété par la Cour de justice selon une méthode systématique, téléologique et surtout dynamique, similaire à celle utilisée par les juges constitutionnels des Etats membres, mais éloignée de l'approche adoptée par les juges et arbitres internationaux lors de l'interprétation des conventions internationales. Le traité assume progressivement les caractéristiques d'une loi «supérieure» inhérente à toute constitution comme cause et effet simultanés de ce processus «en fieri».[31]

La «constitutionnalisation» de l'ordre juridique communautaire s'accompagne de l'affirmation de son autonomie.[32] L'autonomie est une exigence inhérente à la notion d'ordre juridique puisqu'elle signifie que l'ensemble des

25 *Supra* note 1.
26 Expression utilisée par la Cour de justice dans son arrêt du 15 juillet 1964, *Costa c. ENEL*, *supra* note 2.
27 Voir les conclusions de l'avocat général Karl Roemer dans l'affaire *Van Gend en Loos*, *supra* note 1.
28 *Supra* note 2.
29 CJCE, affaires jointes 90 et 91/63, *Commission c. Luxembourg et Belgique*, arrêt du 13 novembre 1964, Rec., 1217 s.
30 Da Cruz Vilaça et Piçarra, «Les limites matérielles de la révision des traités instituant les Communautés européennes», *CDE*, n° 1-2, 3 s.
31 Ibid.
32 Ibid., 13 utilisent le terme «autonomisation» probablement pour mieux exprimer l'idée qu'il s'agit d'un processus en cours.

règles qui le constituent procèdent d'une norme fondamentale primaire et se hiérarchisent à partir et par rapport à elle.[33]

Présent déjà dans les arrêts *Van Gend en Loos*[34] et *Costa*,[35] le thème de l'autonomie de l'ordre juridique de la Communauté sera repris de manière constante par la Cour de justice.[36]

I. L'affirmation de la spécificité constitutionnelle des traités instituant les Communautés

La dimension constitutionnelle des traités institutifs des Communautés est au centre des arrêts consacrés par la Cour de justice à définir la nature de ces conventions. Sa jurisprudence n'en est pas restée là. Par la suite, développant un processus de «constitutionnalisation», la Cour s'attachera à constituer l'irréductible spécificité du système communautaire.

1. Les aspects constitutionnels des traités institutifs des Communautés

La fonction constituante de ces traités a été remarquablement mise en évidence par l'arrêt *Costa*[37] lorsque la Cour de justice déclare qu'

> à la différence des traités internationaux ordinaires..., a créé une Communauté de durée illimitée, dotée d'attributions propres, de la personnalité, de la capacité juridique, d'une capacité de pouvoirs réels issus d'une limitation de compétence ou d'un transfert d'attributions des Etats de la Communauté.

A condition de s'entourer de certaines précautions, les traités fondateurs n'usurpent pas la qualification de «constitution» des Communautés.[38] Ce terme sera utilisé dans le sens de la loi fondamentale d'une collectivité sans préjuger de sa nature.

33 Voir H. Kelsen, *Théorie pure du droit* (1982) 258 s. Des auteurs ont entrepris d'appliquer cette conception aux Communautés (Dorwirk, «A Model of European Communities Legal System», *YEL* (1983) 169 s.; Kakouris, «La relation de l'ordre juridique communautaire avec les ordres juridiques des Etats membres (Quelques réflexions parfois peu conformistes)», in *Du droit international au droit de l'intégration, Liber amicorum Pierre Pescatore* (1987) 319 s., spécialement 324).

34 *Supra* note 1.

35 *Supra* note 2.

36 *Supra* note 29.

37 *Supra* note 2.

38 Voir R. Bernhardt, «Les sources du droit communautaire: la 'constitution' de la Communauté», in *Trente ans de droit communautaire, Collection Perspectives européennes* , discussion de la «constitutionnalisation» des traités communautaires; voir K. Lenaerts, *Le juge et la Constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen* (1988) 261 s., n° 245; P. Pescatore, *Die Gemeinschaftverträge als Verfassungsrecht, Festschrift Kutscher* (1981) 319.

De manière significative la Cour de justice voit dans le traité CEE la «charte constitutionnelle» d'une «Communauté de droit» et en déduit que les actes des Etats membres comme ceux des institutions communautaires lui sont nécessairement subordonnés.[39] Dans son avis du 26 avril 1977, la Cour refuse qu'une convention internationale conclue par la Communauté puisse entraîner «... une modification de la constitution interne de la Communauté».[40]

Certes, il n'est pas question d'occulter l'«origine de droit international classique» des traités institutifs des Communautés, mais de reconnaître qu'«en raison de leur contenu» leur fonction est de «servir de constitution dans l'ordre juridique des Communautés européennes».[41] Il semblerait donc que la nature de ces traités fasse l'objet d'un dédoublement: «constitutions» dans l'ordre juridique interne de la Communauté; traités internationaux pour le reste. Pour l'avocat général Maurice Lagrange

> le traité dont la Cour a pour mission d'assurer l'application, s'il a bien été conclu dans la forme des traités internationaux et s'il en est un incontestablement, n'en constitue pas moins, du point de vue matériel, la charte de la Communauté, les règles de droit qui s'en dégagent constituant le droit interne de cette Communauté.[42]

Les termes employés traduisent une incontestable prudence. Il n'en demeure pas moins qu'à partir du moment où des conséquences juridiques systématiques sont déduites de la dimension «constitutionnelle» des traités institutifs, ce dualisme ne se révèle malaisément praticable.[43]

La nature, au moins partiellement «constitutionnelle» des traités de Paris et de Rome, s'observe d'abord dans la présence, massive, de dispositions institutionnelles. Ces conventions établissent les institutions de la Communauté, déterminent leur composition, fixent leurs compétences, règlent leur fonctionnement, aménagent leurs rapports. Les traités institutifs définissent aussi le statut communautaire des Etats et, consacrent la personnalité internationale des Communautés.[44]

Le caractère constitutionnel des traités imprime sa marque sur l'ensemble de l'ordre juridique communautaire. Le droit communautaire trouve son fondement dans les traités institutifs des Communautés qui constituent la *Grund-*

39 CJCE, affaire 294/83, *Parti écologiste «Les Verts» c. Parlement européen*, arrêt du 23 avril 1986, Rec., 1339 s.

40 CJCE, avis 1/76 du 26 avril 1977 relatif à l'institution d'un Fond européen d'immobilisation de la navigation intérieure, Rec., 741 s.

41 K. Lenaerts, *supra* note 38, 253-254.

42 Maurice Lagrange, conclusions dans l'affaire 8/55, *Fédération charbonnière de Belgique (Fédéchar) c. Haute Autorité de la CECA* , arrêt du 16 juillet 1956, Rec., 1955-1956, 263 s.

43 Sur ce point, voir *infra* section 2.

44 Voir les arrêts *Van Gend en Loos*, *supra* note 1 et *Costa c. ENEL*, *supra* note 2, ainsi que l'arrêt du 13 novembre 1964, *Commission c. Luxembourg et Belgique*, *supra* note 29.

norm de leur ordre juridique. L'ensemble des règles du droit communautaire dérivé se hiérarchisent par rapport aux traités, ce qui se concrétise par la nécessité d'un contrôle généralisé de la conformité des actes des institutions de la Communauté «à la charte constitutionnelle de base qu'est le traité».[45] L'existence des «procédures nécessaires pour faire constater et sanctionner toute violation éventuelle»[46] des règles communautaires est une exigence essentielle qui s'affirme tant à l'égard des institutions, que des Etats et des particuliers en leur qualité de sujets de l'ordre juridique communautaire. Ce principe général «de la justiciabilité» des conflits constitue un des traits de la spécificité de l'ordre juridique communautaire.[47]

Les caractères constitutionnels des traités institutifs ne se limitent pas à leur volet institutionnel, ils s'étendent à leurs règles économiques. Ces traités forment la «constitution économique» des Communautés.[48] La jurisprudence de la Cour de justice révèle l'existence de multiples interactions entre la «constitution économique» et la solution de problèmes essentiels pour la construction de l'ordre juridique communautaire. Ainsi, la reconnaissance d'une compétence exclusive en faveur de la Communauté procède souvent d'une analyse des exigences de la «constitution économique» de la Communauté. Dans son avis du 11 novembre 1975,[49] la Cour estime que la politique commerciale «est conçue par l'article 113 du traité CEE dans la perspective du fonctionnement du marché commun, pour la défense de l'intérêt global de la Communauté, à l'intérieur duquel les intérêts particuliers des Etats membres doivent trouver à s'ajuster mutuellement». La Cour en déduit que

> cette conception est, de toute évidence, incompatible avec la liberté que les Etats membres pourraient se réserver, en invoquant une compétence parallèle, afin de poursuivre la satisfaction distincte de leurs intérêts propres dans les relations extérieures, au risque de compromettre une défense efficace de l'intérêt global de la Communauté.

En l'espèce, l'action unilatérale des Etats membres risquerait de créer des disparités «de nature à fausser la compétition des entreprises des différents Etats membres sur les marchés extérieurs».

La même manière de procéder par une interprétation concrète se retrouve dans d'autres arrêts de la Cour de justice. L'un des plus exemplaires est l'arrêt du 7 février 1973, *Commission c. Italie*.[50] Rendu dans une affaire où il

45 *Parti écologiste «Les Verts»*, *supra* note 39.
46 *Commission c. Luxembourg et Belgique, supra* note 29.
47 Reuter, in V. Constantinesco, J.-P. Jacqué, R. Kovar, D. Simon (éds), *Traité instituant la CEE. Commentaire article par article* (1992) 16.
48 Sur cette notion, voir L.-J. Constantinesco, «La constitution économique de la CEE», *RTDE* (1977) 244 s.
49 CJCE, avis 1/75 du 11 novembre 1975, Rec., 1355 s.
50 CJCE, affaire 39/72, *Commission c. République italienne*, arrêt du 7 février 1963, Rec., 101 s.

était reproché à l'Italie d'avoir méconnu des règlements communautaires, cet arrêt a amené la Cour à démontrer qu'une application incomplète ou sélective de ces règlements n'est pas seulement contraire aux termes de l'articles 189 du traité CEE selon lequel le règlement est obligatoire «dans tous ses éléments» pour les Etats membres, mais revient à faire prévaloir des intérêts nationaux sur l'intérêt commun. Parvenue à ce stade de son raisonnement, la Cour estime devoir le conforter par des considérations relatives aux mécanismes économiques de la Communauté. Elle observe «qu'en particulier, s'agissant de la mise en œuvre d'une mesure de politique économique destinée à éliminer des excédents, dans les délais requis et simultanément avec les autres Etats membres, les dispositions dont l'application lui incombe, portent atteinte à l'efficacité de la mesure décidée en commun tout en s'appropriant, compte tenu de la libre circulation des marchandises, un avantage indu au détriment de ses partenaires».

C'est donc souvent par la prise en compte des objectifs, de la logique et des instruments économiques des traités institutifs de la Communauté que la Cour de justice parvient à formuler des principes plus abstraitement juridiques tels que celui de l'égalité des Etats membres[51] ou «la solidarité qui est à la base de l'ensemble du système communautaire»[52] dont elle tire des conséquences essentielles pour l'ordre juridique de la Communauté. Plus globalement, la Cour de justice verra dans la vocation des traités institutifs des Communautés à réaliser une intégration économique le signe de leur spécificité.[53]

2. La «constitutionnalisation» des traités institutifs des Communautés

Partant d'une donnée conventionnelle qui pour être certaine n'en était pas moins incomplete, voire parfois ambivalente, la Cour de justice va développer une jurisprudence constructive orientée vers une «constitutionnalisation» croissante des traités institutifs des Communautés. L'état de ce processus exprime, à travers ses acquis mais aussi ses limites, la spécificité de l'ordre juridique communautaire.

L'accent mis sur la nature constitutionnelle des traités communautaires conduit la Cour à souligner leur spécificité au regard des traités internationaux. Dans le prolongement de ses arrêts de 1963[54] et de 1964,[55] ce principe

51 Ibid.

52 CJCE, affaires jointes 6 et 11/69, *Commission c. France*, arrêt du 10 décembre 1969, Rec., 523 s.

53 CJCE, avis 1/92 14 décembre 1991 sur le projet d'accord CEE/AELE portant création de l'Espace économique européen (EEE), Rec. I, 6079 s.; Boulouis, «Les avis de la Cour de justice des Communautés sur la compatibilité avec le traité CEE du projet d'accord créant l'Espace économique européen», 3 *RTDE* (1992) 457 s.

54 *Van Gend en Loos, supra* note 1.

55 *Costa c. ENEL, supra* note 2.

sera régulièrement décliné dans les arrêts de la Cour de justice. La spécificité d'un système fortement organisé explique que «le lien entre les obligations des sujets ne saurait être reconnu dans le droit communautaire»[56] de sorte qu'est récusée toute exception de réciprocité qui permettrait à un Etat membre de se prévaloir du comportement d'un autre Etat ou d'une institution pour justifier sa propre violation de ses obligations communautaires.[57]

L'identité des traités institutifs doit être protégée contre toute atteinte provenant, notamment, de conventions internationales conclues par les Communautés européennes. Déjà présent dans l'avis du 26 avril 1977 sur le projet d'accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure,[58] cet impératif est réaffirmé dans un autre avis du 14 décembre 1991.[59] La Cour de justice insiste sur les différences radicales qui existent entre l'accord sur l'Espace économique européen et le traité CEE. Si le premier ne se différencie pas d'une convention internationale classique puisqu'il ne crée que des droits et des obligations entre les parties et n'opère aucun transfert de droits souverains à une organisation internationale, le second se caractérise par l'institution d'un ordonnancement juridique complexe. Cette différence essentielle devait convaincre la Cour de justice à estimer que, dans sa forme initiale, la conclusion de l'accord EEE risquait de mettre en péril l'autonomie de l'ordre juridique communautaire et de compromettre la capacité de la Communauté de réaliser ses objectifs. Les buts des traités communautaires sont d'une ambition sans commune mesure avec ceux de l'accord EEE. Rendant compte des raisons de la Cour de justice, D. Simon et A. Rigaux observent que

> les finalités de l'accord EEE sont limitées à l'application d'un régime de libre-échange et de libre-concurrence, tandis que dans le cadre communautaire, ce régime est déjà réalisé et n'est que le moyen d'une intégration économique devant déboucher sur l'établissement du marché intérieur et la mise en place de l'Union politique, conformément aux objectifs définis par les traités originaires, l'Acte unique européen et les projets adoptés à Maastricht.[60]

On retrouve l'opposition, peut-être un peu trop tranchée, entre l'intégration et la coopération qui a pu être considérée comme représentant un clivage majeur dans la classification des organisations internationales.[61]

56 *Commission c. Luxembourg et Belgique*, *supra* note 29.

57 CJCE, affaire 232/78, *Commission c. France*, arrêt du 25 septembre 1979, Rec., 2729; affaire 352/82, *Commission c. RFA*, arrêt du 14 février 1984, Rec., 777 s.

58 CJCE, avis 1/76, *supra* note 40, Rec., 1589 s.

59 CJCE, avis du 14 décembre 1991 relatif à la compatibilité de l'accord sur l'Espace économique européen avec le traité de la CEE, *supra* note 53; voir Simon et Rigaux, «L'avis de la Cour de justice sur le projet d'accord CEE/AELE portant création de l'Espace économique européen (EEE)», *Europe* (1992) 1 s.

60 Simon et Rigaux, *supra* note 59.

61 Voir sur ce point en particulier, C. Adler, *Koordination und Integration als Rechtprinzipien* (1969).

L'un des aspects les plus novateurs mais aussi les plus controversés de la spécificité des traités instituant la Communauté est leur dimension constitutionnelle qui justifierait la relative intangibilité revendiquée par une partie de la doctrine.

Cette caractéristique se vérifie d'abord à l'égard des conventions internationales que la Communauté peut conclure. Selon l'article 228 du traité CEE, tout accord international négocié par la Communauté peut être déféré par le Conseil, la Commission ou un Etat membre à l'examen de la Cour de justice en vue de vérifier sa compatibilité avec de ce traité. Si la Cour émet un avis négatif, l'accord ne pourra entrer en vigueur qu'après que le traité CEE ait été modifié selon la procédure de l'article 226 CEE.[62] La Cour de justice a donc pour mission de veiller à ce que le traité CEE ne puisse être indirectement modifié.[63]

L'arrangement qui a donné lieu à l'avis 1/75 a été jugé incompatible avec le traité CEE car il affectait la compétence exclusive de la Communauté dans le domaine de la politique commerciale en consacrant une compétence parallèle des Etats membres. Pour la Cour de justice

> admettre une telle compétence équivaudrait ... à reconnaître que les Etats membres peuvent prendre, dans les rapports avec les pays tiers, des dispositions divergentes de celles que la Communauté entend assumer, et reviendrait de ce fait à fausser le jeu institutionnel de la Communauté et à empêcher celle-ci de remplir sa tâche, dans la défense de l'intérêt commun.

Le caractère constitutionnel du traité CEE sera encore mis en exergue dans l'avis 1/76 du 26 avril 1977 consacré au «Projet d'accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure».[64] La conclusion d'un accord international par la Communauté ne saurait entraîner une renonciation à l'autonomie d'action de la Communauté dans ses rapports internationaux et une modification de sa constitution interne par l'altération des éléments essentiels de la structure communautaire en ce qui concerne les prérogatives des institutions, le processus décisionnel au sein de celles-ci et la position réciproque des Etats membres. Non seulement la Cour utilise l'expression «constitution interne» de la CEE, mais elle s'astreint également à préciser les éléments de cette constitution qui méritent une protection particulière.

62 Voir Boulouis, «La jurisprudence de la Cour de justice des Communautés européennes relatives aux relations extérieures des Communautés européennes», *RdC* (1978) vol. II, H.T. 160, 334 s.; Diez de Velasco, «La compétence consultative de la Cour de justice des Communautés européennes», *Du droit international au droit de l'intégration, supra* note 33, 177 s.; Kovar, «La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux par la CEE», *Mélanges offerts à Paul Reuter* (1981) 357 s.

63 CJCE, avis 1/75 du 11 novembre 1975, *supra* note 49.

64 CJCE, avis 1/76 du 26 avril 1977, *supra* note 58.

Les avis 1/78 du 4 octobre 1979 relatif à l'Accord international sur le caoutchouc naturel[65] et 1/91-1/92[66] vont dans le même sens. Dans ce dernier avis, la Cour de justice parvient à la conviction que le projet d'accord soumis à son appréciation compromet l'autonomie de l'ordre juridique communautaire par les entraves qu'il pose à l'accomplissement de la mission de la Cour de justice portant ainsi atteinte aux fondements mêmes de la Communauté.

La question de la nature constitutionnelle des traités institutifs ne peut être examinée sans que l'on ait à s'intéresser à leurs procédures de révision.

Entrent en ligne de compte les articles 236 CEE, 204 CEEA et 95-96 CECA. A des divers degrés toutes ces dispositions associent les institutions de la Commission à la procédure de révision. Cependant, de manière révélatrice, à l'exception de l'article 95 CECA, la décision finale revient aux Etats.

Le principe qui commande la révision des traités selon le droit international est celui du commun accord des parties contractantes. Ce principe est consacré par les articles 39, 54 et 57 de la Convention de Vienne sur le droit des traités. Lorsque les chartes constitutives des organisations internationales comportent des dispositions aménageant des procédures de révision, il est généralement reconnu que les parties contractantes conservent le droit de ne pas passer par elles.

La transposition de cette solution aux traités communautaires est controversée. Se fondant sur l'origine conventionnelle de ces instruments et considérant que leur objet ne saurait être déterminant certains auteurs estiment que rien n'interdit de suivre la règle internationale.[67] D'autres, au contraire, mettent l'accent sur le contenu des traités communautaires qui dépasse de beaucoup un simple échange d'obligations réciproques entre les parties. Ils s'appuyent spécialement sur le rôle imparti à la Cour de justice en observant qu'elle s'étend aux dispositions relatives à la révision. Leur conclusion est que ces dispositions obligent absolument les Etats membres. Une révision «sauvage» des traités institutifs qui s'affranchirait du respect des règles prévues par eux précisément à cet effet, constituerait un manquement au sens de l'article 169 CEE ou des articles équivalents des autres chartes constitutives des Communautés. C'est pourquoi J.-L. da Cruz Vilaça et N. Piçarra considèrent qu'il serait difficile de prétendre que l'article 236 CEE, et par analogie les dispositions comparables des autres traités communautaires,

65 CJCE, avis 1/78 du 4 octobre 1979, Rec., 2871 s.

66 CJCE, avis 1/91 et 1/92 du 14 décembre 1991, *supra* note 33. Josiane Auvret-Finck, «Les avis relatifs au projet d'accord sur la création de l'Espace économique européen», *CDE*, n° 1-2 (1993) 38 s.

67 Voir Deliège-Sequaris, «Révision des traités européens en dehors des procédures prévues», *CDE*, n° 5-6, (1980) 437 s.; G. Gaja, Fonti Communitarie, *Digesto delle Discipline Pubblicitiche*, vol. VI (1990) 437 s.; H. Steinberger, *Der Verfassungstaat als Glied einer europäischen Gemeinschaft, Veröffentlichung der Vereinigung der deutschen Staatrechtlehrer* (1981) 16 s.

> ne contient que des dispositions de nature simplement facultative et n'interdit pas de recourir alternativement aux principes généraux de droit international conventionnel.[68]

La jurisprudence de la Cour de justice contient des indices favorables à la seconde des deux conceptions en présence. Dans l'arrêt *Defrenne* elle affirme de manière générale qu'une modification du traité ne peut résulter – sans préjudice de dispositions spécifiques – que d'une révision opérée en conformité avec l'article 236».[69] Dans l'avis relatif au projet de l'accord sur l'Espace économique européen, la Cour expose que «les compétences conférées par le traité ne peuvent être modifiées que dans le cadre de la procédure visée à son article 236».[70]

Le processus de «constitutionnalisation» des traités instituant les Communautés européennes pourrait ne pas en rester là. La jurisprudence de la Cour de justice contiendrait des indications qui autorisent à s'interroger à propos de l'existence de limites matérielles à la révision des traités communautaires. Si tel devait être le cas, le processus de «constitutionnalisation» serait engagé «dans une nouvelle étape».[71] La Cour de justice ajoute que

> l'article 238 du traité CEE ne fournit aucune base pour instituer un système juridictionnel qui porte atteinte à l'article 164 de ce traité et, plus généralement, aux fondements mêmes de la Communauté.[72]

Elle estime «pour les mêmes raisons» qu'une modification de l'article 238 CEE serait impuissante à remédier à l'incompatibilité du système juridictionnel de l'Accord sur l'Espace économique européen avec le droit communautaire. La Cour semble vouloir soustraire l'article 164 CEE,[73] comme éventuellement d'autres dispositions constituant les «fondements de la Communauté», à la procédure de révision. La question revêt évidemment une importance majeure.

Commentant l'avis 1/76,[74] Jean Boulouis évoquait déjà l'existence de limites à la révision des traités de Paris et de Rome.[75] Selon lui

> lorsque, pour fonder son avis négatif, la Cour invoque des motifs aussi fondamentaux qu'une modification de la constitution interne de la Communauté (avis

68 Da Cruz Vilaça et Piçarra, *supra* note 30, 15-16, n° 4. Dans le sens de l'exclusivité des procédures communautaires de révision, voir Jacqué, «Cours général de droit communautaire», *AEL*, vol. I-1 (1990) 265 s., spécialement 273; Louis, «Quelques considérations sur la révision des traités instituant les Communautés», *CDE*, n° 5-6 (1980) 553 s.

69 CJCE, affaire 43/75, *Defrenne c. Sabena*, arrêt du 8 avril 1976, Rec., 455.

70 CJCE, avis 1/91 et 1/92 du 14 décembre 1991, *supra* note 53.

71 Voir da Cruz Vilaça et Piçarra, *supra* note 30, 20 s.

72 Voir CJCE points 69 à 72 de l'avis du 14 décembre 1991, *supra* note 53.

73 L'article 164 CEE dispose que «la Cour de justice assure le respect du droit dans l'interprétation et l'application du présent traité».

74 CJCE, avis du 26 avril 1977, *supra* note 58.

75 J. Boulouis, *supra* note 62, 355.

> 1/76) et qu'elle évoque le risque de désintégration progressive et irréversible de l'œuvre communautaire, on est justifié à se demander si une révision est encore envisageable ou si l'avis négatif, prenant valeur de veto, ne fait pas échec tout autant à une révision qu'à l'entrée en vigueur de l'accord.

Le sens et la portée de la prise de position de la Cour de justice dans ses avis 1/91 et 1/92[76] divisent la doctrine: si plusieurs auteurs pensent que la Cour a voulu interdire la révision de l'article 164 CEE,[77] d'autres refusent cette interprétation.[78]

Diverses autres dispositions du traité CEE devraient pouvoir se réclamer de cette immutabilité. On songe en particulier à celles relatives au droit de participation des Etats membres aux instances de décision ou encore à l'existence d'une représentation des peuples des Etats de la Communauté. Ces principes constitutionnels sont désignés par des expressions aussi variées que juridiquement incertaines. Ainsi Huglo les qualifie de «principes méta-communautaires», J. Dutheil de la Rochère utilise l'expression «supra-constitutionnalité communautaire»,[79] d'autres, comme Jean Boulouis,[80] se montrent prudents et se contentent de constater l'existence de dispositions qui ne pourraient être révisées dans leur substance mais seulement dans leurs modalités.

II. L'affirmation de l'autonomie de l'ordre juridique des Communautés

L'autonomie est le second socle de l'ordre juridique de la Communauté dont on a pu dire que les deux traits essentiels sont d'être «exclusif et indépendant».[81] Selon A.W. Green,

> The Court of justice has build and is building its own system of law, namely an independant system of Community law ... the word «independant» means that the

76 CJCE, avis du 14 décembre 1991, *supra* note 53.

77 Voir Huglo, «L'incompatibilité de l'accord sur l'Espace économique européen au regard du traité de Rome», *Gazette du Palais*, n° 78/79 (1992) 5 s.; Boulouis, «Les avis de la Cour de justice des Communautés sur la compatibilité avec le traité CEE du projet d'accord créant l'Espace économique européen», *RTDE* (1992) 462 s.; Dutheil de la Rochère, «L'espace économique européen sous le regard des juges de la Cour de justice des Communautés européennes», *RMC* (1992) 607 s.

78 Hummer, «Vorder-und Hintergründe des Gutachtens des AuGH zum EWRV», *Wirtschaftsrechtliche Blätter* (1992) 39 s.; N. Burroughs, «The Risks of Widening Without Deepening», *EL Rev.* (1992) 360 s.; Gaudissard, «La portée des avis 1/91 et 1/92 de la Cour de justice des Communautés européennes relatifs à la création de l'Espace économique européen», *Revue du marché unique européen* (1992) 310 s.

79 Huglo, *supra* note 77, 6. Dutheil de la Rochère, *supra* note 77, 607.

80 Boulouis, *supra* note 77.

81 F. Dehousse, *Rapport au Parlement européen sur la primauté du droit des Etats membres*, Parlement européen, documents de séance 1965-1966, n° 43, 25 mai 1965.

system is independant of any other legal system, either from its own internal principles of interpretation and application, or from any obligation to conform to any external authority. [82]

La jurisprudence de la Cour de justice a précisé le contenu ainsi que les fonctions de l'autonomie de l'ordre juridique de la Communauté.

A. Le contenu de l'autonomie de l'ordre juridique communautaire

L'autonomie de l'ordre juridique de la Communauté se présente sous la forme d'un diptyque: d'une part son autorité n'est subordonnée à aucune condition qui lui soit étrangère; d'autre part, les règles qui le constituent procèdent de lui-même. Dans le premier cas, il s'agit d'une autonomie de validité, dans le second, d'une autonomie de sources. La première se doit d'être absolue, la seconde pouvant n'être que relative.

1. L'autonomie de validité

De manière révélatrice la consécration de l'autonomie de validité du droit communautaire est destinée à faire pièce aux prétentions de certaines juridictions nationales d'assujettir ses règles aux exigences de leur droit. La Cour de justice refusera d'apprécier la validité des décisions de la Haute Autorité de la CECA au regard de divers principes énoncés par la loi fondamentale de la République fédérale d'Allemagne. Elle affirmera avec force qu'il ne lui incombe pas «d'assurer le respect des règles de droit interne, même constitutionnelles, en vigueur dans l'un ou l'autre des Etats membres». [83]

La Cour de justice se tiendra fermement à ce refus, récusant la thèse de la nécessaire «congruence» du droit communautaire aux droits fondamentaux consacrés par les constitutions des Etats membres. Défendue par une partie de la doctrine allemande, cette thèse ne laissera pas indifférente la Cour constitutionnelle de Karlsruhe.

Sans méconnaître la nécessité de protéger les droits fondamentaux, la Cour de justice exclut qu'elle puisse affecter l'autonomie de l'ordre juridique communautaire. Cette protection doit être assurée dans le cadre de cet ordre juridique. Cette double exigence qui permet de concilier deux impératifs dont la Cour reconnaît la légitimité, a été exprimée très clairement dans l'arrêt du 17 décembre 1970, *Internationale Handelsgesellschaft*: [84]

82 A.W. Green, *supra* note 8.

83 CJCE, affaires jointes 36, 37, 39 et 40/59, *Président et autres c. Haute Autorité*, arrêt du 15 juillet 1960, Rec., 859 s.; affaire 1/58, *Storck*, arrêt du 4 février 1959, Rec., 43.

84 CJCE, affaire 11/70, *Internationale Handelsgesellschaft*, arrêt du 17 décembre 1970, Rec., 1135 s.

> Attendu que le recours à des règles ou notions juridiques du droit national, pour l'appréciation de la validité des actes arrêtés par les institutions de la Communauté aurait pour effet de porter atteinte à l'unité et à l'efficacité de droit communautaire;
> que la validité de tels actes ne saurait être appréciée qu'en fonction du droit communautaire; ...

La Cour met ensuite en évidence l'intimité du lien qui unit l'autonomie de validité et la primauté du droit communautaire en reproduisant les termes de son arrêt *Costa*:[85]

> qu'en effet, le droit né du traité, issu d'une source autonome, ne pourrait en raison de sa nature se voir judiciairement opposer des règles de droit international quelles qu'elles soient sans perdre son caractère communautaire et sans que soit mise en cause la base de la Communauté elle-même.

La Cour de justice prend alors le contre-pied de la Cour constitutionnelle allemande[86] en affirmant que

> ... l'invocation d'atteintes portées, soit aux droits fondamentaux tels qu'ils sont formulés par la constitution d'un Etat membre, soit aux principes d'une structure constitutionnelle nationale ne saurait affecter la validité d'un acte de la Communauté ou son effet sur le territoire de cet Etat.

Sensible à l'impératif d'une garantie des droits fondamentaux «en s'inspirant des traditions constitutionnelles communes aux Etats membres», la Cour considère que cette exigence doit être satisfaite «dans le cadre de la structure et les objectifs de la Communauté» en s'intégrant aux «principes généraux du droit» dont elle assure le respect.

Le refus de subordonner la validité du droit communautaire à des principes qui ne seraient pas siens sera régulièrement réitéré.[87]

L'autonomie de l'ordre juridique communautaire a pour corollaire que selon une «jurisprudence constante de la Cour ... la validité d'actes communautaires ne saurait être appréciée qu'en vertu du droit communautaire».[88]

La contrepartie de l'autonomie de validité est que la Communauté se doit d'être une «Communauté de droit»[89] assurant un contrôle efficace de la légalité des actes de ses institutions et, notamment, de la protection des droits fondamentaux.

85 CJCE, arrêt du 15 juillet 1964, *supra* note 2.

86 Voir Tomuschat, «Les rapports entre le droit communautaire et le droit interne allemand d'après la jurisprudence récente de la Cour constitutionnelle allemande», *CDE*, n°1-2 (1989) 163 s.

87 CJCE, affaire 44/79, *Hauer*, arrêt du 13 décembre 1979, Rec., 3727 s.; affaire 234/85, *Keller*, arrêt du 8 octobre 1986, Rec., 2897 s.; affaire 249/85, *Albako*, arrêt du 21 mai 1987, Rec., 2345 s.

88 *Albako*, *supra* note 87; affaires jointes 97 à 99/87, *Dow Chemical Iberica et autres c. Commission*, arrêt du 17 octobre 1989, Rec., 3165 s.

2. L'autonomie de sources

L'exigence d'autonomie de l'ordre juridique de la Communauté se traduit aussi dans ses sources. Dès l'arrêt *Costa* du 15 juillet 1964,[90] cette seconde composante de l'autonomie du droit communautaire est mise en évidence à l'égard des droits nationaux comme du droit international.

(a) L'autonomie à l'égard des droits nationaux

Cette forme d'autonomie s'exprime à travers la préférence accordée par la Cour de justice à des concepts juridiques communautaires à l'encontre du renvoi aux droits des Etats membres. Cette préférence ne cède qu'en présence de prévisions exprès en sens contraire.[91]

Ce choix procède de la préoccupation d'empêcher une «nationalisation» du droit communautaire contraire à sa nature et à l'exigence d'unité qui est la condition de son efficacité.[92] De plus, toute disposition du droit communautaire doit, normalement, recevoir une interprétation qui prenne en compte les objectifs et les exigences de l'action de la Communauté.[93] Le droit communautaire doit donc être interprété à la seule lumière de ses propres règles et non en vertu de la jurisprudence nationale.[94]

Ces impératifs n'ont pas toujours été parfaitement perçus. Dans les premiers temps de la jurisprudence de la Cour de justice ses avocats généraux se sont assez souvent déclarés convaincus de l'utilité, voire de la nécessité d'emprunter aux droits nationaux des notions destinées à combler les lacunes du droit communautaire ou d'en préciser les règles. C'est ainsi que l'avocat général Lagrange considérait que les sources d'inspiration du droit communautaire devaient être cherchées «normalement et le plus souvent dans le droit interne des Etats membres».[95]

Simultanément des réserves s'exprimaient à l'encontre d'une propension de s'en remettre sans suffisamment de précautions aux droits nationaux.[96]

89 Selon l'expression utilisée par la Cour de justice dans son arrêt du 23 avril 1986, *Parti écologiste «Les Verts»*, *supra* note 39.

90 *Costa c. ENEL*, *supra* note 2 où il est dit que «le droit né du traité» est «issu d'une source autonome» des droits des Etats membres, l'ordre juridique communautaire cessant, par ailleurs, d'être qualifié d'international à partir de l'arrêt *Van Gend en Loos*, *supra* note 1.

91 CJCE, affaire 64/81, *Corman*, arrêt du 14 janvier 1982, Rec., 13 s.

92 Voir en ce sens notamment, *Internationale Handelsgesellschaft*, *supra* note 84; affaire 14/68, *Walt Wilhelm*, arrêt du 13 février 1969, Rec., 3 s.

93 CJCE, affaire 327/82, *EKRO*, arrêt du 18 janvier 1984, Rec., 107 s.; TPI, affaire T-41/89, *Schwedler c. Parlement européen*, arrêt du 8 mars 1990, Rec., II-79.

94 CJCE, affaire 1/77, *Bosch*, arrêt du 14 juillet 1977, Rec., 1473 s.

95 Conclusions de l'avocat général Lagrange dans l'affaire *Fédéchar*, *supra* note 42, spécialement 225 s.; voir également conclusions de l'avocat général K. Roemer dans l'affaire 6/54, *Pays-Bas c. Haute Autorité*, arrêt du 21 mars 1955, Rec., I-201 s., spécialement 243 s.

96 Voir conclusions de l'avocat général K. Roemer dans l'affaire 7 et 9/54, *Groupement des industries sidérurgiques luxembourgeoises*, arrêt du 23 avril 1956, Rec. 1955-1956,

Ces apparentes hésitations s'expliquent par le fait que

> la Cour de justice se trouve en présence de deux constatations contradictoires: d'une part, il semble légitime de s'inspirer des données fournies par les droits nationaux dans la mesure où les traités communautaires n'ont pas été rédigés dans une sorte de vide juridique, mais sont nécessairement tributaires des systèmes juridiques des Etats membres, qui ont véritablement fait appel pour la construction de leur œuvre commune à des matériaux issus de leurs droits nationaux.
> D'autre part, à l'inverse, la nécessité d'aboutir à une application uniforme du droit communautaire dans tous les Etats membres s'oppose à une interprétation de la règle commune par renvoi aux notions et aux principes du droit interne, pareil renvoi risquant d'engendrer des divergences d'exécution nationale, susceptibles de provoquer des discriminations et d'entraver ... la réalisation du marché commun.[97]

Cette contradiction ne pourra être surmontée que dans une conception relative du principe d'autonomie des sources du droit communautaire. Ce principe n'interdit pas de se montrer accueillant aux emprunts aux droits internes, mais cette ouverture ne vaut que pour autant qu'elle ne met pas en péril l'unité, l'uniformité et l'efficacité du droit communautaire.

Les apports des droits étatiques sont de deux types. D'une part, ces droits peuvent constituer une source d'inspiration pour le droit communautaire; d'autre part, le droit communautaire peut procéder à un renvoi aux droits nationaux. Autrement dit le recours aux droits étatiques peut prendre la forme d'une «réception» après adaptation aux exigences spécifiques du droit de la Communauté, ou d'un «renvoi» opéré par ce droit à une règle nationale.[98]

Chaque fois qu'elle en ressent la nécessité, la Cour de justice accepte le concours des droits nationaux sans jamais s'abandonner sans conditions entre leurs mains. Cette ligne de conduite a été explicitée dès 1955 par l'avocat général Maurice Lagrange lorsqu'il déclarait:

> il ne s'agit pas ici d'appliquer le droit italien ou le droit français ni celui de tout autre pays de la Communauté, mais le droit du traité, et c'est uniquement pour parvenir à l'élaboration de ce droit du traité que l'étude des solutions juridiques nationales doit être entreprise chaque fois qu'il apparaît nécessaire à cette fin.[99]

La Cour de justice s'attache donc à apprécier si les concepts issus des droits nationaux sont susceptibles de s'intégrer au droit communautaire. Au surplus, la Cour se gardera de s'adresser au droit d'un Etat membre déterminé, soucieuse de dégager des principes communs à ces droits. C'est la méthode

107 s., spécialement 125; conclusions de l'avocat général M. Lagrange dans l'affaire 3/54, *ASSIDER*, arrêt du 11 février 1955, Rec. 1955-1956, 143 s.

97 D. Simon, *supra* note 19, 562.

98 Voir Kovar, «Le pouvoir réglementaire de la Communauté européenne du charbon et de l'acier», *LGDJ* (1964) 307; D. Simon, *supra* note 19, 564.

99 Conclusions dans l'affaire 3/54, *supra* note 96.

imposée par le traité CEE en matière de responsabilité non contractuelle.[100] Dans ce domaine comme plus généralement, «plutôt qu'à une confrontation mécanique des règles techniques accueillies dans chaque Etat membre, il importe de procéder à une évaluation des résultats auxquels ils aboutissent et des tendances générales dont ils s'inspirent».[101] Le but recherché est de dégager de la comparaison des droits nationaux le concept «le plus adapté aux nécessités auxquelles a voulu parer le traité».[102] Sauf exception, ce procédé exclut le renvoi pur et simple aux droits étatiques en faveur d'une «intégration sélective des sources externes» en fonction de «leur aptitude à entrer dans l'ordre juridique communautaire et (de) l'aptitude de celui-ci à les accueillir».[103]

L'autonomie du droit communautaire n'est pas une fin en soi. Elle procède de la nécessité pour la Cour de justice de permettre à la Communauté de réaliser ses objectifs dans le respect de sa nature. Elle est une expression mais aussi un des instruments de mesure du niveau de l'intégration juridique dans la Communauté.

L'examen de la jurisprudence de la Cour de justice révèle que la nécessité de l'unité et de l'uniformité du droit communautaire qui, selon l'expression de L.-J. Constantinesco, doit être et demeurer impérativement *gleichbedeutend*,[104] conduit à préférer dans la plupart des cas un sens communautaire. L'avocat général Roemer soutient qu'il existe une présomption en faveur de l'attribution d'un sens communautaire aux normes communautaires. En effet,

> puisqu'il faut que la portée du droit communautaire soit la même partout, on peut, lorsque les textes communautaires utilisent certains termes, considérer en cas de doute qu'ils doivent se voir reconnaître une signification uniforme. Si telle n'était pas l'intention du législateur communautaire, s'il désirait abandonner au droit national le soin de définir un terme, il faudrait qu'on puisse s'en rendre compte clairement, que cet abandon soit exprimé formellement ou qu'il résulte sans équivoque possible de la disposition en cause.[105]

100 Article 215, alinéa 2 CEE.

101 M. Waelbroeck, in Mégret et autres, *Le droit de la CEE*, vol. 10, tome 1, 269.

102 M. Lagrange, in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes*, Congrès Européen de Cologne, FIDE (1963) 1, KSE (1963) 212-213.

103 Boulouis, «A propos de la fonction normative de la jurisprudence: remarques sur l'œuvre juridictionnelle de la CJCE», *Mélanges en hommage à Marcel Waline, LGDJ* (1974) tome 1, 49 s., spécialement 154-155. Dans ses conclusions dans l'affaire 41/69, *ACF Chemiefarma N.V.*, arrêt du 15 juillet 1970, Rec., 661 s., l'avocat général Gand déclarait: «il s'agit avec réserves de se tourner vers les législations des Etats membres car les règles communes à celles-ci ne pourraient servir de point de référence que dans la mesure où elles sont susceptibles d'être transposées dans le droit communautaire tout en respectant les caractéristiques de celui-ci».

104 Constantinesco, *supra* note 25.

105 Conclusions de l'avocat général Roemer dans l'affaire 49/71, *Hagen*, arrêt du 1er février 1972, Rec., 35 s.

Cette conviction est partagée par la Cour de justice qui dans son arrêt *EKRO* du 18 janvier 1984 affirme qu'

> il découle des exigences tant de l'application uniforme du droit communautaire que du principe d'égalité, que les termes d'une disposition du droit communautaire qui ne comporte aucun renvoi exprès au droit des Etats membres pour déterminer son sens et sa portée doivent normalement trouver, dans toute la Communauté, une interprétation autonome et uniforme qui doit être recherchée en tenant compte du contexte de la disposition et de l'objectif poursuivi par la réglementation en cause.[106]

L'interprétation d'une notion qui relève d'une norme qui ne renvoie pas au droit national pour déterminer son sens et sa portée, «ne saurait être laissée à la discrétion de chaque Etat membre».[107] Les cas où la Cour de justice attribue un sens communautaire à des notions déterminantes pour l'application d'un régime communautaire sont la règle. Ainsi, «le traité (CEE) ayant institué par les articles 48 à 51 la libre circulation des 'travailleurs' a de ce fait conféré à ce terme une portée communautaire». C'est l'unité du régime institué par le traité qui serait compromise si chaque Etat membre pouvait définir à son gré la notion de travailleur.[108] Le choix de la Cour de justice est d'autant plus significatif que l'avocat général Lagrange doutait «qu'il (fut) possible de se contenter d'une notion purement communautaire»,[109] la Cour de justice affirme que cette notion «relève ... non du droit interne mais du droit communautaire».[110]

La notion de taxe, d'effet équivalent à des droits de douane au sens des articles 13 s. CEE, n'implique aucune référence au droit des Etats membres mais doit être interprétée «à la lumière des objectifs du traité».[111]

En l'absence d'une définition précise des notions d'«agriculture» ou d'«exploitation agricole», il revient aux institutions communautaires d'élaborer, le cas échéant, aux fins de la réglementation découlant du traité, une telle définition de l'exploitation agricole.[112]

Pas davantage la Cour de justice n'a admis que la notion «d'emplois dans l'administration publique» au sens de l'article 48, paragraphe 4 CEE puisse

106 CJCE, affaire 327/82, *supra* note 93; voir aussi affaire 64/81, *Corman, supra* note 91.

107 CJCE, affaire 51/76, *Verbond van Nederlandse Ondernemingen*, arrêt du 1er février 1977, Rec., 113 s., spécialement 125; affaire 154/80, *Staatssecretaris van Financien*, arrêt du 5 février 1981, Rec., 445 s., spécialement 453.

108 CJCE, affaire 75/63, *Unger*, arrêt du 19 mars 1964, Rec., 347 s.

109 Conclusions dans l'affaire *Unger, supra* note 108.

110 Dans le même sens, CJCE, affaire 53/81, *Levin*, arrêt du 22 mars 1982, Rec., 1035 s., spécialement 1049. Sur ce point voir Desoldre, «De la notion communautaire de travailleur», *CDE*, n° 1 (1979) 38 s.

111 CJCE, affaires 52 et 55/65, *Commission c. République fédérale d'Allemagne*, arrêt du 16 juin 1986, Rec., 228 s.

112 CJCE, affaire 85/77, *Azienda avicola Sant'Anna*, arrêt du 28 février 1978, Rec., 527 s., spécialement 540; affaire 139/77, *Denkavit*, arrêt du 13 juin 1978, Rec., 1317 s., spécialement 1332.

être laissée à la discrétion des Etats membres par un renvoi à leurs droits. Déjà dans ses conclusions dans l'affaire *Sotgiu*,[113] l'avocat général Mayras s'était prononcé contre l'argumentation du gouvernement allemand qui prétendait attribuer en exclusivité au droit national la définition de la nature «administrative» des fonctions en cause et de la détermination des conditions d'accès à l'emploi. L'avocat général constatait que l'article 48 du traité CEE n'opère pas un renvoi à des critères nationaux de sorte qu'

> il existe de sérieuses raisons de douter qu'eu égard aux objectifs et à l'esprit de la CEE, une telle interprétation fondée sur la prééminence de la souveraineté des Etats puisse être retenue [...] dans les domaines où les compétences propres ont été transférées aux organes communautaires, la primauté, l'effet direct et la nécessité d'une application uniforme des règles édictées par ces organes ne peuvent s'accommoder de critères d'interprétation qui permettraient à chacun des Etats membres de façonner à son gré, c'est-à-dire d'étendre ou de restreindre la portée de ces normes communautaires.

Il eut été paradoxal que le souci de faire prévaloir une notion communautaire ne se soit pas exprimé à propos de l'article 177 CEE qui précisément institue des procédures destinées à assurer l'unité de l'interprétation de validité du droit communautaire. C'est pourquoi la notion de juridiction qui commande le champ d'application de l'article 177 ne pouvait être que communautaire.[114]

La nécessité de constituer des concepts communautaires est intimement liée aux principes les plus essentiels de l'ordre juridique communautaire que sont l'attribution de compétences propres, la primauté, l'effet direct, l'unité et l'uniformité du droit communautaire, l'égalité des Etats membres.

Finalement, l'autonomie des sources et l'autonomie de validité procèdent de la même exigence essentielle: exclure toute subordination de l'ordre juridique de la Communauté aux droits étatiques dans ce qui lui est essentiel.[115]

La «communautarisation» des notions juridiques connaît des degrés, même si la construction d'un concept communautaire est la solution la plus fréquemment retenue.

Dans certaines circonstances, l'emprise du droit communautaire est moins accentuée. Elle compose avec la nécessité de laisser subsister une certaine

113 CJCE, affaire 152/73, arrêt du 12 février 1974, Rec., 153 s.

114 CJCE, affaire 61/65, *Veuve Vaasen-Göbbels*, arrêt du 30 juin 1966, Rec., 337 s.; affaire 246/80, *Broeckmeulen*, arrêt du 6 octobre 1981, Rec., 2311 s.; affaire 109/88, *Handels-og Kontorfunktionersnes Forbund Denmark*, arrêt du 17 octobre 1989, Rec., 3199 s.; affaire C-24/92, *Corbiau*, arrêt du 30 mars 1993, non encore publié.

115 CJCE, affaire 149/79, *Commission c. Belgique*, arrêt du 17 décembre 1980, Rec., 3881 s.: «la règle fondamentale pour l'existence de la Communauté, selon laquelle le recours à des dispositions constitutionnelles, de l'ordre juridique interne pour limiter la portée des dispositions du droit communautaire ne saurait être admise puisqu'il porterait atteinte à l'unité et à l'efficacité de ce droit, doit s'appliquer également dans la détermination de la portée et des limites de l'article 48, paragraphe 4, du traité de la CEE».

liberté aux droits nationaux. sans substituer une notion commune aux concepts nationaux, la Cour de justice les soumet à un «encadrement» plus ou moins rigoureux. L'exemple le plus caractéristique de ce procédé a trait à la notion d'«ordre public» sous les articles 36, 48, paragraphe 3 ou 56 CEE.

On a pu penser initialement que ces dispositions constituaient «une réserve pratiquement indéfinie de souveraineté étatique».[116] Cette crainte ne s'est, heureusement, pas confirmée. Afin d'éviter que les droits reconnus par le traité CEE aux ressortissants de la Communauté soient à la merci des autorités étatiques, la Cour de justice a entrepris d'encadrer la notion d'ordre public, tout en sachant qu'elle ne pouvait prétendre, dans l'état du droit communautaire, lui substituer une notion entièrement commune. Elle constate donc que

> pour l'essentiel les Etats membres sont libres de déterminer [...] conformément à leurs besoins nationaux les exigences de l'ordre public,[117]

mais elle n'en assigne pas moins des limites à cette liberté. Dans un attendu de principe qui sera reproduit dans plusieurs autres arrêts, la Cour de justice affirme qu'

> il convient de souligner que la notion d'ordre public dans le contexte communautaire, et notamment en tant que justification d'une dérogation au principe fondamental de la libre circulation des travailleurs, doit être entendue strictement, de sorte que sa portée ne saurait être déterminée unilatéralement sans contrôle des institutions de la Communauté,[118]

c'est-à-dire en dernier ressort de la Cour de justice elle-même.

En vérité, l'encadrement par le droit communautaire de la notion d'ordre public se resserrera progressivement, la Cour de justice n'admettant les recours à cette dérogation qu'en présence d'une menace réelle et suffisamment précise affectant un intérêt fondamental de la société.[119]

Le contrôle exercé sur les qualifications des droits nationaux permettra à la Cour d'écarter du champ d'application de l'article 36 CEE divers intérêts qu'elle juge étrangers à la protection de l'ordre public.

116 Lyon-Caen, «Chronique de droit social européen», *RTDE* (1966) 693.
117 CJCE, affaire 41/74, *Van Duyn*, arrêt du 4 décembre 1974, Rec., 1337 s.
118 CJCE, affaire 152/73, *Sotgiu*, arrêt du 12 février 1974, Rec., 153 s.; affaire 67/74, *Bonsignore*, arrêt du 26 février 1975, Rec., 297 s., spécialement 307; affaire 36/75, *Rutili*, arrêt du 28 octobre 1975, Rec., 1219 s.; voir Druesne, «La réserve d'ordre public de l'article 48 du traité de Rome», *RTDE* (1976) 229 s.; Simon, «Ordre public et libertés publiques dans les Communautés européennes», *RMC* (1976) 201 s.
119 CJCE, affaire 30/77, *Bouchereau*, arrêt du 27 octobre 1977, Rec., 1999 s.

On peut lire dans l'arrêt *Kohl* du 6 novembre 1984 que

> quelle que soit l'interprétation qui doit être donnée à la notion d'ordre public, celle-ci ne saurait être étendue de façon à inclure des considérations tenant à la protection des consommateurs.[120]

De même,

> une législation imposant un prix minimal en matière de carburants ne peut être censée répondre à un objectif d'ordre public au sens de l'article 36 du Traité.[121]

Il en ira de même dans le domaine de la liberté de circulation des personnes. L'ordre public ne saurait, par exemple, justifier des mesures visant à une prévention générale destinée à exercer un effet dissuasif sur des étrangers.[122] Surtout, conformément à l'objet du traité CEE, la notion d'ordre public

> ne s'entend en définitive que dans sa conception traditionnelle. Les autorités ne peuvent y faire appel pour porter atteinte à l'exercice des droits économiques et sociaux.[123]

Pour la Cour de justice

> les raisons d'ordre public ne sauraient être détournées de leur fonction propre par le fait qu'elles soient «invoquées à des fins économiques».[124]

Le droit communautaire peut faire preuve d'une plus grande réserve comme c'est le cas de la notion de «moralité publique» présente dans l'article 36 et dans l'article 56 du traité CEE. La Cour de justice reconnaît qu'

> il appartient à chaque Etat membre de déterminer les exigences de la moralité publique sur son territoire selon sa propre échelle des valeurs, et dans la forme qu'il a choisie.[125]

Des renvois aux droits des Etats membres sans un encadrement minimal par le droit communautaire sont relativement exceptionnels. Cette solution peut correspondre à un état transitoire ou provisoire du développement du droit de la Communauté.[126]

120 CJCE, affaire 177/83, *Kohl*, arrêt du 6 novembre 1964, Rec., 3651 s., spécialement 3663.
121 CJCE, affaire 34/84, *Procureur de la République c. Michel Leclerc*, arrêt du 25 septembre 1985, Rec., 2915 s., spécialement 2924; affaires jointes 114 et 115/84, *Piszko c. Centre Leclerc et Carrefour Supermarché*, arrêt du 25 septembre 1985, Rec., 2961 s., spécialement 2968.
122 *Bonsignore*, *supra* note 118.
123 J. Boulouis et R.-M. Chevallier, *supra* note 16, tome 2, 87.
124 *Rutili*, *supra* note 117. Directive n° 64/221 du Conseil du 24 février 1964, JOCE, n° 56 du 4 avril 1964, 845 s., article 2, paragraphe 2.
125 CJCE, affaires jointes 115 et 116/81, *Adaoui et Cornuaille c. Belgique*, arrêt du 18 mai 1982, Rec., 1665 s.
126 Voir Mortelmans, «Les lacunes provisoires en droit communautaire», *CDE*, n° 4 (1981) 410 s. Pour des arrêts récents opérant un renvoi aux droits nationaux, voir TPI, 14

Il est des cas où le renvoi aux droits nationaux peut entraîner des conséquences regrettables. Il en est ainsi de la nationalité des personnes physiques qui commande l'application de divers régimes communautaires dont celui de l'établissement.

Selon la conception dominante le droit communautaire renvoie au droit de chacun des Etats membres pour la définition des conditions d'acquisition et de perte de la nationalité.[127] Dans son arrêt *Micheletti* du 7 juillet 1992,[128] la Cour de justice a non seulement rappelé que la définition des conditions d'obtention et de perte de la nationalité relève, conformément au droit international, de la compétence de chaque Etat membre, mais a en outre jugé qu'il n'appartient pas à la législation d'un Etat membre de restreindre les effets que le droit communautaire attache à l'attribution de la nationalité d'un autre Etat membre. Certaines voix discordantes se sont fait entendre. Elles font valoir que les Communautés européennes tendent à un degré d'intégration sans commune mesure avec celui qui caractérise la société internationale, de sorte qu'il ne serait pas concevable que la définition des ressortissants de la Communauté puisse être totalement abandonnée aux seuls droits étatiques par l'effet du renvoi au droit de la nationalité des Etats membres.[129] Si le cas de la notion de nationalité est certainement le plus exemplaire, mais également le plus discutable, le traité CECA offrait d'autres illustrations de ce procédé.[130]

(b) L'autonomie à l'égard du droit international

Outre que la spécificité des traités instituant les Communautés européennes ne peut autoriser à oublier qu'il s'agit de conventions internationales, les accords internationaux qu'elles sont habilitées à conclure font du droit international une source du droit communautaire. Ce n'est toutefois pas cet aspect des rapports entre l'ordre juridique communautaire et le droit international qui sera examiné ici.[131]

décembre 1992, affaire T-43/90, *Diez Garcia c. Parlement*, Rec., II-2619 s., affaire T-44/90, *Khouri c. Commission*, Rec., II-2637 s.

127 Voir en ce sens Séché, in Mégret et autres, *Le droit de la CEE*, vol. 3, (2e édition, 1990) 16, n° 13: «Conformément aux règles du droit international public, il incombe à chaque Etat de fixer les conditions d'acquisition et de perte de la nationalité pour ce qui les concerne»; C. Gavalda et G. Parléani, *Traité de droit communautaire des affaires* (2e édition, 1992) 244, n° 225; Kovar et Simon, «La citoyenneté européenne», *CDE*, n° 3-4 (1993) 285 s., spécialement 289.

128 CJCE, affaire C-369/90, *Mario Vicente Micheletti*, arrêt du 7 juillet 1992, Rec., I-4258 s.; pour un commentaire critique, voir Ruzié, *RGDIP* (1993) 107 s.

129 Voir T.C. Hartley, *EEC Immigration Law, North-holland* (1978) 76; Greenwood, «Nationality and the Limits of Free Movements of Persons in Community Law», *YEL* (1987) 185 s., spécialement 187-193.

130 Voir R. Kovar, *supra* note 98, 309-313.

131 Sur cette question, voir Rideau, «Droit international et droit communautaire», *CDE* (1973) 435 s.; Ganshof van der Meersch, «L'ordre juridique des Communautés européennes et le

S'interroger sur l'autonomie de l'ordre juridique communautaire à l'égard du droit international consiste à apprécier son ouverture, sa «perméabilité» aux règles internationales.[132] Il s'agit donc de rechercher si, comment et dans quelle mesure le droit communautaire use des principes du droit international dans la sphère interne des Communautés.

L'ordre juridique communautaire ne peut s'enfermer dans une autarcie qui occulterait artificiellement une partie de sa réalité. Il ne saurait non plus renoncer à sa spécificité en accueillant des règles qui méconnaîtraient la nature de la Communauté.[133] A l'instar de la position adoptée à l'égard des droits étatiques, les emprunts au droit international sont sélectifs: sont acceptés ceux qui contribuent à renforcer le système communautaire, les autres se trouvent écartés.

La Cour de justice ne s'interdit donc pas de faire appel au droit international pour interpréter telle ou telle règle communautaire. Dans l'arrêt *Humblet*,[134] elle se réfère à la «terminologie fiscale internationale» et «aux accords internationaux les plus récents en matière de double imposition». La Cour jugera aussi que la possibilité d'attraire un Etat membre devant une juridiction d'un autre Etat est réglée par le «droit de ce dernier et les principes de droit international».[135] Les conclusions des avocats généraux constatent souvent les emprunts au droit international, en particulier à propos des compétences de la Communauté vis-à-vis des Etats tiers ou de leurs ressortissants.[136] Lorsqu'est en cause le statut international de la Communauté, la Cour de justice est nécessairement amenée à se référer aux principes du droit des gens. C'est ainsi que dans son arrêt du 27 septembre 1988, la Cour prend en considération le «principe de territorialité qui est universellement reconnu en droit international public» pour asseoir la compétence de la Communauté dans l'application de ses règles de concurrence à des entreprises qui n'ont pas leur siège dans la Communauté.[137]

Alors même qu'elle doit régler une question purement interne telle que la hiérarchie entre le droit communautaire et les droits des Etats membres, la Cour de justice fait appel à des considérations de droit international en même

droit international», *RdC* (1975) V, 1 s.; D. Jacot-Guillarmod, *Droit communautaire et droit international public* (1979).

132 Selon l'expression de D. Simon, *supra* note 19, 48 s.

133 Voir P. Pescatore, *supra* note 18, spécialement 48 s.

134 CJCE, affaire 6/60, *Humblet*, arrêt du 16 décembre 1960, Rec., 1444 s.

135 CJCE, affaire 244/80, *Foglia*, arrêt du 16 mars 1981, Rec., 3045 s., spécialement 3064.

136 Voir à propos de l'application des règles de concurrence à des entreprises établies à l'extérieur de la CEE les conclusions de l'avocat général Mayras dans l'affaire des «matières colorantes», CJCE, affaires 48, 49 et 51 à 57/69, *Imperial Chemical Industries c. Commission*, arrêt du 15 juillet 1972, Rec., 619 s.; conclusions de l'avocat général Darmon dans l'affaire «Pâte de bois», arrêt du 27 septembre 1986, affaires jointes 89, 104, 114, 117, 125 à 129/85, Rec., 5193 s.; sur le «principe du droit international» selon lequel les Etats membres ne peuvent priver leurs propres nationaux du droit de vivre sur leur territoire, voir les conclusions de l'avocat général Mayras, arrêt *Rutili supra* note 118.

137 CJCE, *supra* note 136.

temps qu'à des raisons relatives à la spécificité de l'ordre juridique de la Communauté.[138] Enfin, tout en refusant de considérer que la Communauté est liée par les instruments conventionnels multilatéraux consacrés à la protection des droits de l'homme, la Cour de justice reconnaît devoir s'en inspirer, la Convention européenne de sauvegarde des droits de l'homme représentant naturellement sa référence privilégiée.[139]

Au total, «la Cour transpose une solution du droit international dans la mesure où elle est conforme à la spécificité des Communautés et aux mécanismes qui en découlent».[140] L'ordre juridique communautaire ne manifeste aucune prévention de principe à l'encontre du droit international dès lors, au moins, que ce dernier ne porte pas atteinte à son identité.[141]

C'est aux cas où la Cour de justice a estimé devoir récuser toute référence au droit international qu'il faut s'intéresser pour mesurer correctement le degré d'autonomie de l'ordre juridique de la Communauté.

La procédure de sanction des violations de leurs obligations communautaires par les Etats membres est un des terrains d'élection de la distance prise par le droit communautaire à l'égard du droit international. Le refus de l'*exceptio non adimpleti contractus* est une constante de la jurisprudence de la Cour de justice,[142] comme celle fondée sur la carence des institutions communautaires.[143] L'affirmation du caractère «objectif» du contentieux de la constatation de manquement,[144] conjuguée avec la récusation des faits justificatifs mentionnés précédemment sont autant d'indices de la spécificité de l'ordre juridique de la Communauté par rapport au régime de la responsabilité internationale.

Cette préoccupation conduit la Cour à rejeter des principes ou des institutions qui sont la traduction du moindre degré d'intégration juridique de la société internationale et, de ce fait, s'avèrent incompatibles avec la nature du

138 C'est en prenant appui sur «les principes du droit international» que la Cour de justice règle le conflit de normes successives en faveur du droit communautaire, CJCE, affaire 10/61, *Commission c. Italie*, arrêt du 27 février 1962, Rec., 1 s. La Cour de justice se réfère aux obligations attachées par le droit international à l'acte de ratification d'une convention internationale, pour en déduire que «tous les Etats ont adhéré au traité dans les mêmes conditions et sans aucune réserve que celles exprimées dans les protocoles additionnels», CJCE, affaire 9/65, *San Michele*, ordonnance du 22 juin 1965, Rec., 15 s.

139 CJCE, *Internationale Handelsgesellschaft*, *supra* note 84.

140 V. Constantinesco, «Compétences et pouvoirs dans les Communautés européennes», *LGDJ* (1974) 261.

141 Sur le degré d'ouverture du droit communautaire au droit international, voir avec profit les observations de D. Simon, *supra* note 19.

142 CJCE, *Commission c. Grand-Duché de Luxembourg et Royaume de Belgique*, *supra* note 29; affaire C-38/89, *Blanquernon*, arrêt du 11 janvier 1990, Rec., I-90 s.; affaire C-146/89, *Commission c. Royaume-Uni*, arrêt du 9 juillet 1991, Rec., I-3525 s.

143 CJCE, affaires 2 et 3/62, *Commission c. Belgique et Luxembourg*, arrêt du 14 décembre 1962, Rec., 813 s.; affaire 7/71, *Commission c. France*, arrêt du 14 décembre 1971, Rec., 1003 s., commentaire de V. Constantinesco, *JDI* (1973) 539 s.; observations de J. Hébert, *RTDE* (1972) 299 s.

144 Sur ce point voir *infra*.

système communautaire destiné à exprimer un intérêt commun supérieur aux intérêts nationaux qui doivent trouver satisfaction dans le cadre des institutions et des procédures établies par les traités constitutifs des Communautés conformément aux principes de «solidarité»,[145] de «loyauté»[146] communautaire. Cette logique interdit aux Etats membres de se réclamer d'une conception étroite de la réciprocité[147] ou encore de prétendre à une défense unilatérale de leurs intérêts.[148] Ces exigences sont fréquemment rappelées par la Cour qui, reprenant des thèmes déjà présents dans son arrêt du 7 février 1973, *Commission c. Italie*,[149] affirme qu'

> en permettant aux Etats membres de profiter des avantages de la Communauté, le traité leur fait aussi l'obligation d'en respecter les règles; le fait pour un Etat membre, de rompre unilatéralement, selon la conception qu'il se fait de son intérêt national, l'équilibre entre les avantages et les charges découlant de son appartenance à la Communauté, met en cause l'égalité des Etats membres devant le droit communautaire et crée des discriminations à charge de leurs ressortissants; ce manquement aux devoirs de solidarité acceptés par les Etats membres du fait de leur adhésion à la Communauté affecte jusqu'aux bases essentielles de l'ordre juridique communautaire.[150]

B. Les fonctions de l'autonomie de l'ordre juridique communautaire

L'autonomie de l'ordre juridique des Communautés commande l'ensemble de ses rapports avec les droits des Etats membres en fondant la primauté et l'applicabilité directe du droit communautaire. Sans, évidemment, prétendre diminuer l'importance de ces deux principes, il se révèle nécessaire de les inclure dans une conception d'ensemble des relations entretenues par les ordres juridiques communautaire et nationaux. Or, sous ce rapport, la Cour de justice a pu laisser transparaître certaines hésitations.

145 Sur le sens et la portée de ce principe, voir notamment, CJCE, affaire 6 et 11/69, *Commission c. France*, arrêt du 10 décembre 1969, Rec., 523 s. où la Cour de justice évoque la «solidarité» qui est à la base de l'ensemble du système communautaire»; affaire 39/72, *Commission c. République italienne*, *supra* note 50; affaires 3, 4 et 6/76, *Kramer*, arrêt du 14 juillet 1976, Rec., 1279 s.

146 V. Constantinesco, «L'article 5 CEE de la bonne foi à la loyauté communautaire», *Du droit international au droit de l'intégration, supra* note 33, 97.

147 Parmi les multiples arrêts développant cette idée, voir *Commission c. Luxembourg et Belgique, supra* note 29; *Commission c. République française, supra* note 143; *Blanquernon, supra* note 142; affaire C-146/89, *Commission c. Royaume-Uni, supra* note 142, Rec., I-3533 s.; *Commission c. Italie, supra* note 138.

148 *Commission c. République italienne, supra* note 145. Pour la Cour de justice des difficultés économiques et politiques ne peuvent justifier des mesures unilatérales de la part d'un Etat membre. Elles doivent, le cas échéant, trouver leur solution dans le cadre des procédures communautaires prévues à cet effet, CJCE, affaire 42/82 R., *Commission c. France*, ordonnance du 4 mars 1982, Rec., 841 s., spécialement 875 s.

149 *Supra* note 50.

150 CJCE, *Commission c. Royaume-Uni*, arrêt du 7 février 1979, affaire 178/78, Rec., 419 s., spécialement 429.

Dans son arrêt *Costa*[151] la Cour considère que «l'ordre juridique propre» institué par le traité de la CEE s'est «intégré au système juridique des Etats membres lors de l'entrée en vigueur du traité». L'idée d'une «intégration» du droit communautaire au système juridique des Etats membres pourrait conduire à penser qu'il subit une transformation de sa nature selon un schéma dualiste. Or, une telle conception ne s'accorderait pas, à l'évidence, avec l'autonomie du droit communautaire dont la Cour de justice fait un principe constant de sa jurisprudence. Il est finalement heureux que la Cour ait choisi de substituer au terme «intégration» qui pouvait receler une regrettable ambiguïté, une formulation mieux à même de restituer la position réelle du droit communautaire. L'arrêt *Simmenthal*[152] permettra d'apporter une utile correction puisqu'il y est affirmé que le droit communautaire, originaire et dérivé, fait «partie intégrante avec rang de priorité de l'ordre juridique applicable sur le territoire de chacun des Etats membres». Ainsi, le droit communautaire et les droits nationaux coexistent au sein de l'ordre juridique complexe qui s'applique sur le territoire des Etats membres. Encore convient-il de rappeler que cette coexistence ne s'organise pas sur un pied d'égalité puisqu'il est précisé que le droit communautaire a «rang de priorité» sur les droits nationaux. Au total, la Cour de justice condamne tant la conception d'un droit communautaire qui s'intégrerait dans le droit étatique que celle de deux ordres juridiques simplement juxtaposés dont les relations seraient exclusivement réglées par la délimitation de leurs champs de compétence respectifs. Sans ignorer l'intérêt d'une analyse des relations entre les ordres juridiques de la Communauté et de ses Etats en termes de rapports de compétences, la Cour de justice est persuadée que cette approche ne permet pas de les restituer dans leur intégralité. Les rapports normatifs constituent une donnée irréductible. L'arrêt *Simmenthal* témoigne de cette dualité lorsque la Cour déclare que

> le fait de reconnaître une efficacité quelconque à des actes législatifs nationaux empiétant sur le domaine à l'intérieur duquel s'exerce le pouvoir législatif de la Communauté, ou autrement incompatible avec les dispositions du droit communautaire, reviendrait à nier..., le caractère effectif d'engagements inconditionnellement et irrévocablement assumés par les Etats membres, en vertu du traité, et mettrait ainsi en question les bases mêmes de la Communauté.[153]

La nécessité d'établir une hiérarchie entre le droit communautaire et les droits nationaux sur le fondement de sa spécificité et de son autonomie s'impose pour contrecarrer des tendances contraires qui peuvent être constatées dans les décisions des juridictions nationales.

151 *Supra* note 2.
152 CJCE, affaire 106/77, arrêt du 9 mars 1978, Rec., 629 s.
153 *Supra* note 152.

1. L'autonomie fonde la primauté du droit communautaire

En affirmant l'autonomie de l'ordre juridique des Communautés, la Cour de justice n'est pas seulement parvenue à écarter toute prétention de subordonner ses règles aux droits nationaux, spécialement aux normes constitutionnelles des Etats membres, elle a aussi établi un lien consubstantiel entre l'autonomie et la primauté du droit communautaire. C'est parce qu'il est «issu d'une source autonome» que «le droit né du traité» de la CEE ne peut «en raison de sa nature spécifique se voir judiciairement opposer un texte interne quel qu'il soit, sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même».[154]

Commentant cet extrait de l'arrêt *Costa*, le professeur Guy Isaac observe que la supériorité du droit communautaire «ne résulte pas d'une quelconque concession de la part du droit constitutionnel des Etats membres» mais est «fondée sur la nature intrinsèque des traités communautaires et des Communautés». Ce fondement autonome a pour effet que

> la primauté échappe aux aléas que lui feraient courir si elle en dépendait, les règles divergentes qui, dans chaque Etat, prétendent régler les conflits du droit international et du droit interne.[155]

En fondant la primauté du droit communautaire sur sa nature propre, la Cour de justice cherchait d'abord à lui assurer une force identique dans toute la Communauté conformément aux exigences d'unité et d'uniformité dont elle a souvent eu l'occasion de souligner l'importance. En même temps, le droit communautaire peut prétendre exercer sa supériorité à l'encontre de toutes les normes étatiques aussi éminentes soient-elles, sans exception même en faveur des règles constitutionnelles nationales.[156] C'est encore la même raison qui permet de conférer à la primauté du droit communautaire la valeur d'un principe de droit liant les juridictions des Etats membres dans l'exercice de leurs fonctions.[157]

Comme on l'a déjà laissé pressentir,[158] les juridictions nationales ne se sont pas toujours ralliées à la conception qu'a la Cour de justice des rapports de hiérarchie existant entre le droit communautaire et les droits des Etats membres. Mêmes si les conséquences pratiques de ces divergences ont pu être sensiblement réduites, elles n'en traduisent pas moins des conceptions radicalement différentes de celles de la Cour de justice quant aux rapports entre les ordres juridiques nationaux et communautaire ou à la nature des règles qui constituent ce dernier.

154 *Costa c. ENEL*, *supra* note 2.
155 G. Isaac, *Droit communautaire général* (1990) 169.
156 CJCE, affaire 48/71, *Commission c. Italie*, arrêt du 13 juillet 1972, Rec., 533 s.
157 Sur ce point, voir *infra* page 54.
158 Voir *supra* page 22.

C'est ainsi que, dans le contexte d'une tradition marquée fortement par l'empreinte du dualisme, la jurisprudence constitutionnelle italienne a, en quelque sorte, privilégié à l'excès l'autonomie de l'ordre juridique communautaire pour parvenir à régler ses relations avec l'ordre juridique italien sans avoir à établir une hiérarchie entre eux, mutilant la construction élaborée par la Cour de justice.

Dès 1965, dans sa décision *Acciaierie San Michele*,[159] la Cour constitutionnelle italienne mettait en ces termes l'accent sur l'autonomie du système juridique de la CECA:

> les articles 102 et 113 de la Constitution ... ne concernent que des droits et des intérêts qui sont reconnus à chaque sujet en raison de sa position dans l'ordre juridique interne, et non des droits et des intérêts qu'il tire de sa position dans un ordre étranger, comme celui de la CECA.

Celui-ci est «totalement distinct» de l'ordre juridique italien. La séparation des deux ordres juridiques est soulignée avec une telle intensité qu'on est tenté d'en déduire «que ce qui se produit dans le domaine du second ne concerne nullement le premier».[160]

La Cour constitutionnelle italienne concède toutefois que les ordres juridiques des Etats membres et de la Communauté sont «coordonnés» sur la base de l'article 11 de la Constitution.

Cette conception de deux ordres juridiques «distincts et autonomes», mais «coordonnés» en fonction du transfert de compétences opéré par la loi d'exécution adoptée en vertu de l'article 11 de la Constitution italienne est présente dans plusieurs autres décisions de la Cour constitutionnelle.[161] Son arrêt du 18 juin 1984, *Granital*[162] s'inscrit dans cette lignée, la Cour constitutionnelle affirmant qu'

> il y a une constante dans la jurisprudence sur les rapports entre le droit communautaire et le droit interne, à savoir que les deux ordres juridiques sont autonomes et distincts, même s'ils sont coordonnés en fonction de la répartition des compétences établies et garanties par le traité.

Palliant les inconvénients du «dualisme», la reconnaissance de l'autonomie de l'ordre juridique de la Communauté a le mérite d'exclure toute transformation du droit communautaire en droit italien qui aurait pour conséquence

159 Cour constitutionnelle italienne, 27 décembre 1965, *Acciaierie San Michele*, *Foro Italiano* (1966) I, 8, note P. Catalano.

160 Olmi, «Les rapports entre droit communautaire et droit national dans les arrêts des juridictions supérieures des Etats membres», *RMC* (1981) 178 s.

161 Cour constitutionnelle italienne, décision du 27 décembre 1973, *CDE* (1975) 122 s., observations P. de Caterini; décision du 30 octobre 1975, *RTDE* (1976) 396 s., note L. Plouvier.

162 Cour constitutionnelle italienne, décision du 18 juin 1984, *Granital*, *CDE* (1986) 185 s., note J.-V. Louis.

d'interdire de reconnaître aux normes communautaires un rang spécifique différent de celui des lois italiennes. La Cour constitutionnelle s'en explique en exposant que

> la distinction entre notre ordre juridique et celui de la Communauté implique que la réglementation en question[163] n'est pas insérée dans le droit interne et n'est pas non plus assujettie au régime juridique prévu par les lois de l'Etat.

Tout en appréciant les efforts de la Cour constitutionnelle pour garantir l'efficacité du droit communautaire, force est de constater que la voie choisie par elle pour y parvenir s'accorde mal avec les vues de la Cour de justice des Communautés européennes. En effet, pour le juge constitutionnel italien qui déclare vouloir développer jusqu'«à ses conséquences ultimes» la conception qui sous-tendait sa jurisprudence antérieure, l'article 11 de la Constitution italienne ne constitue pas le fondement juridique de la primauté du droit communautaire, proposition qui n'est certainement pas pour déplaire à la Cour de justice, mais autorise le droit de la Communauté à produire en tant que tel ses effets sur le territoire italien. Dans ce cadre, droit italien et droit communautaire trouvent à s'appliquer dans les limites de leurs domaines de compétence sans hiérarchie entre eux. En d'autres termes les conflits de normes sont inconcevables, les deux systèmes de droit en présence ne pouvant connaître que des conflits de compétence. Il existe donc, sous ce rapport, une différence de principe entre la Cour constitutionnelle italienne et la Cour de justice des Communautés.[164] Alors que la Cour de justice insiste dans l'arrêt *Simmenthal*[165] sur le thème d'une unité de «l'ordre juridique applicable sur le territoire de chacun des Etats membres» résultant de la subordination de l'ordre juridique italien à l'ordre juridique communautaire, la Cour constitutionnelle met l'accent sur leur dualité accentuée par l'exclusion de toute hiérarchie entre eux.[166] La Cour constitutionnelle italienne est parfaitement consciente de la distance existant entre elle et le juge communautaire puisqu'elle note que celui-ci «part de prémisses différentes de celles retenues par elle», «la source normative de la Communauté (étant) fondue en un système unique», alors qu'elle récuse cette fusion. Le juge constitutionnel italien peut donc conclure qu'

> en raison précisément de la distinction entre les deux ordres juridiques, la primauté du règlement arrêté par la Communauté doit être comprise au sens où l'entend le récent arrêt, c'est-à-dire que la loi interne n'agit pas dans le domaine où se situe l'acte, lequel obéit entièrement au droit communautaire.

163 Il s'agissait de règlements communautaires.

164 Voir sur ce point les appréciations contrastées de Barav, «Cour constitutionnelle italienne et droit communautaire: le fantôme de *Simmenthal*», *RTDE* (1985) 313 s. et de J.-V. Louis, *CDE*, *supra* note 162.

165 *Supra* note 152.

166 En ce sens, voir J.-V. Louis, commentaire sous l'arrêt *Granital*, *supra* note 162.

On ne saurait mieux exprimer la thèse d'une dualité absolue des deux ordres juridiques en présence en se réclamant d'une conception synallagmatique de leur autonomie.

Postérieurement à l'arrêt *Granital*[167] la jurisprudence de la Cour constitutionnelle italienne laisse transparaître quelques indices d'une évolution possible de sa position. Elle a ressenti une certaine difficulté à en rester à la logique d'une dualité absolue des ordres juridiques italien et communautaire. Aussi a-t-on pu observer que

> dans certaines décisions, la terminologie utilisée évoque plutôt une optique unitaire. C'est le cas de l'arrêt n° 389/89, *Provincia di Bolzano*, où les règles communautaires sont décrites comme «des règles lesquelles, dans les limites des compétences et dans le cadre des objectifs propres aux organes de production normative de la Communauté, ont un rang primaire» ou encore comme des règles lesquelles «priment les dispositions nationales, bien que de rang législatif».

On peut citer dans le même sens l'ordonnance n° 144/89, *Buitoni Perugina*, où il est dit que

> la règle communautaire entre et demeure en vigueur dans notre ordre juridique sans que son efficacité soit influencée par la loi nationale.

Rien ne semble véritablement acquis car

> des réaffirmations de la conception dualiste sont présentes dans la jurisprudence la plus récente, notamment dans l'arrêt n° 168/91, *Giampaoli*.[168]

Pour des raisons qui tiennent également à leur vision des rapports du droit allemand avec le droit international, les juridictions allemandes ont elles aussi placé l'autonomie de l'ordre juridique communautaire au centre de leur jurisprudence.

Dans sa décision du 18 octobre 1967[169] la Cour constitutionnelle fédérale refuse d'examiner la compatibilité de règlements communautaires avec la Loi fondamentale en considérant que sa compétence se limitait aux seuls actes de l'autorité publique allemande. Son raisonnement prend appui sur l'autonomie de l'ordre juridique de la Communauté ainsi que sur la renonciation acceptée par l'Etat allemand à certains de ses pouvoirs souverains conformément à l'article 24, paragraphe 1 de la Loi fondamentale et sur la spécificité du droit communautaire.[170] L'ensemble de ces considérations l'autorisent à conclure

167 Cour constitutionnelle italienne, 18 juin 1984, *supra* note 162.

168 Daniele, «Après l'arrêt *Granital*: Droit communautaire et Droit national dans la jurisprudence récente de la Cour constitutionnelle italienne», *CDE* (1992) n° 1-2, 3 s., spécialement 12-13.

169 BVerfG, 18 octobre 1967, Recueil officiel, volume 2e, 293; 1 *RTDE* (1968) 231 s.

170 Les règlements du Conseil et de la Commission sont des actes d'une autorité publique supranationale instituée par le traité et nettement distincte de l'autorité publique des Etats membres. Les institutions de la CEE exercent des droits souverains auxquels les Etats

à l'impossibilité d'une subordination du droit de la Communauté au droit allemand en des termes qui ne sont pas sans rappeler les arrêts *Van Gend en Loos*[171] et *Costa*[172] de la Cour de justice constatant que le traité de la CEE a donné naissance à «une Communauté spéciale en voie d'intégration progressive, une organisation interétatique au sens de l'article 24, paragraphe 1 de la Loi fondamentale à laquelle la République fédérale d'Allemagne et les autres Etats membres ont transféré certains pouvoirs souverains. Il s'est créé ainsi une nouvelle autorité, autonome et indépendante à l'égard de l'autorité des divers Etats membres; ses actes ne doivent donc être ni confirmés, ni ratifiés par les Etats membres et ne peuvent donc être annulés par eux».[173]

La suite de l'arrêt de la Cour constitutionnelle n'est pas moins intéressante. En effet, on peut y lire que «d'une certaine façon le traité CEE représente la constitution de cette Communauté.»

Certes, la Cour constitutionnelle n'assimile pas entièrement le traité de la CEE à la constitution d'un Etat, pas plus qu'elle n'assimile la Communauté à un Etat, mais elle n'en reconnaît pas moins leur spécificité.[174] Cette reconnaissance est formulée en des termes qui mettent l'accent sur la nature originaire de l'ordre juridique communautaire, son irréductibilité aux catégories du droit international et du droit étatique, son autonomie enfin. Pour le juge constitutionnel allemand,

> les règles arrêtées par les institutions communautaires dans le cadre des compétences qui leur ont été attribuées (le droit secondaire) constituent un ordre juridique originaire, que l'on ne peut qualifier, ni de droit international, ni de droit interne des Etats membres. L'ordre communautaire et l'ordre interne des Etats membres constituent deux ordres juridiques distincts et autonomes; le droit créé par le traité CEE provient d'une source autonome.[175]

De manière plus satisfaisante que la Cour constitutionnelle italienne, son homologue allemande résout les conflits entre son droit national et le droit communautaire en jugeant que celui-ci déploie ses effets directs sur le territoire de la République fédérale et «évinc(e) en s'y superposant» les dispositions du droit allemand qui lui seraient contraires.[176]

membres ont renoncé en faveur de la Communauté qu'ils ont instituée», BVerfG, décision du 18 octobre 1967, *supra* note 169.

171 *Supra* note 1.

172 *Supra* note 2.

173 BVerfG, décision du 18 octobre 1967, *supra* note 169.

174 Sur ce point voir *supra* les développements traitant de la spécificité des traités institutifs des Communautés.

175 Dans le même sens, dans deux décisions postérieures des 9 juin 1971 et 21 mai 1974 (Recueil officiel, volume 31, 145 et volume 37, 271), le *Bundesverfassungsgericht* réaffirme que «le droit communautaire n'est ni une partie de l'ordre juridique national, ni un droit international, mais qu'il est un ordre juridique indépendant, qui provient d'une source autonome».

176 BVerfG, décision du 9 juin 1971, *supra* note 175, *CDE* (1973) 217 s.

Le fondement assigné par la Cour de justice des Communautés à la primauté du droit communautaire détermine ses caractères et sa portée. Ceci est sensible dès l'arrêt *Costa*.[177]

Pour la Cour, la primauté du droit communautaire ressortit à la nature des Communautés. A la thèse «internationaliste», est substituée une conception «communautaire» qui veut que la primauté du droit communautaire soit réglée par lui-même et non par les droits constitutionnels des Etats membres. L'innovation de cette conception a été contestée en faisant valoir que les juridictions internationales n'ont jamais jugé autrement.[178] Certes, cette observation est exacte, mais elle ne parvient pas à priver la primauté du droit communautaire de sa spécificité. En effet, à la différence du juge international, la Cour de justice ne se contente pas de poser le principe de la supériorité du droit communautaire sur les droits des Etats membres comme un précepte s'imposant à elle-même, elle lui confère la valeur d'une règle qui oblige aussi les juridictions nationales. Confrontés à un conflit de normes, les juges des Etats membres sont tenus de faire prévaloir la règle communautaire qui, selon les termes remarquablement maîtrisés de l'arrêt *Costa*[179]

> ne pourrait (...) en raison de sa nature originale spécifique, se voir judiciairement opposer un texte interne quel qu'il soit sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même.

L'originalité de la démarche de la Cour de justice est de fonder sur la nature propre du droit communautaire sa «primauté interne», de sorte que dans le cas du droit international seule la «primauté internationale», c'est-à-dire la consécration par les juridictions internationales de sa prééminence sur les droits nationaux, est «considérée comme une règle de droit des gens», alors que sa «primauté interne» est «laissée au droit public interne des Etats» qui peuvent «la reconnaître ou non, de manière discrétionnaire». Au contraire, la «primauté interne» du droit communautaire n'est pas abandonnée à la discrétion des droits nationaux, mais imposée comme une exigence communautaire.[180] La Cour de justice ne cessera de préciser les exigences de la primauté du droit communautaire à l'intention du juge national.[181] Le «dualisme» propre à la primauté du droit international est donc récusé au profit de l'unité de la primauté du droit communautaire, seule à même de traduire la nature de l'ordre juridique de la Communauté dont elle exprime la spécificité au regard du droit international en même temps que l'autonomie vis-à-vis des droits des Etats membres.

177 *Supra* note 2.
178 De Witte, «Retour à '*Costa*'. La primauté du droit communautaire à la lumière du droit international», *RTDE* (1984) 425 s., spécialement 427.
179 *Supra* note 2.
180 Voir De Witte, *supra* note 178.
181 Sur cette jurisprudence, voir *infra* page 68 s.

Pour concerner de la manière la plus tangible les juges, l'obligation d'assurer la prééminence du droit communautaire s'adresse à travers les Etats membres à l'ensemble de leurs organes constitutionnels et administratifs et de leurs collectivités publiques.[182] La primauté du droit communautaire se caractérise donc aussi par son «immédiatisation».

Ces considérations vont à l'encontre des thèses «révisionnistes» qui contestent radicalement la spécificité de la primauté du droit communautaire en alléguant qu'elle peut parfaitement s'expliquer par la théorie et la pratique du droit international le plus classique, ajoutant que, de toute manière, la Cour de justice n'est pas en mesure de tirer de la prétendue spécificité de la supériorité du droit communautaire des conséquences autres que celles pouvant résulter de la reconnaissance de son caractère international.[183]

Pour être intellectuellement stimulante cette thèse ne parvient pas à «banaliser» la primauté du droit communautaire. Elle permet néanmoins de mieux mesurer la portée des réticences des juridictions nationales à fonder la supériorité du droit communautaire sur la nature de celui-ci et estimant nécessaire de s'en tenir à cet égard aux dispositions de leur droit constitutionnel. De ce point de vue, la position du Conseil d'Etat français est particulièrement significative. Si on doit se réjouir de le voir, tardivement certes, reconnaître la primauté du droit communautaire sur la loi, il est évident qu'il se refuse à toute référence à la spécificité de ce droit et, qu'en basant sa décision sur l'article 55 de la Constitution française, il assimile le traité de la CEE à une convention internationale.[184] D'autres juridictions, comme les cours constitutionnelles italienne et allemande, prennent effectivement en compte l'autonomie et la spécificité de l'ordre juridique de la Communauté sans pour autant suivre la Cour de justice dans les conséquences qu'elle en tire pour la primauté du droit communautaire.[185]

2. L'autonomie fonde l'immédiateté du droit communautaire

L'«immédiateté» du droit communautaire désigne son aptitude à produire par lui-même dans les Etats membres les effets juridiques qui s'attachent à lui sans que ceux-ci puissent être subordonnés à l'interposition des droits nationaux. Cette absence de médiatisation du droit communautaire peut revêtir des formes et atteindre des degrés variables. Par delà ces différences, elle est

182 Voir *infra* page 68 s.

183 Voir par exemple, Wyatt, «New Legal Order or Old», 7 *EL Rev.* (1982) 147 s.

184 *Nicolo*, arrêt du 20 octobre 1989, Conseil d'Etat français, *Dalloz* (1989) Rec., 136. Sur cette décision, voir Boulouis, «A propos de l'arrêt Nicolo», *Revue critique de droit international privé* (1990) 91 s.; E. Honorat et E. Baptiste, *Actualité juridique. Droit administratif* (1989) 756 s.; Isaac, *RTDE* (1989) 771 s.; Kovar, «Le Conseil d'Etat et le droit communautaire: de l'état de guerre à la paix armée», *Dalloz* (1990) Chronique, 57; D. Simon, *Actualité juridique. Droit administratif* (1989) 788 s.

185 Voir *infra*.

l'une des particularités significatives de la nature du droit communautaire. La notion d'immédiateté ne se confond pas avec celle de l'applicabilité directe du droit communautaire qui n'en est qu'une des composantes, l'autre étant l'effet direct qui peut lui être reconnu.[186]

(a) L'autonomie et l'applicabilité directe du droit communautaire

L'applicabilité directe du droit communautaire signifie que l'entrée en vigueur de ses règles ne peut dépendre d'une réception par le droit de chacun des Etats membres, ni, à plus forte raison, d'une transformation en règles du droit national. L'autonomie de l'ordre juridique s'oppose nécessairement à de telles prétentions. Alors même qu'à lire l'article 189 du traité de la CEE l'applicabilité directe est un attribut qui semble réservé au seul règlement communautaire, l'examen de la jurisprudence de la Cour de justice conduit à penser que sa portée est sensiblement plus étendue.[187] La Cour de justice n'a-t-elle pas jugé que

> les règles de droit communautaire, établies par le traité lui-même ou en vertu des procédures qu'il a instituées, s'appliquent de plein droit au moment et avec des effets identiques sur toute l'étendue du territoire de la Communauté.[188]

La capacité du droit communautaire de s'appliquer de plein droit, en même temps et avec les mêmes effets dans la Communauté correspond exactement au contenu de l'applicabilité directe. Il suffit pour s'en convaincre de considérer les effets qui s'attachent au règlement dont l'article 189 du traité de la CEE précise, sans ambiguïté, qu'il est «directement applicable dans tout Etat membre». La version allemande du traité utilise l'expression *gilt unmittelbar* qui désigne certainement l'exclusion d'une *auctoritas interpositio* du pouvoir normatif étatique.[189] L'applicabilité directe du droit communautaire prohibe toute prétention des droits des Etats membres à faire dépendre la force obligatoire des règlements de l'intervention d'une mesure nationale. Ce principe est constamment répété par la Cour de justice. Parfaitement représentatif de cette jurisprudence, l'arrêt du 10 octobre 1973[190] énonce que

186 En cette matière la terminologie utilisée par la doctrine comme par la Cour de justice n'est pas «normalisée», voir G. Isaac, *supra* note 155, 152 s.

187 Voir Kovar, «L'intégrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de justice des Communautés européennes», *Das Europa der zweiten Generation, Gedächnisschrift für Christoph Sasse* (1981) volume I, 151 s.

188 CJCE, affaire 48/71, *Commission c. Italie*, *supra* note 156, Rec., 534 s.

189 Voir la décision du Conseil constitutionnel français du 30 décembre 1977, JORF, 31 décembre 1977, 6385 à propos des règlements: «la force obligatoire qui s'attache aux dispositions qu'ils comportent n'est pas subordonnée à une intervention des autorités des Etats membres et, notamment du Parlement français...»; Conseil d'Etat français, 22 décembre 1978, *Dalloz* (1979) Rec., 125 s.: «ce règlement qui, en vertu de l'article 189 [...] s'intègre dès sa publication, dans le droit interne des Etats membres [...].»

190 CJCE, affaire 34/73, *Variola*, arrêt du 10 octobre 1973, Rec., 990 s.; voir aussi, affaire 50/76, *Amsterdam Bulb BV c. Produktschap voor Siegerwassen*, arrêt du 2 février 1977,

> l'applicabilité directe d'un règlement exige que son entrée en vigueur et son application en faveur ou à la charge des sujets de droit se réalisent sans aucune mesure portant réception dans le droit national.

Il n'est pas sans intérêt pour la suite de relever que la Cour de justice associe l'effet direct à l'applicabilité directe des règlements pour exclure que leur force obligatoire puisse être assujettie à l'interposition de mesures étatiques.[191]

La forte tradition dualiste de l'Italie explique que la reconnaissance de l'applicabilité directe ait éprouvé de sérieuses difficultés à s'imposer, alors même que dès 1973, sa Cour constitutionnelle avait justement estimé que

> les exigences fondamentales de l'égalité et de la certitude juridique requièrent que les règles communautaires – qui ne peuvent être considérées comme source de droit international, ni de droit étranger, ni de droit interne des divers Etats – soient pleinement et obligatoirement appliquées dans tous les Etats membres, sans que des lois de réception et d'adaptation soient nécessaires, comme des actes ayant force de loi dans chaque pays de la Communauté, de sorte qu'elles entrent en vigueur en même temps et sont appliquées également et uniformément à l'égard de tous les destinataires.[192]

Les pratiques des autorités italiennes contraires à l'applicabilité directe des règlements communautaires ont été systématiquement condamnées. Les arrêts rendus dans les affaires 48/71[193] et 106/77[194] censurent deux des prétentions les plus négatrices de l'applicabilité directe et, par là de l'autonomie du droit communautaire.

Selon l'opinion commune, à la différence du règlement, l'incomplétude normative de la directive lui interdit de pouvoir être directement applicable. Instrument d'une «législation indirecte»,[195] la directive se distinguerait déjà ainsi radicalement du règlement, sans compter son incapacité à produire un effet direct. Exprimant cette conception des directives, Léontin-Jean Constantinesco[196] écrit

Rec., 137 s.; affaire 94/77, *Zerbone*, arrêt du 31 janvier 1978, Rec., 99 s.; affaire 31/78, *Bussonne*, arrêt du 30 novembre 1978, Rec., 2429 s.

191 Dans l'arrêt *Variola*, *supra* note 190, la Cour ajoute «que les Etats membres sont tenus, en vertu des obligations qui découlent du traité et qu'ils ont assumées en ratifiant celui-ci, à ne pas entraver l'effet direct propre au règlement et à d'autres règles du droit communautaire».

192 Cour constitutionnelle italienne, arrêt du 27 décembre 1973, *Frontini*, *CDE* (1975) 122 s.

193 *Commission c. Italie «œuvres d'art»*, *supra* note 156.

194 *Simmenthal*, *supra* note 152.

195 L'expression «pouvoir normatif indirect» est utilisée dans l'exposé des motifs luxembourgeois du projet de loi de ratification du traité de la CEE, Chambre des Députés, document 6375, 7, 41 et 42. Pierre Pescatore souligne aussi que «la directive, à la différence du règlement, est conçue comme un moyen de législation indirecte et médiate...»: *L'effet des directives communautaires. Essai de démythification*, Chronique, XXXV, (1980) 171 s.

196 L.-J. Constantinesco, *Das Recht der Europaïschen Gemeinschaften*, volume I (1977) 614.

> sie erlangen innerstaatliche Wirkungen nur durch die nationale Ausführungsmaßnahme der Mitgliedstaaten.

Pourtant, la doctrine laisse transparaître quelques doutes sur le bien-fondé de cette orthodoxie. C'est ainsi que Pierre Henri Teitgen[197] soutient que

> pas plus que le règlement, la directive ou la décision adressées aux Etats n'ont à être «reçues» dans leur ordre juridique interne; elles y sont intégrées de plein droit.

En d'autres termes, sous ce rapport au moins, il n'existerait pas de différence entre l'effet des directives et celui des règlements. On rappellera que la Cour de justice a jugé que l'applicabilité directe du règlement implique l'exclusion de toute «mesure portant réception dans le droit national».[198] Or, les arrêts de la Cour de justice montrent que les conditions de la mise en œuvre des directives par les Etats membres sont étrangères à une quelconque réception ou à toute transformation en droit interne, même si la terminologie utilisée peu sembler hésitante. Tour à tour, il est question d'une «introduction» dans l'ordre juridique interne,[199] d'une «traduction» des directives «dans des dispositions internes»,[200] de «mesures d'application» ou «d'exécution».[201] L'essentiel est que la directive par elle-même ne soit pas dépourvue d'une certaine portée normative[202] ou selon l'expression de Pierre Pescatore soit «traitée comme un non-être juridique du point de vue interne»[203] puisqu'elle peut produire des effets directs précisément lorsque les autorités nationales ont manqué à prendre les mesures que nécessite son application en droit interne. C'est dire que les effets de droit des directives ne peuvent pas être subordonnés à un ordre d'exécution, à l'*auctoratis interpositio*, du pouvoir normatif étatique.

Certes, il ne saurait être question d'occulter entièrement l'écart qui existe sous le rapport de l'applicabilité directe, comme de l'effet direct entre le règlement et la directive, de confondre ces deux catégories d'actes, mais il n'est pas moins difficile d'expliquer l'effet direct de substitution des directives en leur déniant une existence juridique propre. Au surplus, comme le fait observer Konraad Lenaerts,[204]

> alors même qu'elle ne produit pas d'effet direct..., toute directive déploie certains effets dans l'ordre juridique interne. En toute hypothèse, une directive peut être invoquée devant le juge national, afin de faire contrôler par celui-ci la compatibilité de la législation interne avec l'acte communautaire en cause.

197 P.H. Teitgen, *Droit institutionnel communautaire, Cours* (1977-1978) 181.
198 *Variola, supra* note 190.
199 CJCE, affaire 148/78, *Ratti*, arrêt du 5 avril 1979, Rec., 1628 s.
200 CJCE, affaire 102/79, *Commission c. Belgique*, arrêt du 6 mai 1980, Rec., 1473 s.
201 Ibid.
202 N. Catalano, *Manuel de droit des Communautés européennes* (1962) 135.
203 P. Pescatore, *supra* note 195.
204 K. Lenaerts, *Le juge et la Constitution* , *supra* note 38, 560.

(b) L'autonomie et l'effet direct du droit communautaire

Comme l'écrit le professeur Isaac[205]

> non seulement le droit communautaire s'insère automatiquement dans l'ordre interne des Etats membres, mais il possède une aptitude générale à y compléter le patrimoine juridique des particuliers de droits subjectifs et/ou d'obligations, tant dans leurs rapports avec d'autres particuliers que dans les relations avec l'Etat dont ils relèvent.

Cette propriété du droit communautaire, ou du moins de certaines de ses règles, caractérise partiellement au moins l'«effet direct».

La Cour de justice relie explicitement l'effet direct à l'autonomie de l'ordre juridique communautaire. L'arrêt *Van Gend en Loos*[206] commence par l'affirmation de la spécificité des Communautés en tant qu'organisation d'intégration, dont elle déduit la spécificité de l'effet direct du droit communautaire par rapport à l'effet direct des conventions internationales en refusant l'interprétation textuelle et subjective, en somme traditionnelle, qui lui était proposée, pour lui préférer une méthode téléologique et systématique. En dernière analyse, c'est la finalité du traité de la CEE qui porte en elle l'effet direct communautaire. Sa démarche est objective en ce sens que la Cour ne s'attache pas tant à l'intention particulière des parties contractantes de faire produire un effet direct à telle disposition du traité qu'à leur intention globale de créer un ordre juridique «dont les sujets sont non seulement les Etats membres mais également leurs ressortissants». Jean-Victor Louis[207] a pu constater avec raison «que d'emblée la Cour de justice dès son célèbre arrêt *Van Gend en Loos*, a rattaché l'effet direct à la nature même de l'ordre juridique communautaire et au processus d'intégration dont il est l'expression».

Le lien établi par la Cour de justice entre l'autonomie et l'effet direct ressort clairement lorsqu'elle déclare que

> le droit communautaire, indépendant de la législation des Etats membres, de même qu'il crée des charges dans le chef des particuliers est aussi destiné à engendrer des droits qui entrent dans leur patrimoine juridique...[208]

205 G. Isaac, *supra* note 155.
206 *Supra* note 1.
207 J.-V. Louis, in Mégret et autres, *Le droit de la CEE, supra* note 101, 520.
208 *Van Gend en Loos, supra* note 1.

Deuxième partie

Le développement de l'ordre juridique communautaire

Les fondements de l'ordre juridique posés, la Cour de justice entreprendra d'en développer les potentialités. Son action s'exercera dans deux directions: le renforcement de son autorité et l'extension de son domaine.

I. Le renforcement de l'autorité de l'ordre juridique communautaire

S'intéresser au renforcement de l'autorité de l'ordre juridique communautaire oblige à envisager ses rapports avec les systèmes juridiques des Etats membres. Aussi, les développements qui vont suivre seront naturellement consacrés dans une large mesure à cet aspect essentiel du droit communautaire.

Pour autant, l'examen des relations qu'entretient le droit de la Communauté avec les droits nationaux ne permet pas de rendre pleinement compte de l'autorité du droit communautaire qui doit aussi s'apprécier, en elle-même, dans la sphère interne de l'ordre juridique communautaire, abstraction faite de ses rapports avec les systèmes juridiques étatiques.

A. L'autorité du droit communautaire dans ses rapports avec les droits des Etats membres

L'autorité du droit communautaire dépend de nombreux facteurs, à commencer par sa capacité à affirmer le principe de sa suprématie à l'égard des droits nationaux, mais aussi de l'efficacité des moyens dont il dispose pour s'imposer effectivement dans un conflit l'opposant à ceux-ci.

1. L'affirmation de la primauté du droit communautaire

Résumant dans une formule lapidaire et expressive la jurisprudence de la Cour de justice, Pierre Pescatore a pu dire que la primauté est une «condition essentielle» du droit communautaire.[209] En effet, tolérer qu'une norme nationale puisse être judiciairement opposée au droit né du traité reviendrait à lui faire «perdre son caractère communautaire» et mettrait en cause «la base

209 P. Pescatore, *L'ordre juridique des Communautés européennes* (1975) 227.

juridique de la Communauté».[210] C'est dire que le principe de la primauté est consubstantiel au système juridique communautaire.

Tout au long d'une jurisprudence rectiligne, la Cour de justice ne cessera de développer le «principe fondamental de la primauté de l'ordre juridique communautaire»,[211] primauté absolue et inconditionnelle qui s'impose aux juridictions des Etats membres sans l'intercession de leur droit national. Ces caractères de la primauté du droit communautaire vont eux-mêmes déterminer sa portée.

(a) Les caractères de la primauté

Pour la Cour de justice la primauté ressort de la nature des Communautés. L'innovation majeure introduite par l'arrêt *Costa*[212] est d'avoir substitué à la distinction opérée par les juridictions internationales entre la «primauté internationale» et la «primauté interne»[213] un principe unique dans son fondement. Cette mutation n'a été possible qu'en raison de l'autonomie de l'ordre juridique communautaire à l'égard de celui des Etats membres. C'est parce qu'il est «issu d'une source autonome» et de «sa nature spécifique originale» que le droit communautaire «ne (peut) se voir judiciairement opposer un texte interne quel qu'il soit».[214]

Cette première innovation a permis d'en induire une autre tout aussi décisive. La primauté du droit communautaire est énoncée comme un impératif qui oblige l'ensemble des autorités étatiques et, plus particulièrement les juridictions nationales. La seconde caractéristique de la primauté du droit communautaire est d'être juridiquement immédiate. Cette immédiatisation a une double signification: le principe de la primauté du droit communautaire ne saurait dépendre de l'interposition d'une prescription de droit interne reconnaissant son autorité et, ce principe constitue une obligation juridique pour les divers organes ou démembrements de l'Etat. Ces deux expressions de l'immédiateté du principe de la primauté du droit communautaire sont déjà présentes dans l'arrêt *Costa* dans le cas des juridictions nationales.[215] Elles sont remarquablement réunies dans l'arrêt *Simmenthal*.[216] Cette immédiatisation du principe de la primauté est évidemment redevable à l'effet direct du droit communautaire qui lui assure la qualité d'une norme justiciable. Cette condition étant satisfaite

210 *Costa c. ENEL, supra* note 2.
211 *Variola, supra* note 190.
212 *Supra* note 2.
213 Sur cette distinction voir *supra.*
214 *Costa c. ENEL, supra* note 2.
215 Ibid.
216 *Supra* note 152.

> ... tout juge national, saisi dans le cadre de sa compétence, a l'obligation d'appliquer intégralement le droit communautaire et de protéger les droits que celui-ci confère aux particuliers, en laissant inappliquée toute disposition éventuellement contraire de la loi nationale, que celle-ci soit antérieure ou postérieure à la règle communautaire;
> que serait, dès lors, incompatible avec les exigences inhérentes à la nature même du droit communautaire toute disposition d'un ordre juridique national ou toute pratique, législative, administrative ou judiciaire, qui aurait pour effet de diminuer l'efficacité du droit communautaire par le fait de refuser au juge compétent pour appliquer ce droit, le pouvoir de faire, au moment même de cette application, tout ce qui est nécessaire pour écarter les dispositions législatives nationales formant éventuellement obstacle à la pleine efficacité des normes communautaires; ...[217]

Ainsi, l'obligation faite au juge national d'assurer en cas de conflit la primauté d'une règle communautaire d'effet direct sur une disposition nationale ne signifie pas seulement qu'il lui incombe de ne pas appliquer la disposition en cause, mais aussi d'écarter l'application des règles de son droit interne qui lui interdiraient de consacrer efficacement la supériorité du droit communautaire.[218] Autrement dit le juge est tenu à une obligation de résultat soit par les moyens que prévoit son ordre juridique, soit, à défaut «de sa propre autorité».[219]

Si, les juridictions sont les principales intéressées, l'immédiatisation du principe de la primauté touche toutes les autorités des Etats membres.[220]

(b) La portée de la primauté

La portée de la primauté du droit communautaire est la plus étendue qui puisse être, puisqu'il l'emporte dans sa totalité sur l'ensemble du droit national.

La primauté n'est pas l'apanage du seul droit originaire, c'est-à-dire des dispositions des traités instituant les Communautés européennes. Alors que l'affaire *Costa c. ENEL*[221] a trait à un conflit opposant le traité de la CEE à une loi postérieure, c'est un règlement et des dispositions de nature constitutionnelle qui s'affrontent dans l'affaire *Internationale Handelsgesellschaft*.[222] Les arrêts *Politi*[223] ou *Marimex*[224] consacrent eux aussi la supériorité des règlements de la Communauté sur le droit des Etats membres.

217 Ibid.
218 Sur l'arrêt *Simmenthal* voir J. Boulouis, *Actualité juridique. Droit administratif* (1978) 324 s.; A. Barav, *CDE* (1978) 230 s.; Carreau, «Droit communautaire et droits nationaux: concurrence ou primauté?», *RTDE* (1978) 381 s.; Constantinesco et Kovar, 4 *JDI* (1979) 936 s.
219 *Simmenthal*, *supra* note 152.
220 CJCE, affaire 48/71, *Commission c. Italie*, arrêt du 13 juillet 1972, Rec., 529 s.
221 *Supra* note 2.
222 *Supra* note 84.
223 CJCE, affaire 43/71, arrêt du 14 décembre 1971, Rec., 1039 s.
224 CJCE, affaire 84/71, *Marimex*, arrêt du 7 mars 1972, Rec., 629 s.

Pas davantage les Etats destinataires de décisions au sens de l'article 189 du traité de la CEE ne sont en droit de leur opposer des dispositions de leur droit interne, quand bien même elles seraient de nature législative.[225]

Cette exigence vaut aussi pour les directives, étant entendu que le juge ne pourra se prononcer que si leurs dispositions remplissent les conditions nécessaires pour produire un effet direct.[226]

Enfin, les accords internationaux conclus par les Communautés l'emportent également sur les droits étatiques. Comme l'observe le professeur Jean-Victor Louis, «partie intégrante de l'ordre juridique communautaire, les accords jouissent dans les ordres juridiques nationaux de la primauté reconnue au droit communautaire en général».[227] La jurisprudence de la Cour de justice fait effectivement prévaloir les accords internationaux de la CEE sur le droit des Etats membres.[228]

La portée du principe de primauté est intimement liée à l'autonomie de l'ordre juridique communautaire. La supériorité du droit communautaire s'étend à l'ensemble des règles qui le constituent en raison de leur appartenance à un ordre juridique autonome à l'intérieur duquel les droits nationaux ne sauraient opérer des distinctions. Si une hiérarchie existe entre les normes du droit communautaire, elle est établie par ce droit et ne vaut que dans l'ordre juridique de la Communauté.

Aucune différence ne doit non plus être faite selon que les règles communautaires sont ou non d'effet direct. Les unes comme les autres prévalent sur les droits nationaux qui leur sont contraires. Ce sont les conditions de la mise en œuvre de la primauté du droit communautaire par les instances étatiques, et, plus particulièrement par les juridictions nationales, qui sont affectées par cette distinction. L'effet direct contribue de manière déterminante à renforcer l'efficacité de la primauté du droit communautaire.[229]

Cette constatation convie à s'intéresser de plus près aux relations qu'entretiennent la primauté et l'effet direct du droit communautaire. Ces rapports sont si intimes qu'on a pu estimer que «l'arrêt *Van Gend en Loos* contenait en germe l'arrêt *Costa c. ENEL*».[230] Cette intimité ne facilite pas l'analyse des relations de ces deux notions. La Cour de justice s'est elle-même vu reprocher d'avoir suscité une certaine confusion en présentant parfois la primauté et l'effet direct d'une manière accréditant l'idée d'une totale indépen-

225 CJCE, affaire 130/78, *Salumificio di Cornuda*, arrêt du 8 mars 1979, Rec., 1421 s.; affaire 249/85, *Albako*, *supra* note 87.

226 CJCE, affaire 158/80, *Rewe*, arrêt du 7 juillet 1981, Rec., 1805 s.; affaire 8/81, *Becker*, arrêt du 19 janvier 1982, Rec., 53 s.

227 J.-V. Louis, «Les relations extérieures», *Le droit de la CEE, supra* note 101, vol. 12, 192.

228 CJCE, affaire 38/75, *Nederlandse Spoorwegen*, arrêt du 19 novembre 1975, Rec., 1439 s.; affaires jointes 267 à 269/81, *SPI et SAMI*, arrêt du 16 mars 1983, Rec., 801 s.

229 Cette idée est déjà présente dans l'arrêt *Van Gend en Loos*, *supra* note 1.

230 J.-V. Louis, *Le droit de la CEE*, *supra* note 207, vol. 10, 522, n° 7.

dance,[231] alors que d'autres fois elle semble vouloir absorber la première de ces notions dans la seconde. Cette dernière tendance s'observe en particulier dans l'arrêt *Léonesio* du 17 mai 1972,[232] la Cour de justice soulignant que

> les règlements communautaires, pour s'imposer avec la même force à l'égard des ressortissants de tous les Etats membres, s'intègrent au système juridique applicable sur le territoire national, qui doit laisser s'exercer l'effet direct prescrit à l'article 189, de telle sorte que les particuliers peuvent les invoquer sans que leur soient opposables des dispositions ou pratiques dans l'ordre interne.

De même, à propos d'une décision et non plus d'un règlement, la Cour expose que

> [...] l'effet direct de l'interdiction en cause oblige les juridictions nationales à l'appliquer, sans que puissent lui être opposées des règles de droit national quelles qu'elles soient...[233]

En revanche, dans l'arrêt *Simmenthal*,[234] la Cour restitue parfaitement, en les dissociant, les fonctions respectives de la primauté et de l'effet direct, sans omettre de rendre compte de leur complémentarité. Elle rappelle que

> l'applicabilité directe signifie que les règles du droit communautaire doivent déployer la plénitude de leurs effets, d'une manière uniforme dans tous les Etats membres, à partir de leur entrée en vigueur et pendant toute la durée de leur validité,

pour ajouter

> qu'ainsi, ces dispositions sont une source immédiate de droits et d'obligations pour tous ceux qu'elles concernent, qu'il s'agisse des Etats membres ou des particuliers qui sont parties à des rapports juridiques relevant du droit communautaire.

Ensuite elle souligne

> qu'au surplus, en vertu du principe de la primauté du droit communautaire, les dispositions du traité et des actes des institutions directement applicables ont, pour effet, dans leurs rapports avec le droit interne des Etats membres, non seulement de rendre inapplicable de plein droit, du fait même de leur entrée en vigueur, toute disposition contraire de la législation existante, mais encore – autant que ces dispositions et actes font partie intégrante, avec rang de priorité, de l'ordre juridique applicable sur le territoire de chacun des Etats membres – d'empêcher la formation valable de nouveaux actes législatifs nationaux dans la mesure où ils seraient incompatibles avec des normes communautaires.

L'autonomie de la primauté par rapport à l'applicabilité directe ou à l'effet direct est donc reconnue. Lorsqu'est en cause une règle de droit communautaire d'effet direct, la principe de la primauté lui permet de l'emporter sur toute norme de droit interne qui lui est contraire. La primauté est une règle de

231 Voir en ce sens Carreau, *supra* note 218.
232 CJCE, affaire 93/71, *Léonesio*, arrêt du 17 mai 1972, Rec., 96 s.
233 CJCE, affaire 120/73, *Gebrüder Lorenz*, arrêt du 11 décembre 1973, Rec., 1471 s.
234 *Simmenthal*, *supra* note 152.

conflit. L'utilité de l'effet direct est de rendre la disposition qui possède cette propriété «justiciable», c'est-à-dire invocable par tout sujet de droit devant un juge national et applicable par celui-ci.

La primauté n'est pas un attribut réservé au seul droit communautaire d'effet direct. Elle s'étend aussi aux normes qui sont dépourvues de cette qualité. Les effets qui s'attachent en propre au principe de la primauté du droit communautaire sont progressivement plus visibles dans la jurisprudence sur les conséquences de l'inexécution ou de l'exécution incorrecte d'une directive communautaire. Dans ce contexte on fait valoir que[235]

> c'est en effet la primauté qui, par elle-même, implique l'obligation, maintenant classique pour les juridictions nationales, d'écarter l'application d'une norme nationale contraire, mais aussi celle d'interpréter le droit national à la lumière des finalités définies par la directive[236] et surtout celle de réparer les conséquences dommageables qui pourraient résulter pour le particulier du défaut de transposition adéquate de ce type de normes.[237]

Denys Simon et Anne Rigaux estiment que

> les potentialités ouvertes par la jurisprudence Francovich, en tant qu'elle consacre au bénéfice du particulier un principe de réparation en cas de violation du droit communautaire, alors même que les dispositions de la directive en cause étaient insusceptibles de produire un effet direct de substitution, ouvraient la voie à une déconstruction/reconstruction des effets respectifs de l'effet direct et de la primauté.[238]

Tout en étant convaincu de la nécessité de réexaminer les effets respectifs de l'effet direct et de la primauté, on peut se demander si le droit à réparation en cas d'inexécution d'une directive découle du principe de la primauté du droit communautaire. Pareille imputation suppose un élargissement du concept de primauté qui n'est plus conçue seulement comme une règle de conflit. Quoiqu'il en soit, une chose est certaine, la jurisprudence *Francovich* correspond bien à un renforcement de l'autorité du droit communautaire.

La supériorité du droit communautaire s'affirme sans considération de chronologie des normes en présence. Dès ses arrêts *Politi*[239] et *Marimex*,[240] la Cour de justice consacre la supériorité du droit de la Communauté sur les lois mêmes postérieures. S'exprimant avec une totale clarté, elle affirme que «la primauté du droit communautaire par rapport aux dispositions du droit

235 Simon et Rigaux, «L'arrêt Marshall II et l'effet direct des directives: une solution d'espèce à une question de principe?», 10 *Europe* (1993) 1 s.

236 CJCE, affaire 14/83, *von Colson et Kamann*, arrêt du 10 avril 1984, Rec., 1891 s.; affaire 79/83, *Harz*, arrêt du 10 avril 1984, Rec., 1921 s.; affaire 106/89, *Marleasing*, arrêt du 13 novembre 1990, Rec., I-4135 s.

237 CJCE, affaire C-6/90 et C-9/90, *Francovich et Bonifaci*, arrêt du 19 novembre 1991, Rec., I-5357 s.

238 Simon et Rigaux, *supra* note 235.

239 *Supra* note 223.

240 *Supra* note 224.

national s'affirme sans égard aux dates respectives des dispositions en cause».[241] Confirmant cette solution, la Cour en précise les conséquences dans l'arrêt *Simmenthal*[242] du 9 mars 1978 en ces termes:

> ... les dispositions des traités et les actes des institutions directement applicables ont pour effet, dans leurs rapports avec le droit interne des Etats membres, non seulement de rendre inapplicable de plein droit, du fait même de leur entrée en vigueur, toute disposition contraire de la législation nationale existante, mais encore – autant que ces dispositions font partie intégrante, avec rang de priorité, de l'ordre juridique applicable sur le territoire de chacun des Etats membres – d'empêcher la formation valable de nouveaux actes législatifs nationaux dans la mesure où ils seraient incompatibles avec les normes communautaires.

La matière de la législation nationale est indifférente. La primauté du droit communautaire s'étend à toutes les branches des droits des Etats membres. Cette extension est particulièrement significative en matière pénale qu'on aurait pu croire réservée à la compétence étatique.[243]

Les traités et le droit communautaire dérivé priment dans les matières qu'ils réglementent, non seulement le droit interne des Etats membres, mais aussi les conventions conclues antérieurement par ceux-ci.[244] En vérité, le rapport chronologique n'est pas plus déterminant ici que pour le droit interne des Etats membres, la primauté du droit communautaire s'affirmant également à l'égard des conventions conclues par les Etats appartenant à la Communauté postérieurement à l'entrée en vigueur des traités instituant les Communautés ou des actes pris par leurs institutions dès lors que les conventions en cause porteraient atteinte au droit communautaire.[245]

Le sort des conventions liant des Etats communautaires à des Etats tiers qui ont été conclues avant le traité de la CEE ou l'entrée de l'Etat dans la Communauté est réglé par l'article 234 du traité qui interdit aux Etats membres de se prévaloir des obligations souscrites par eux dans le cadre de ces accords internationaux à l'encontre de leurs engagements communautaires.[246]

241 CJCE, affaire 83/78, *Pigs Marketing Board c. Redmond*, arrêt du 29 novembre 1978, Rec., 2347 s.

242 *Supra* note 152.

243 Voir notamment, CJCE, affaire 88/77, *Schonenberg*, arrêt du 16 février 1988, Rec., 473 s.; affaire 299/86, *Drexl*, arrêt du 25 février 1988, Rec., 1213 s. Sur les rapports du droit communautaire et du droit pénal, voir A. Huet, *Verbo droit pénal, Répertoire de droit communautaire.*

244 CJCE, affaire 10/61, *Commission c. Italie*, *supra* note 138; affaire 278/82, *Rewe*, arrêt du 14 février 1984, Rec., 721 s.

245 CJCE, affaire 235/87, *Matteucci c. Communauté française de Belgique*, arrêt du 28 septembre 1988, Rec., 5189 s.

246 *Commission c. Italie*, *supra* note 138; affaire 812/79, *Attorney general c. J.C. Burgoa*, arrêt du 14 octobre 1980, Rec., 2787 s.; TPI, affaire T-69/89, *Radio Telefis Eierann c. Commission*, arrêt du 10 juillet 1991, Rec., II-485 s.

2. La garantie de l'efficacité du droit communautaire

L'effectivité du droit communautaire suppose d'abord que son autorité puisse s'exprimer pleinement dans l'ordre juridique des Etats membres et, ensuite, qu' il soit appliqué concrètement par les autorités nationales.

(a) L'effectivité de l'autorité du droit communautaire

L'efficacité de la primauté du droit communautaire est étroitement liée à son effet direct. C'est pourquoi la Cour de justice s'est naturellement consacrée à développer les effets qui s'attachent à cette propriété des règles communautaires. Pour autant, elle ne s'est pas désintéressée du sort du droit communautaire privé de cet attribut.[247] Si les juridictions nationales se sont vu assigner des responsabilités accrues, les prérogatives de la Commission et de la Cour elle-même à l'égard des Etats membres qui ont manqué à leurs obligations n'ont pas été, loin de là, négligées.

La complémentarité de ces deux instruments concourt à garantir l'efficacité de la primauté du droit communautaire comme la Cour de justice l'avait voulu en déclarant dans l'arrêt *Van Gend en Loos*[248] que

> la circonstance que le traité (de la CEE), dans les articles susvisés,[249] permet à la Commission et aux autres Etats membres d'attraire devant la Cour un Etat qui n'a pas exécuté ses obligations n'implique pas pour les particuliers l'impossibilité d'invoquer, le cas échéant, devant le juge national ces obligations, tout comme le fait que le traité met à la disposition de la Commission des moyens pour assurer le respect des obligations imposées aux assujettis n'exclut pas la possibilité, dans les litiges entre particuliers devant le juge national, d'invoquer la violation de ces obligations.

Ainsi,

> la vigilance des particuliers intéressés à la sauvegarde de leurs droits entraîne un contrôle efficace qui s'ajoute à celui que les articles 169 et 170 confient à la diligence de la Commission et des Etats membres.

Précisant les fonctions respectives de ces deux voies parallèles, la Cour dira que

> l'action d'un particulier tend à la sauvegarde de droits individuels dans un cas d'espèce tandis que l'intervention des autorités communautaires vise à l'observation générale et uniforme de la règle communautaire,

de sorte

> que les garanties accordées aux particuliers en vertu du système du traité pour la sauvegarde de leurs droits individuels et les attributions reconnues aux institutions

247 Voir *supra*.
248 *Supra* note 1.
249 Traité CEE, articles 169-171.

> communautaires en ce qui concerne le respect par les Etats de leurs obligations ont un objet, des fins et des effets différents.[250]

i) Les autorités nationales garantes de l'effectivité de l'autorité du droit communautaire

L'action de la Cour de justice a été déterminée par la volonté de contraindre avec toujours plus d'exigence les autorités étatiques à garantir l'efficacité du droit communautaire. Le renforcement de l'effet direct a incontestablement été l'instrument privilégié de cette stratégie. Des conséquences toujours plus nombreuses et plus précises ont été tirées du principe de l'effet direct. Cet acquis demeurait dépendant de l'état des voies de droit et des procédures nationales, puisque

> en l'absence de réglementation communautaire en la matière, il appartient à l'ordre juridique interne de chaque Etat membre de désigner les juridictions compétentes et de régler les modalités procédurales des recours en justice destinés à assurer la sauvegarde des droits que les justiciables tirent de l'effet direct du droit communautaire...[251]

S'il ne s'était vu imposer des limites, le principe de l'«autonomie institutionnelle et procédurale» aurait pu gravement préjudicier à l'effet direct des règles communautaires. Aussi, n'est-il pas étonnant que la Cour de justice ait entrepris d'encadrer l'autonomie reconnue aux Etats membres. Enfin, il lui est apparu que la méconnaissance de leurs obligations par les autorités nationales devait pouvoir être sanctionnée dans l'ordre interne alors même que les règles communautaires qui en souffrent ne sont pas de nature à produire un effet direct.

Le renforcement de l'effet direct

La notion d'effet direct s'est progressivement affirmée, mais aussi affinée. Si, dès l'origine l'accent a été mis sur la création de droits et/ou d'obligations dans le chef des particuliers, l'évolution de la jurisprudence de la Cour de justice s'est faite dans le sens d'une diversification et d'une gradation des effets de l'effet direct. Auparavant, les conditions requises d'une norme communautaire pour accéder à l'effet direct ont été définies de manière extensive. L'élargissement du domaine du droit produisant un effet direct associé à l'approfondissement des fonctions de cette propriété constituent un apport décisif à l'autorité du droit communautaire.

250 CJCE, affaire 28/67, *Firma Molkerei Zentrale*, arrêt du 3 avril 1968, Rec., 211 s.; affaire 172/83, *Syndicat national des fabricants raffineurs d'huile de graissage*, arrêt du 10 mars 1983, Rec., 555 s.

251 CJCE, affaire 33/76, *Rewe*, arrêt du 16 décembre 1976, Rec., 1989 s.

Selon la définition proposée par le président Lecourt[252] l'effet direct,

> c'est le droit pour toute personne de demander à son juge de lui appliquer traités, règlements, directives ou décisions communautaires. C'est l'obligation pour le juge de faire usage de ces traités, quelle que soit la législation du pays dont il relève.

Ainsi, l'effet direct entraîne un double phénomène d'immédiatisation: celle des ressortissants communautaires, mais aussi celle des juridictions et, plus largement, des autres autorités étatiques.

L'effet direct a pour finalité ultime d'établir un rapport immédiat entre les ressortissants de la Communauté et le droit communautaire qui lui permet de produire ses effets sans que l'interposition de l'ordre juridique national puisse leur faire obstacle.

L'effet direct peut se limiter à la possibilité pour des particuliers d'invoquer des règles communautaires présentant cette propriété à l'encontre des Etats membres. Dans d'autres cas, l'effet direct trouve également à s'appliquer dans des relations inter-individuelles. A un effet direct partiel qui se limite à créer des droits en faveur des particuliers s'oppose un effet direct complet donnant naissance à des droits et corrélativement à des obligations dans le chef des ressortissants communautaires. Cette distinction s'impose à la directive qui, en l'état actuel du droit communautaire, ne peut prétendre qu'à la première des deux formes d'effet direct qui viennent d'être exposées sans pouvoir revendiquer un «effet direct horizontal», c'est-à-dire créer des obligations à la charge des particuliers. Résolvant par la négative la question de l'effet direct «horizontal», la Cour a jugé que

> le caractère contraignant d'une directive sur lequel est fondée la possibilité d'invoquer celle-ci devant une juridiction nationale n'existe qu' à l'égard de «tout Etat membre destinataire», de sorte «qu'une directive ne peut, par elle-même, créer d'obligations dans le chef d'un particulier et qu'une disposition d'une directive ne peut donc pas être invoquée en tant que telle à l'encontre d'une telle personne». [253]

Soucieuse d'élargir autant que possible la portée de l'effet direct «vertical» des directives, la Cour de justice a admis leur invocabilité à l'encontre non seulement de l'Etat, mais de l'ensemble des collectivités publiques,[254] ainsi qu'à l'encontre de tous les

> organismes ou entités qui étaient soumis à l'autorité ou au contrôle de l'Etat ou qui disposaient de pouvoirs exorbitants par rapport à ceux qui résultent des règles applicables aux rapports entre particuliers. [255]

252 R. Lecourt, *L'Europe des juges* (1976) 248.
253 CJCE, affaire 152/84, *Marshall*, arrêt du 26 février 1986, Rec., 723 s.
254 CJCE, affaire 103/88, *Fratelli Costanzo*, arrêt du 22 juin 1989, Rec., 1839 s.
255 CJCE, affaire C-188/89, *Foster*, arrêt du 12 juillet 1990, Rec., I-3313 s.

En revanche,

> d'une directive non transposée dans l'ordre juridique interne d'un Etat membre ne peuvent résulter (...) des obligations pour des particuliers ni à l'égard d'autres particuliers, ni, à plus forte raison, à l'égard de l'Etat lui-même.[256]

Dans son arrêt *Marshall II*,[257] confrontée à la question des effets d'une directive dans les relations entre un salarié et son employeur, la Cour de justice a contourné la difficulté, alors que l'avocat général l'invitait à franchir le pas dans un sens favorable à la reconnaissance de l'effet «horizontal».[258]

La jurisprudence de la Cour de justice révèle aussi que la création de droits et/ou d'obligations pour les individus n'épuise pas les effets de l'effet direct.[259] Une norme communautaire peut produire des effets sans nécessairement que ce soit des droits ou des obligations.[260] D'ailleurs dans son arrêt *Van Gend en Loos*,[261] la Cour de justice a jugé que l'article 12 «produit des effets immédiats et engendre des droits individuels...», formule qui autorise à penser que la création de droits ou d'obligations n'est qu'une des manifestations possibles de l'effet direct du droit communautaire.

Précisément, de manière toujours plus fréquente, la Cour retient des expressions beaucoup plus compréhensives. L'effet direct d'une disposition du droit communautaire confère aux particuliers «le droit de s'en prévaloir en justice»,[262] les juges devant la «prendre en considération».[263] Dans d'autres décisions, la Cour utilise pour caractériser une norme d'effet direct les termes «susceptible d'être invoquée directement dans tout Etat membre».[264]

Cette définition des effets de l'effet direct a le mérite de ne pas considérer la règle communautaire seulement comme la source de droits subjectifs, mais également comme un élément du droit objectif dont les ressortissants communautaires peuvent se prévaloir et que les juridictions ou, plus généralement les autorités étatiques, doivent tenir compte.[265] Le droit communautaire d'effet direct s'insère dans le contentieux de la légalité objective.

256 CJCE, affaire 14/86, *Pretore di Salo*, arrêt du 11 juin 1987, Rec., 2565 s.; affaire 30/86, *Kolpinghuis Nijmegen*, arrêt du 8 octobre 1987, Rec., 3982 s.

257 CJCE, affaire C-370/88, *Marshall*, arrêt du 13 novembre 1990, Rec., I-4071 s.

258 Sur l'effet direct des directives voir par exemple, Manin, «L'invocabilité des directives, quelques interrogations?», *RTDE* (1990) 669 s.; Dal Farra, «L'invocabilité des directives communautaires devant le juge national de la légalité», *RTDE* (1992) 631 s.

259 D'où la préférence souvent marquée pour le terme «invocabilité».

260 Bleckmann, «L'applicabilité directe du droit communautaire», in *Les recours des individus devant les instances nationales en cas de violation du droit européen* (1978) 85 s.; spécialement 115 s.

261 *Supra* note 1.

262 CJCE, affaire 9/70, *Grad*, arrêt du 6 octobre 1970, Rec., 828 s.; affaire 77/72, *Capolongo*, arrêt du 9 juin 1973, Rec., 611 s.

263 *Grad*, *supra* note 262.

264 CJCE, affaire 2/74, *Reyners*, arrêt du 21 juin 1974, Rec., 631 s.

265 En ce sens voir *Verbond van Nederlandse Ondernemingen*, *supra* note 107.

C'est ainsi qu'une directive qui ne ménage pas de marge d'appréciation aux instances nationales

> ... est de nature à pouvoir être invoquée par les justiciables dans le but de faire vérifier si les mesures nationales édictées en vue de sa mise en œuvre lui sont conformes, et que les juridictions nationales doivent la faire prévaloir sur les mesures nationales qui s'avèrent incompatibles avec ses termes.[266]

Cette tendance n'est pas le propre de la directive, elle vaut pour l'ensemble du droit communautaire, l'effet direct désignant toute forme d'invocabilité de ses règles.[267]

L'encadrement de l'autonomie institutionnelle

Dès l'origine de sa jurisprudence relative à l'effet direct, la Cour de justice a insisté sur le lien existant entre la création de droits qui entrent dans le patrimoine des particuliers et l'obligation pour les juridictions d'en assurer la garantie.

Dans son arrêt du 5 février 1963, *Van Gend en Loos*,[268] elle affirmait déjà que

> l'article 12 du traité instituant la Communauté économique européenne produit des effets immédiats et engendre dans le chef des justiciables des droits que les juridictions internes doivent sauvegarder.

Les juridictions étatiques se voyaient donc assigner une mission en vertu de l'autorité du droit communautaire. Cette mission s'exerce normalement dans le cadre des droits nationaux qui gouvernent tout ce qui a trait à l'organisation des voies de droit et des procédures. Le droit communautaire s'en remet aux droits des Etats membres, consacrant un principe d'«autonomie procédurale» qui n'est qu'une expression particulière du principe d'«autonomie institutionnelle».[269] La Cour de justice se réfère régulièrement à ce principe.[270]

266 CJCE, affaire 38/77, *Enka*, arrêt du 23 novembre 1977, Rec., 2203 s.

267 Voir en ce sens, P. Pescatore, *supra* note 209, 212-213; Dumon, «La notion de 'disposition directement applicable en droit européen'», Rapport de la deuxième commission permanente de la Fédération internationale de droit européen, *CDE* (1968) 361 s.; M. Waelbroeck et Vandersanden, «Observations sous l'arrêt *Sayag* du 11 juillet 1968», *Journal des Tribunaux de commerce*, 8 mars 1969, 175 s.

268 *Supra* note 1.

269 Voir Kovar, «Droit communautaire et droit procédural national», *CDE* (1977) 230 s.

270 Voir par exemple, CJCE, affaire 28/67, *Molkerei-Zentrale*, *supra* note 250, Rec., 228 s.; affaire 13/68, *Salgoil*, arrêt du 19 décembre 1968, Rec., 661 s.; affaire 39/70, *Norddeutsches Vieh- und Fleischkontor*, arrêt du 11 février 1971, Rec., 49 s.; affaire 6/71, *Rheinmühlen Düsseldorf*, arrêt du 27 octobre 1971, Rec., 823 s.

Pour elle, le traité de la CEE

> ne limite pas le pouvoir des juridictions nationales compétentes pour appliquer, parmi les divers procédés de l'ordre juridique interne, ceux qui sont appropriés pour sauvegarder les droits individuels conférés par le droit communautaire.[271]

Pour autant, le principe de l'autonomie procédurale ne vaut pas blanc-seing pour les droits nationaux. La Cour de justice exige dès ses premiers arrêts que le juge interne choisisse les procédés de l'ordre juridique interne qui s'avèrent «appropriés pour sauvegarder les droits individuels conférés par le droit communautaire».[272] Progressivement, les exigences du droit communautaire deviendront plus pressantes, le principe de l'autonomie procédurale ne trouvant à s'appliquer qu'à condition de ne pas compromettre ces attributs essentiels du droit des Communautés que sont sa primauté et son effet direct. L'autonomie est subordonnée à une obligation de résultat destinée à assurer l'efficacité du droit communautaire. Si le droit interne offre au juge national les moyens suffisants pour atteindre ce résultat, le droit communautaire sera satisfait. Si, au contraire, l'agencement des règles étatiques empêche la réalisation de l'objectif assigné au juge par le droit communautaire, celui-ci lui enjoindra de s'affranchir des contraintes de son droit national.

Le premier degré de l'intervention du droit communautaire consiste à formuler des standards minima de protection à l'adresse des juridictions étatiques. Cette démarche est tout particulièrement celle des arrêts *Rewe*[273] et *Comet*[274] qui exigent que la protection assurée par les droits nationaux dans les procédures relatives à l'application du droit communautaire ne soit pas moindre que celle prévue pour des procédures concernant exclusivement le droit interne et, qu'en tout état de cause, elle soit efficace. La jurisprudence de la Cour relative à la répétition de l'indu est à cet égard exemplaire.

Tout en reconnaissant que les droits nationaux peuvent sans froisser le droit communautaire limiter le remboursement des taxes ou impositions contraires aux interdictions édictées par le traité de la CEE en prenant en considération la répercussion de ces charges sur des acheteurs pour éviter un enrichissement sans cause,[275] la Cour de justice a entrepris de fixer des limites à l'autonomie procédurale pour empêcher que les Etats puissent en

271 *Molkerei-Zentrale*, *supra* note 250.
272 Ibid.
273 CJCE, affaire 33/76, *Rewe*, *supra* note 251.
274 CJCE, affaire 45/76, *Comet*, arrêt du 16 décembre 1976, Rec., 2043 s.; observations Kovar, *supra* note 269.
275 CJCE, affaire 68/79, *Hans Just*, arrêt du 27 février 1980, Rec., 501 s. Sur cette jurisprudence voir Barav, «La répétition de l'indu dans la jurisprudence de la Cour de justice des Communautés européennes», *CDE* (1981) 507s.; Smith, «A European Concept of Condictio Indebiti», *CML Rev.* (1982) 269 s.; M. Waelbroeck, «La nature du droit au remboursement des montants payés contrairement au droit communautaire», *Liber amicorum Mertens de Wilmars* (1982).

abuser en imposant aux contribuables des conditions de preuve insupportables les privant de leur droit au remboursement et affectant l'efficacité des prescriptions communautaires.[276]

L'encadrement de l'autonomie procédurale franchit un degré supplémentaire lorsque la Cour de justice enjoint aux juridictions nationales de se libérer des contraintes que leur propre droit assigne à leurs pouvoirs pour assurer au droit communautaire la plénitude de ses effets.

Déjà dans l'arrêt *Salgoil*[277] du 19 décembre 1968 la Cour de justice soulignait qu'il appartenait aux

> juridictions compétentes des Etats membres à sauvegarder les intérêts des justiciables affectés par une méconnaissance éventuelle _[d'une disposition du droit communautaire] en leur assurant une protection directe et immédiate de leurs intérêts.

Pour être «directe et immédiate» cette protection doit pouvoir être assurée par toute juridiction nationale qui, dans le cadre de sa compétence, est appelée à connaître d'un litige mettant en cause des règles communautaires d'effet direct. Les implications de cette exigence se révéleront dans toute leur ampleur spécialement dans l'arrêt du 9 mars 1978, *Simmenthal.*[278] La Cour de justice estimera que l'obligation faite par le droit italien au juge national de renvoyer l'appréciation de la compatibilité d'une loi avec le droit communautaire à la Cour constitutionnelle méconnaît le devoir de tout juge d'écarter immédiatement et de plein droit toute disposition nationale contraire à une norme communautaire d'effet direct. La prétention de la juridiction constitutionnelle italienne de subordonner l'inapplicabilité d'une loi au préalable d'une déclaration d'inconstitutionnalité est apparue doublement inadmissible à la Cour de justice. Non seulement elle entraînait le maintien en vigueur, même transitoirement, d'une loi susceptible de contrevenir au droit communautaire, mais, en outre, elle impliquait une assimilation du conflit entre une loi et une règle communautaire au conflit entre cette même loi et une disposition constitutionnelle. Souscrire à la thèse de la Cour constitutionnelle aurait conduit à priver les juridictions italiennes du pouvoir d'assurer pleinement l'autorité du droit communautaire. Reconnaître la nécessité de l'intervention du juge constitutionnel aurait signifié l'acceptation d'une ultime manifestation d'une conception dualiste des rapports de droit, la règle communautaire étant assimilée à une loi italienne. Aussi la Cour de justice se devait de rappeler que tout juge devait pouvoir contrôler lui-même la compatibilité de toute disposition nationale avec une règle communautaire pour en tirer, éventuellement, les conséquences découlant de sa primauté et de son effet direct. L'interposition de la Cour constitutionnelle devait donc être écartée.

276 CJCE, affaire 199/82, *Administration des Finances de l'Etat c. San Giorgio*, arrêt du 9 novembre 1983, Rec., 3595 s.

277 CJCE, affaire 13/68, *Salgoil*, *supra* note 270.

278 *Simmenthal*, *supra* note 152.

Certains auteurs on estimé que la Cour de justice se serait engagée dans une contradiction clairement évidente. En effet, il y aurait incohérence à vouloir affirmer tout à la fois les conséquences de l'immédiatisation des rapports de droit et la qualité d'institution nationale du juge interne appelé à en consacrer les effets en présence d'un conflit entre le droit communautaire et le droit national.

Des commentateurs[279] de l'arrêt *Simmenthal* mettaient en évidence l'existence d'un dilemme:

> la totale cohérence de l'ordre juridique communautaire (tel que l'absence d'une règle de conflit spécifique entre le droit communautaire et le droit national contraire et l'absence de procédures spécifiques destinées à trancher un tel conflit le caractérisent actuellement) voudrait que l'on considérât le juge national, dans ce cas, comme un juge communautaire décentralisé exerçant à titre communautaire une attribution proprement communautaire.[280] [...] Mais, d'un autre côté, l'autonomie institutionnelle, correspond sans doute mieux aux relations actuelles qui, sur le plan organique, relient la Cour de justice et les juridictions nationales, comme d'une façon générale les institutions étatiques et les institutions de la Communauté.

La volonté de la Cour de justice de voir se réaliser des conditions garantissant efficacement l'autorité du droit communautaire n'a pas été arrêtée par les objections d'une partie de la doctrine.

L'arrêt *Factortame*[281] du 19 juin 1990 s'inscrit dans la ligne de la jurisprudence de la Cour de justice.

Le raisonnement de la Cour prend appui sur les solutions consacrées dans l'arrêt *Simmenthal* dont les passages essentiels sont repris intégralement. Les règles communautaires

> doivent déployer la plénitude de leurs effets, d'une manière uniforme dans tous les Etats membres, à partir de leur entrée en vigueur et pendant toute la durée de leur validité...
> En vertu du principe de la primauté du droit communautaire, les dispositions des traités et les actes des institutions directement applicables ont pour effet, dans leurs rapports avec le droit interne des Etats membres ... de rendre inapplicable de plein droit, du fait même de leur entrée en vigueur, toute disposition contraire de la législation nationale.

279 V. Constantinesco et R. Kovar, *JDI* (Clunet) (1978) 936 s.

280 C'est ce qu'appelle de ses vœux D. Carreau en évoquant le dédoublement fonctionnel propre aux ordres juridiques de superposition, *RTDE* (1978) 381 s.

281 CJCE, affaire C-213/89, *The Queen and Secretary of State for Transporte ex parte Factortame Ltd e. a.*, arrêt du 19 juin 1990, Rec., I-2434 s.; sur cette décision voir Bonichot, «Les pouvoirs d'injonction du juge national pour la protection des droits conférés par l'ordre juridique communautaire», *Revue française de droit administratif* (1990) 912 s.; Simon et Barav, «Le droit communautaire et la suspension provisoire des mesures nationales, les enjeux de l'affaire *Factortame*», *RMC* (1990) 591 s.

Comme il appartient aux juridictions nationales d'assurer la protection juridique résultant de l'effet direct des normes communautaires et l'autorité de celles-ci, doit être considérée comme incompatible avec les exigences du droit communautaire,

> toute disposition de l'ordre juridique national ou toute pratique, administrative ou judiciaire qui aurait pour effet de diminuer l'efficacité du droit communautaire par le fait de refuser au juge compétent pour appliquer ce droit le pouvoir de faire tout ce qui est nécessaire pour écarter les dispositions législatives formant éventuellement obstacle, même temporaire, à la pleine efficacité des normes communautaires.

Cette exigence devait logiquement conduire la Cour de justice à condamner des règles de droit interne interdisant aux juges de prescrire des mesures provisoires qui seraient indispensables à la préservation de l'autorité du droit communautaire. Juge communautaire de droit commun, le juge national, alors même que son droit ne les lui accorderait pas, doit avoir à sa disposition tous les moyens procéduraux nécessaires pour éviter qu'un justiciable, se prévalant du droit communautaire, soit irrémédiablement privé de la possibilité de faire valoir ses droits.[282] Dans un deuxième temps, la Cour s'attachera à préciser les conditions de la suspension provisoire de l'application d'une loi. Invitée à se prononcer sur la compétence des juridictions nationales pour décider de surseoir à l'exécution d'actes communautaires, la Cour de justice observera que

> la protection provisoire qui est assurée aux justiciables devant les juridictions nationales par le droit communautaire ne saurait varier, selon qu'ils contestent la compatibilité de dispositions de droit national avec le droit communautaire ou la validité d'actes communautaires de droit dérivé, dès lors que dans les deux cas, la contestation est fondée sur le droit communautaire lui-même.[283]

La Cour formulera plusieurs conditions qui sont également destinées à s'appliquer lorsque le juge interne a à examiner si un sursis à l'application d'une loi est nécessaire.

Il ressort de l'ensemble de ces décisions que l'emprise du droit communautaire sur l'autonomie institutionnelle et procédurale va en se renforçant. D'un encadrement de l'exercice par le juge étatique des pouvoirs qui lui sont attribués par leur droit, on est passé à l'injonction d'écarter des règles nationales incapacitantes, pour en arriver à l'obligation de reconnaître aux juridictions nationales des prérogatives qui ne leur ont pas été conférées par le droit interne.[284]

282 Voir en ce sens, D. Simon, note sous l'arrêt *Factortame*, *JDI* (Clunet) (1991) 447 s.

283 CJCE, affaires C-143/88 et C-92/89, *Zuckerfabrik Süderdithmarschen*, arrêt du 21 février 1991, Rec., I-415 s.

284 Grévisse et Bonichot, «Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les Etats membres», in *L'Europe et le droit,*

Le rétrécissement de l'autonomie procédurale trouve sa justification et sa limite dans la nécessité de concilier deux exigences: faire en sorte que les dispositions communautaires directement applicables puissent effectivement être invoquées devant le juge national et exécutées par lui, évitant que le droit communautaire n'empiète sur la procédure judiciaire nationale plus que nécessaire.[285]

Ce processus n'est peut-être pas parvenu à son terme. Certes, la Cour a jugé que le traité de la CEE «n'a pas entendu créer devant les juridictions nationales, en vue du maintien du droit communautaire, des voies de droit autres que celles établies par le droit national»,[286] pourtant il n'est désormais pas déraisonnable de se demander si cette proposition correspond entièrement à l'état du droit communautaire.[287] La jurisprudence de la Cour de justice contient un certain nombre d'indices qui donnent du crédit à cette interrogation. Dans son arrêt *Johnston*[288] du 15 mai 1986, l'existence d'une voie de recours juridictionnelle permettant aux particuliers d'agir contre toute décision d'une autorité nationale leur déniant le bénéfice d'un droit résultant du traité de la CEE ou du droit communautaire dérivé a été jugée essentielle à la protection effective du ressortissant communautaire. Le droit au juge[289] est un principe général du droit communautaire qui découle des traditions constitutionnelles communes aux Etats membres qui se trouve consacré dans les articles 6 et 13 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.[290] Dans ce contexte, la Cour a jugé que l'exigence d'un contrôle juridictionnel s'impose «même si les règles de procédure interne ne le prévoient pas en pareil cas».[290bis]

L'évolution de la jurisprudence de la Cour de justice convie à une réflexion sur la signification et le devenir du principe de l'autonomie procédurale. L'encadrement toujours plus contraignant de cette autonomie par le droit communautaire démontre que ce principe n'est pas l'expression de la souveraineté des Etats membres, mais une nécessité fonctionnelle pour le système communautaire qui ne peut se réaliser qu'avec le concours des appareils

supra note 5, 297 s; Barav, «La plénitude du juge national en sa qualité de juge communautaire», ibid., 1 s.

285 Oliver, «Le droit communautaire et les voies de recours nationales», *CDE*, n° 3-4 (1992) 348 s., spécialement 374.

286 CJCE, affaire 158/80, *Rewe*, *supra* note 226, spécialement 1838.

287 Voir en ce sens, D. Simon, note sous l'arrêt *Factortame*, *supra* note 282; P. Oliver, *supra* note 285; contra Le Mire, «Observations sous l'arrêt *Factortame*, Actualité juridique», *Droit administratif* (1990) 834 s., spécialement 836.

288 CJCE, affaire 222/84, *Johnston*, arrêt du 15 mai 1986, Rec., 1651 s.

289 Voir Simon, «Les exigences de la primauté du droit communautaire: continuité ou métamorphoses?», in *L'Europe et le droit, supra* note 5, 483 s.

290 Voir aussi, CJCE, affaire 222/86, *UNECTEF c. Heylens*, arrêt du 15 octobre 1987, Rec., 4097 s., spécialement 4117; affaire C-18/81, *RTT*, arrêt du 13 décembre 1991, Rec., I-5941 s.; affaire C-97/91, *Oleificio Borelli SpA c. Commission*, arrêt du 3 décembre 1992, Rec., I-6313 s.

290bis *Oleificio Borelli*, *supra* note 290.

judiciaires des Etats membres, sans toutefois renoncer à son autorité. C'est par le biais de l'immédiateté normative du droit communautaire que s'affirmera la relativisation de l'autonomie procédurale et la subordination des juges nationaux. Aux deux impératifs nécessairement quelque peu contradictoires d'une collaboration judiciaire avec les Etats membres et d'une autorité inconditionnelle du droit communautaire, la Cour de justice ne pouvait répondre qu'en tentant d'aligner la logique de l'immédiateté procédurale sur celle de l'immédiateté normative.

La reconnaissance d'effets au droit communautaire sans effet direct

Longtemps négligées, les règles communautaires dépourvues d'effet direct semblaient être privées d'existence dans l'ordre juridique des Etats membres. Cette appréciation s'est peu à peu avérée injuste. Ainsi, alors même qu'elles ne produisent pas d'effet direct, les directives sont appelées à déployer «certains effets dans l'ordre juridique interne».[291] Au minimum une directive peut toujours être invoquée devant un juge national, afin de faire contrôler par celui-ci la compatibilité de la législation interne avec l'acte communautaire en cause.[292] Il est remarquable que si le Conseil d'Etat français a refusé de reconnaître aux directives un effet direct de substitution, il a néanmoins admis qu'

> il revient aux juges nationaux de contrôler la compatibilité des mesures nationales au regard des directives dont elles sont destinées à assurer l'application.[293]

De même, les dispositions des directives incapables de produire un effet direct n'en peuvent pas moins être prises en considération par le juge interne pour l'interprétation de son droit.[294]

C'est surtout par l'engagement de la responsabilité de l'Etat membre qui a omis de mettre en œuvre une directive que la condition du droit communautaire d'effet indirect s'est affirmée. A l'origine, la Cour de justice a consacré le droit pour les particuliers d'obtenir réparation des préjudices résultant d'une violation par l'autorité nationale des droits qu'ils tirent du droit communautaire.[295] On se doit d'observer que la Cour de justice avait tenu à indiquer que l'une des fonctions du recours en constatation de manquement de l'article 169 du traité de la CEE pouvait être

> d'établir la base d'une responsabilité qu'un Etat membre peut être dans le cas d'encourir, en conséquence, à l'égard d'autres Etats membres, de la Communauté ou ... des particuliers.[296]

291 K. Lenaerts, *Le juge et la Constitution*, *supra* note 38.
292 Voir par exemple, *Verbond van Nederlandse Ondernemingen*, *supra* note 107.
293 G. Isaac, *supra* note 155.
294 CJCE, affaire 32/74, *Haaga*, arrêt du 12 novembre 1974, Rec., 1201 s.; *Marleasing*, *supra* note 236.
295 CJCE, affaire 39/72, *Commission c. Italie*, *supra* note 50.
296 Ibid.

L'affaire *Francovich*[297] offrira à la Cour de justice l'occasion de préciser que

> la pleine efficacité des normes communautaires serait mise en cause et la protection des droits qu'elles reconnaissent serait affaiblie si les particuliers n'avaient pas la possibilité d'obtenir réparation lorsque leurs droits sont lésés par une violation du droit communautaire imputable à l'Etat membre.

Si, dans ce passage la Cour de justice lie le droit à réparation des justiciables à la protection des droits qui leur sont conférés par le droit communautaire, elle se réfère aussi à la nécessité d'assurer la pleine efficacité des normes communautaires pour justifier la mise en cause de la responsabilité étatique. L'intérêt de cette décision provient surtout de la consécration de la responsabilité des Etats membres du fait de leur carence à prendre les mesures qu'exige l'application d'une directive précisément lorsqu'elle n'est pas susceptible de produire un effet direct. Dans ce cas,

> le plein effet des normes communautaires est subordonné à la condition d'une action de la part de l'Etat et que, par conséquent, les particuliers ne peuvent pas, à défaut d'une telle action, faire valoir devant les juridictions nationales les droits qui leur sont reconnus par le droit communautaire.

Comme l'effet direct,[298] la mise en cause de la responsabilité des Etats est destinée à sanctionner leur carence et d'empêcher qu'ils puissent en tirer impunément avantage. Cette responsabilité ne pourra être mise en cause que si les mesures nécessaires à la transposition d'une directive dépourvue d'effet direct n'ont pas été prises au terme du délai imparti à l'Etat.[299] Trois autres conditions doivent en outre être remplies: le résultat prescrit par la directive doit comporter l'attribution de droits à des particuliers, le contenu de ces droits doit pouvoir être déterminé sur la base des dispositions de la directive, enfin, un lien de causalité doit exister entre la violation de l'obligation incombant à l'Etat et le dommage subi par les personnes lésées. Elargissant la portée de son arrêt la Cour constate que

> le principe de la responsabilité de l'Etat pour les dommages causés aux particuliers par les violations du droit communautaire qui lui sont imputables est inhérent au système du traité.

Ce droit général reconnu aux ressortissants communautaires n'opère aucune distinction selon l'aptitude de la règle invoquée à produire ou non un effet direct. Il trouve

> son fondement dans l'article 5 du traité, en vertu duquel les Etats membres sont tenus de prendre toutes mesures générales ou particulières propres à assurer l'exé-

297 CJCE, affaires jointes C-6/90 et C-9/90, *supra* note 327. Barav, «Sanction de la non-transposition de la directive CEE relative à l'insolvabilité de l'employeur», *JCP* (1991) II, 21783; observations voir Constantinesco, *JDI* (Clunet) (1992) n° 2, 426 s.

298 CJCE, affaire 9/70, *Grad*, *supra* note 262; affaire 31/87, *Gebroeders Beentjes*, arrêt du 20 septembre 1988, Rec., 4635 s.

299 V. Constantinesco, observations sous l'arrêt *Francovich*, *supra* note 237.

cution du droit communautaire. Or, parmi ces obligations se trouve celle d'effacer les conséquences illicites d'une violation du droit communautaire.

Parvenus à ce stade, on ne peut éviter de s'interroger à propos de la validité de la division du droit communautaire en fonction du critère de l'effet direct. Une conclusion s'impose: toute distinction «manichéenne» procède d'une erreur. Toute règle communautaire, alors même qu'elle ne crée pas de droits pour les particuliers a vocation à produire certains effets de droit dans l'ordre juridique des Etats membres. A une division dichotomique opposant l'effet direct à l'absence d'effet direct qui donne une vision abusivement simplifiée d'une réalité autrement plus complexe, il faut certainement préférer une présentation davantage nuancée fondée sur une pluralité graduée de situation en fonction des divers types d'effet que peuvent avoir les normes communautaires. Ces effets s'étagent de la création de droits ou d'obligations à la simple prise en considération pour les besoins de l'interprétation du droit national. Par ailleurs la règle communautaire peut avoir un effet d'exclusion ou de substitution à l'égard du droit interne, ou seulement fonder la responsabilité de l'Etat. Plutôt que de parler de l'effet direct au singulier, il serait probablement préférable d'utiliser le pluriel pour parler des effets directs du droit communautaire,[300] voire de s'interroger sur l'intérêt de lui préférer le concept de «justiciabilité» de la règle communautaire mieux à même d'exprimer les multiples circonstances où elle peut être invoquée devant une juridiction nationale pour être mise en œuvre par celle-ci.

ii) La Cour de justice garante de l'effectivité de l'autorité du droit communautaire

Les articles 169-170 du traité de la CEE[301] instituent une procédure destinée à permettre le contrôle du respect des obligations communautaires des Etats membres. Cette procédure représente pour la Communauté l'«*ultima ratio* permettant de faire prévaloir les intérêts communautaires consacrés par les traités contre l'inertie et contre la résistance des Etats membres».[302]

La politique jurisprudentielle de la Cour de justice est inspirée par le souci de renforcer l'efficacité de cette procédure. Sa contribution est particulièrement significative dans deux directions: la définition du manquement d'une part, l'autorité du constat du manquement de l'autre.

300 Voir dans un sens voisin, les observations de l'avocat général Van Gerven dans ses conclusions du 27 octobre 1993 dans l'affaire C-128/92, *H. J. Banks & Company Ldt c. British Coal Corporation*, non encore publiées.

301 Article 88-89 du traité CECA; articles 141-142 du traité CEEA.

302 CJCE, affaire 25/59, *Pays-Bas c. Haute Autorité*, arrêt du 15 juillet 1960, Rec., 723 s., spécialement 761.

L'extension de la notion de manquement

L'intention de la Cour de justice de conférer une portée maximum à la notion de manquement se vérifie d'abord à propos de la définition des règles ainsi protégées, ensuite en ce qui concerne l'objet de l'obligation qui pèse sur les Etats membres, enfin à l'égard de la détermination des auteurs de l'infraction.

Les normes dont la violation constitue le manquement

L'article 169 CEE vise la violation par un Etat membre d'une obligation qui lui incombe «en vertu ... du traité» et, par assimilation, les obligations résultant d'un acte contraignant des institutions communautaires.[303] Les accords internationaux conclus par la Communauté obligent également les Etats membres.[304] Le cas des accords complémentaires conclus par les Etats membres pour réaliser les objectifs de la Communauté paraît plus douteux. Selon le professeur M. Waelbroeck[305] de tels accords ne s'intègrent pas dans l'ordre juridique communautaire de sorte que leur méconnaissance ne saurait être justiciable de la procédure de l'article 169 du traité de la CEE. S'agissant des «décisions des représentants des Etats membres réunis au sein du Conseil», le lien de connexité qu'ils entretiennent avec des dispositions générales des traités, l'article 5 CEE tout particulièrement et la poursuite d'objectifs communautaires autorisent à les inclure parmi les sources d'obligations étatiques dont la méconnaissance relève de la procédure de constatation de manquement.[306] Il pourrait en être de même des accords conclus en vertu de l'article 220 du traité de la CEE.

Les principes généraux du droit communautaire et des droits fondamentaux sont considérés par une très importante partie de la doctrine comme sources d'obligations pour les Etats membres au sens de l'article 169 du traité de la CEE.[307] De manière plus nuancée, le professeur M. Waelbroeck[308] estime qu'une distinction doit être faite entre les principes qui constituent le fondement du système communautaire, notamment les principes de non-discrimination, de primauté du droit communautaire ... et les

303 Par analogie avec le traité CECA, voir CJCE, affaire 3/59, *République fédérale d'Allemagne c. Haute Autorité*, arrêt du 8 mars 1960, Rec., 119 s.

304 CJCE, affaire 104/81, *Kupferberg*, arrêt du 26 octobre 1982, Rec., 3641 s.; affaires jointes 194 et 241/85, *Commission c. Grèce*, arrêt du 25 février 1988, Rec., 1037 s.

305 M. Waelbroeck, in J. Mégret et autres, *supra* note 101, 51.

306 Voir en ce sens Pescatore, «Remarque sur la nature des décisions des représentants des Etats membres réunis au sein du Conseil», *Sociaal-Economische Wetgeving* (1966) 578 s., spécialement 583.

307 Barav, «Failure of Member States to Fulfil their Obligations under Community Law», *CML Rev.* (1975) 377 s.; Cahier, «Les articles 169 et 171 du traité instituant la CEE à travers la pratique de la Commission et la jurisprudence de la Cour», *CDE* (1973) 3 s.; Evans, «The Enforcement Procedure of Article 169 EEC: Commission Discretion», *EL Rev.* (1990) 442 s.; Mertens de Wilmars et Verougstraet, «Proceedings Against Member States for Failure to Fulfil their Obligations», *CML Rev.* (1970) 385 s.

308 M. Waelbroeck, in Mégret et autres, *supra* note 101, 51-52.

principes communs aux droits nationaux qui ont seulement pour fonction de combler les lacunes du droit communautaire et régissent exclusivement l'exercice des pouvoirs des institutions de la Communauté au nombre desquels figurent les principes de proportionnalité, de non-rétroactivité, de sauvegarde de la confiance légitime... Si la violation des premiers par un Etat membre peut être mise en cause par la procédure de l'article 169 du traité de la CEE, ce ne serait pas le cas de la seconde catégorie de principes. La jurisprudence de la Cour de justice permet de douter de la totale pertinence de cette différence de traitement.[309]

Des actes qui, pour ne pas entrer dans la nomenclature établie par le traité de la CEE, relèvent néanmoins de la procédure de constatation de manquement dès lors qu'ils sont imputables à une institution de la Communauté et qu'ils créent des obligations à la charge des Etats.[310] Enfin, l'inexécution d'un arrêt rendu par la Cour de justice portant constatation d'une infraction étatique peut donner lieu à une nouvelle constatation de manquement de l'autorité de la chose jugée qui s'attache à la décision de la Cour.[311]

Les causes d'exonération du manquement

Le renforcement de l'efficacité de la procédure de constatation de manquement s'observe aussi dans l'extrême réserve manifestée par la Cour de justice à l'égard des moyens invoqués par les Etats pour leur défense. Est ainsi écartée la reconnaissance de l'existence du manquement par son auteur.[312] La même rigueur vaut à propos de l'*exceptio non adimpleti contractus*. La récusation de toute condition de réciprocité est une des constantes de la jurisprudence de la Cour de justice. Pareille condition est radicalement incompatible avec la nature spécifique de l'ordre juridique des Communautés qui sous ce rapport se distingue entièrement du droit international. La spécificité du système communautaire tient à ce qu'il

> ne se borne pas à créer d'obligations réciproques entre les différents sujets auxquels il s'applique, mais établit un ordre juridique nouveau qui règle les pouvoirs, droits et obligations desdits sujets, ainsi que les procédures nécessaires pour faire constater et sanctionner toute violation éventuelle.[313]

309 C'est ainsi qu'en matière de répétition de l'indu par les Etats membres la Cour a jugé que le recours à des mesures rétroactives méconnaissait les exigences du droit communautaire, voir CJCE, affaires jointes 331, 376 et 378/85, *Les Fils de Jules Bianco,* arrêt du 25 février 1988, Rec., 1099s.

310 CJCE, affaire 141/78, *France c. Royaume-Uni*, arrêt du 4 octobre 1979, Rec., 2923 s.; affaire 32/79, *Commission c. Royaume-Uni* , arrêt du 10 juillet 1980, Rec., 2403 s.

311 CJCE, affaire 48/71, *Commission c. Italie*, *supra* note 156, Rec., 529 s.

312 CJCE, affaire 303/84, *Commission c. République fédérale d'Allemagne*, arrêt du 20 mars 1986, Rec., 1171 s.

313 CJCE, affaires jointes 90 et 91/63, *Commission c. Luxembourg et Belgique*, *supra* note 29, spécialement 1232; affaire 52/75, *Commission c. Italie*, arrêt du 26 février 1976, Rec., 277 s.; affaire 277/78, *Commission c. France*, arrêt du 25 septembre 1979, Rec., 2779 s.; *Commission c. Royaume-Uni* , *supra* note 142.

A ces raisons s'en ajoute une autre. Quand bien même que la procédure de l'articles 169 concerne directement la Commission et les Etats, on ne saurait oublier qu'elle intéresse indirectement aussi les ressortissants communautaires.

Un Etat membre ne peut se prévaloir d'une faute de la Commission pour tenter de s'exonérer.[314]

Des Etats ont souvent tenté d'échapper à une condamnation en alléguant des difficultés administratives, politiques ou constitutionnelles qui les auraient empêchés de se conformer à leurs obligations. Ces raisons ne sont jamais parvenues à convaincre la Cour de justice.[315] La Cour a ainsi jugé qu'un manquement ne peut être excusé par les retards de la procédure parlementaire,[316] la dissolution des chambres,[317] ou une crise gouvernementale.[318]

De manière plus générale, la Cour de justice récuse systématiquement l'invocation par un Etat des exigences de son droit comme justificatif d'un comportement infractionnel en jugeant qu'il lui incombe

> conformément aux obligations générales imposées (...) par l'article 5 du Traité (CEE), de tirer, dans son ordre interne, les conséquences de son appartenance à la Communauté.[319]

Tel est le cas de la nécessité d'obtenir une autorisation budgétaire du législateur,[320] du délai prévu pour le retrait des actes administratifs qui rendrait impossible la récupération d'une aide illicite,[321] ou encore les obstacles à cette même récupération résultant du droit des sociétés.[322]

C'est en vain aussi qu'un Etat membre estimerait pouvoir se justifier en avançant les difficultés d'ordre économique ou social que provoquerait l'exécution d'une réglementation communautaire.[323]

314 CJCE, affaires 2 et 3/62, *Commission c. Luxembourg et Belgique*, *supra* note 143; affaire 7/71, *Commission c. France*, *supra* note 143, Rec., 1003 s.

315 CJCE, affaire C-334/87, *Commission c. Allemagne*, arrêt du 10 juillet 1990, Rec., I-2849 s.; affaire 123/76, *Commission c. Italie*, arrêt du 14 juillet 1977, Rec., 1307 s.; affaire 102/79, *Commission c. Belgique*, *supra* note 200.; affaire 390/85, *Commission c. Belgique*, arrêt du 12 février 1987, Rec., 1331 s.

316 CJCE, affaire 77/69, *Commission c. Belgique*, arrêt du 5 mai 1970, Rec., 237 s.; affaire 8/70, *Commission c. Italie*, arrêt du 18 novembre 1970, Rec., 961 s.

317 *Commission c. Italie*, *supra* note 316.

318 CJCE, affaire 30/72, *Commission c. Italie*, arrêt du 8 février 1973, Rec., 161 s.

319 *Commission c. Italie*, *supra* note 318.

320 Ibid.

321 CJCE, affaire C-5/89, *Commission c. Allemagne*, arrêt du 20 septembre 1990, Rec., I-3487 s.

322 CJCE, affaire C-142/87, *Royaume de Belgique c. Commission*, arrêt du 20 mars 1990, Rec., I-959 s.

323 Voir par exemple, CJCE, affaire 128/78, *Commission c. Royaume-Uni*, arrêt du 7 février 1979, Rec., 419 s.; affaire 232/78, *Commission c. France*, *supra* note 57.

Si, la Cour de justice montre de la sévérité à l'égard des Etats membres qui se prévalent de difficultés économiques pour tenter d'échapper à leurs obligations, elle n'exclut pas la possibilité de reconnaître l'existence de cas de force majeure.[324] Elle n'est pas moins soucieuse d'enfermer cette justification dans des limites étroites. La force majeure exige «un événement imprévisible et insurmontable»[325] et ne vaut excuse que pour la période indispensable pour une administration normalement diligente et efficace pour se conformer à ses obligations.[326]

Alors même qu'un cas de force majeure est constaté, l'existence d'un ordonnancement juridique interdit toute initiative unilatérale de l'Etat membre. Conformément «aux devoirs réciproques de coopération que leur impose notamment l'article 5 du traité CEE», l'Etat et la Commission sont tenus de «collaborer de bonne foi en vue de surmonter ces difficultés dans le plein respect des dispositions du Traité».[327] Seule, une impossibilité absolue de se conformer à ses obligations peut, finalement, constituer une justification valable du manquement étatique.[328]

La Cour de justice n'a pas accepté d'exonérer un Etat de son infraction en considération de l'absence de tout préjudice.[329] Dans le même ordre d'idée, le simple fait pour un Etat membre de maintenir en vigueur ou d'adopter des dispositions contraires au droit communautaire constitue le manquement. Le maintien en vigueur d'un texte de droit interne qui contrevient au droit communautaire crée une insécurité juridique préjudiciable aux ressortissants communautaires qui constitue le manquement au sens de l'article 169 du traité de la CEE.[330] A plus forte raison, le faible nombre de cas d'application de la disposition irrégulière ne peut être pris en compte à la décharge de l'Etat mis en cause.[331]

Une régularisation tardive ne prive pas d'intérêt la constatation d'un manquement par la Cour de justice. Cette procédure a aussi pour objet de mettre fin à des divergences d'interprétation du droit communautaire dont la portée dépasse celle de l'espèce.[332] L'intérêt de procéder au constat d'une infraction subsiste encore «en vue d'établir la base d'une responsabilité qu'un Etat membre peut être dans le cas d'encourir en conséquence de son

324 CJCE, affaire 101/84, *Commission c. Italie*, arrêt du 11 juillet 1985, Rec., 2629 s.
325 CJCE, affaire 70/86, *Commission c. Grèce*, arrêt du 17 septembre 1987, Rec., 3545 s.
326 *Commission c. Italie*, *supra* note 324.
327 CJCE, affaire C-217/88, *Commission c. Allemagne*, arrêt du 10 juillet 1990, Rec., I-2879 s.
328 CJCE, affaire 52/84, *Commission c. Belgique*, arrêt du 15 janvier 1986, Rec., 100 s.; affaire 94/87, *Commission c. Allemagne*, arrêt du 2 février 1989, Rec., 175 s.; affaire 213/85, *Commission c. Pays-Bas*, arrêt du 2 février 1988, Rec., 281 s.
329 CJCE, affaire 95/77, *Commission c. Pays-Bas*, arrêt du 11 avril 1978, Rec., 863 s.
330 CJCE, affaire 167/73, *Commission c. France*, arrêt du 4 avril 1974, Rec., 359 s.
331 CJCE, affaire 166/82, *Commission c. Italie*, arrêt du 7 février 1984, Rec., 459 s.; affaire 257/86, *Commission c. Italie*, arrêt du 21 juin 1988, Rec., 3249 s.
332 CJCE, affaire 7/71, *Commission c. France*, *supra* note 143, Rec., 1003 s.; affaire 26/69, *Commission c. France*, arrêt du 9 juillet 1970, Rec., 565 s.

manquement à l'égard d'autres Etats membres, de la Communauté ou de particuliers».[333]

Enfin, les Etats ne sauraient invoquer dans le cadre d'une procédure en constatation de manquement l'illégalité d'un acte du droit dérivé.[334] La seule exception que la Cour de justice se déclare disposée à accueillir est celle d'un acte qui «manquerait de toute base juridique dans l'ordre juridique communautaire».[335] Par la suite, elle a réaffirmé que des actes entachés de «vices particulièrement graves et évidents» devaient être considérés comme inexistants.[336]

Les auteurs du manquement

Imputable à l'Etat membre, le manquement peut avoir pour auteur effectif tout organe ou entité qui relève de lui. La jurisprudence de la Cour de justice révèle l'élaboration progressive d'une notion communautaire de l'Etat[337] qui s'organise autour d'un principe directeur: l'Etat est conçu de manière fonctionnelle de sorte, d'une part, qu'il se laisse décomposer en fonctions distinctes et, d'autre part, qu'il s'affranchit des catégories formelles que les droits nationaux pourraient vouloir lui opposer. Il en résulte un double mouvement de désagrégation conduisant à détacher de l'Etat certains de ses composants au sens du droit interne, mais inversement aussi l'agrégation d'entités qui selon le droit national ne devraient pas lui être rattachées. Dans son arrêt du 20 septembre 1988, *Beentjes*,[338] la Cour de justice a ainsi jugé que

> la notion d'Etat, au sens de (l'article 1er de la directive 71/305), doit recevoir une interprétation fonctionnelle. Le but de la directive, qui vise à la réalisation de la liberté d'établissement et de la libre prestation des services en matière de marchés publics de travaux, serait en effet compromis si l'application du régime de la directive devait être exclue du seul fait qu'un marché public de travaux est adjugé par un organisme qui, tout en ayant été créé pour exécuter des tâches que la loi lui confère, n'est pas formellement intégré à l'administration de l'Etat.

333 CJCE, affaire 39/72, *Commission c. Italie*, arrêt du 7 février 1973, Rec., 101 s.; affaire 309/84, *Commission c. Italie*, arrêt du 20 février 1986, Rec., 599 s.; affaire 240/86, *Commission c. Grèce*, arrêt du 24 mars 1988, Rec., 1835 s.; affaire C-263/88, *Commission c. France*, arrêt du 12 décembre 1990, Rec., I-4620 s.

334 CJCE, affaire 226/87, *Commission c. Belgique*, arrêt du 30 juin 1988, Rec., 3611 s.; pour la procédure de l'article 93, paragraphe 2 relative aux aides, affaires jointes 6 et 11/69, *supra* note 52. Même si ces arrêts portent spécifiquement, la même solution devrait s'appliquer aux règlements et aux directives par référence à l'exception de recours parallèle puisque les Etats sont habilités à attaquer la légalité de ces actes par la voie du recours en annulation.

335 *Supra* note 52. La doctrine a vu dans cette décision une référence à la théorie de l'inexistence: Philippe Cahier, «Note», *CDE* (1970); J.-V. Louis, «Ordre public communautaire et intérêt des Etats dans les procédures en constatation de manquements», *Miscellanea Ganshof van der Meersch* (1972) tome II, 225 s., spécialement 231.

336 CJCE, affaire 116/85, *Commission c. Allemagne*, arrêt du 18 septembre 1986, Rec., 2519 s.

337 Hecquard-Theron, «La notion d'Etat en droit communautaire», *RTDE* (1990) 693 s.

338 CJCE, affaire 31/87, *Beentjes Gebroeders, supra* note 298.

Le droit communautaire rejoint ainsi des tendances déjà présentes dans les systèmes juridiques nationaux en contribuant à leur accentuation.

La conception de l'Etat mise en œuvre par le droit communautaire est le produit des principes qui structurent la «constitution économique» de la Communauté[339] et de la nécessité d'assurer l'unité et l'uniformité du droit communautaire.[340] La conjonction de ces deux facteurs se traduit par une redéfinition de l'Etat autour de ses fonctions régaliennes et de ses missions essentielles de service public.

La conception retenue par la Cour de justice l'amène à considérer que l'auteur d'un manquement étatique au sens de l'article 169 du traité de la CEE peut être non seulement une autorité centrale mais également une collectivité territoriale: un *Land*,[341] une région,[342] un «conseil de district urbain,[343] une municipalité.[344]

La démarche réaliste de la Cour de justice lui permet de déceler derrière l'existence apparente d'une entité la présence de l'Etat ou d'autres autorités étatiques. S'il apparaît qu'un organisme privé est investi par la législation de fonctions et de prérogatives de nature étatique, la Cour n'hésitera pas à lui reconnaître la qualité d'un démembrement de l'Etat. C'est ainsi qu'il a été jugé que peuvent constituer des mesures d'effet équivalant à des restrictions quantitatives des décisions d'une organisation professionnelle telle que la *Royal Pharmaceuticals Society of Great Britain*.[345] L'extension de l'imputabilité à l'Etat des comportements de certains organismes qui ne lui sont pourtant pas rattachés organiquement dépasse le cas des délégations de prérogatives étatiques, le manquement peut résulter des agissements d'entités de droit privé dès lors que l'Etat joue un rôle décisif dans leur fonctionnement.[346]

Parallèlement se constate une immédiatisation de chacun des organes ou des institutions constituant l'Etat ou se rattachant à lui. Avec constance la Cour de justice vient rappeler que l'obligation de se conformer au droit

339 Sur cette notion voir *supra* note 48. C'est ainsi que l'application des règles de concurrence est commandée par un principe de neutralité qui veut que l'Etat agissant «jure gestionis» soit assimilé à une entreprise, CJCE, affaire 41/83, *République italienne c. Commission,* arrêt du 20 mars 1985, Rec., 873 s.

340 Par exemple la jurisprudence relative à l'article 48, paragraphe 4 du traité de la CEE, affaire 152/73, *Sotgiu*, *supra* note 113; affaire 149/79, *Commission c. Belgique*, *supra* note 115; affaire 307/84, *Commission c. France* , arrêt du 3 juillet 1986, Rec., 1725 s.; affaire 66/85, *Lawrie Blum* , arrêt du 3 juillet 1986, Rec., 2121 s.

341 CJCE, affaire C-58/89, *Commission c. Allemagne*, arrêt du 17 octobre 1991, Rec., I-4983 s.

342 CJCE, affaire C-33/90, *Commission c. Italie*, arrêt du 13 décembre 1991, Rec., I-6001 s.

343 CJCE, affaire 45/87, *Commission c. Irlande*, arrêt du 22 septembre 1988, Rec., 4929 s.

344 CJCE, affaire 199/85, *Commission c. Italie*, arrêt du 10 mars 1987, Rec., 1039 s.

345 CJCE, affaire jointes 266 et 267/87, *The Queen c. Royal Pharmaceuticals Society of Great Britain*, arrêt du 18 mai 1989, Rec., 1295 s.

346 CJCE, affaire 249/81, *Commission c. Irlande*, arrêt du 24 novembre 1982, Rec., 4005 s.

communautaire incombe aux divers organes ou composants de l'Etat en fonction de leurs compétences respectives.[347]

En même temps, la Cour de justice refuse que l'organisation des compétences dans un Etat membre puisse servir à affaiblir l'autorité du droit communautaire. En effet,

> si chaque Etat membre est libre de répartir, comme il l'entend, les compétences normatives sur le plan interne, il n'en demeure pas moins qu'en vertu de l'article 169, il reste seul responsable vis-à-vis de la Communauté, des obligations qui résultent du droit communautaire.

Par conséquent, les Etats sont tenus de prendre les mesures nécessaires pour que les diverses autorités nationales, même décentralisées, respectent les obligations communautaires.[348] Il appartient à l'Etat membre d'assumer la responsabilité des infractions imputables à chacun de ses organes, à chacune de ses collectivités ou à chacune des entités qui lui sont rattachées, quand bien même leur indépendance serait constitutionnellement consacrées.[349] A cet égard, le cas des juridictions nationales a été au centre d'un débat. L'indépendance des autorités judiciaires est ressentie comme une objection dirimante. La doctrine ne s'est pourtant pas laissée arrêter par cet argument,[350] pas plus que l'avocat général Warner, même si celui-ci estime que le manquement exige une méconnaissance délibérée du droit communautaire, à l'exclusion d'une simple erreur.[351] Dans son arrêt du 5 mai 1970, *Commission c. Belgique*,[352] la Cour de justice a explicitement jugé que des comportements d'«institutions constitutionnelles indépendantes» peuvent être des manquements, formule qui au-delà des parlements est susceptible de viser les tribunaux.[353]

La complexité du problème explique la prudence de la Commission qui, sans écarter entièrement la possibilité d'engagement d'une procédure de constatation de manquement, s'attache à obtenir des Etats membres la cessation de l'infraction au droit communautaire sans qu'il soit porté atteinte à l'indépendance du pouvoir judiciaire.[354]

347 Voir en ce sens, notamment, *von Colson et Kamann, supra* note 236; affaire 222/84, *Johnston, supra* note 288, Rec., 1651 s.

348 *Commission c. Italie*, *supra* note 342.

349 *Commission c. Belgique*, *supra* note 324; affaire 100/77, *Commission c. Italie*, arrêt du 11 avril 1978, Rec., 879 s.

350 Voir G. Isaac, *supra* note 155; M. Waelbroeck, in *Le droit de la CEE*, *supra* note 101, 55.

351 J.-P. Warner, conclusions dans l'affaire 9/75, *Meyer-Burckhardt*, arrêt du 27 octobre 1977, Rec., 1171 s.; conclusions dans l'affaire 30/77 *Bouchereau*, *supra* note 119.

352 *Supra* note 324.

353 Voir en ce sens P. Pescatore, «Responsabilité des Etats membres en cas de manquement aux règles communautaires», *Il foro Padano* (1972) IV, 16.

354 Voir Sixième rapport annuel de la Commission au Parlement européen sur le contrôle de l'application du droit communautaire, 1988, JOCE, 30 décembre 1989, spécialement 53. Pour plus de détails voir H. Calvet, *Verbo manquement*, *Répertoire de droit communautaire*, n° 34 s.

Le renforcement de l'autorité de la constatation du manquement

Pour être incontestablement la question la plus importante, la question de l'autorité de la décision constatant un manquement n'est pas la seule qu'on se doit d'examiner. Dans certaines circonstances la situation créée par une infraction étatique peut risquer d'entraîner des conséquences gravement préjudiciables et irrémédiables. La reconnaissance de la capacité pour la Commission d'adopter des mesures provisoires s'avère alors indispensable.

Les mesures provisoires décidées par la Cour de justice

L'avis motivé de la Commission étant dépourvu de caractère obligatoire et la saisine de la Cour de justice ne produisant pas un effet suspensif,[355] les institutions de la Communauté comme les Etats membres se seraient trouvés privés de tout moyen d'empêcher les conséquences préjudiciables d'un manquement présumé dans l'attente de la décision finale de la Cour de justice. Le secours pouvait venir de l'article 186 du traité CEE qui dispose que «dans les affaires dont elle est saisie, la Cour de justice peut prescrire les mesures provisoires nécessaires». Ces mesures relèvent de la procédure en référé de l'article 36 du Statut de la Cour de justice des Communautés européennes.

Le droit pour la Cour de décider des mesures provisoires dans le cadre de la procédure en constatation de manquement a été contestée.[356] Ces objections n'ont pas suffi à dissuader la Cour de justice qui a d'abord délivré une injonction à l'encontre d'un Etat dans le cadre d'une procédure fondée sur l'article 93, alinéa 2 en matière d'aides,[357] puis, à l'occasion de la mise en œuvre d'une procédure au titre de l'article 169 du traité CEE.[358] Un Etat membre peut donc se voir enjoindre de ne pas appliquer les mesures nationales en cause avant même que leur incompatibilité avec le droit communautaire n'ait été établie par un jugement de la Cour de justice. Cette solution a son pendant devant les juridictions nationales conformément à ce qui a été jugé par la Cour dans son arrêt *Factortame*.[359]

Si, dans un premier temps, la Cour de justice n'a usé qu'avec prudence de son pouvoir,[360] elle l'exerce désormais régulièrement.[361] Cette fréquence est

355 Traité CEE, article 185.

356 Voir notamment les conclusions de l'avocat général Mayras sous CJCE, ordonnance du 21 mai 1977, affaire 31/77 R et 53/77 R, Rec., 921 s.

357 CJCE, affaires 31/77 et 53/77, *supra* note 356.

358 CJCE, affaire 61/77, *Commission c. Irlande,* ordonnance du 22 mai 1977, Rec., 937 s.; affaire 61/77, ordonnance du 13 juillet 1977, R, II-1411 s.

359 *Supra* note 281.

360 Voir sur ce point, J. Rideau et J.-L. Charrier, *Code des procédures européennes* (1990) 225.

361 Voir par exemple, CJCE, affaire 42/82 R, *Commission c. France*, *supra* note 148; affaire 154/85 R, *Commission c. Italie*, ordonnance du 7 juin 1985, Rec., 1753 s.; affaire 293/85 R, *Commission c. Belgique*, ordonnance du 25 octobre 1985, Rec., 3521 s.; affaire 194/88

assurément le signe de l'importance des mesures provisoires pour l'efficacité de la procédure en constatation de manquement.

L'arrêt de la Cour de justice

L'autorité de l'arrêt par lequel la Cour de justice se prononce est réglée par l'article 171 du traité de la CEE qui dispose que

> si la Cour de justice reconnaît qu'un Etat membre a manqué à une des obligations qui lui incombent en vertu du présent traité, cet Etat est tenu de prendre les mesures que comporte l'exécution de l'arrêt de la Cour de justice.

Cette disposition limite l'objet de l'arrêt de la Cour de justice à la seule constatation du manquement, l'Etat condamné étant tenu de prendre les mesures qu'implique l'arrêt pour qu'il soit mis fin au manquement.

La Cour de justice en a conclu que les «limites de sa compétence» étant ainsi déterminées par une «séparation rigoureuse des compétences des institutions communautaires et de celles des organes des Etats membres» les arrêts rendus au titre de l'article 169 du traité CEE ne pouvaient avoir qu'un effet déclaratoire.[362]

Cette conception ne doit pas conduire à une appréciation par trop restrictive des effets qui s'attachent aux arrêts de constatation de manquement qui ne rendrait pas exactement compte de la réalité. La constatation d'un manquement n'épuise pas l'objet de l'arrêt de la Cour de justice. Par ailleurs l'autorité de la chose jugée de l'arrêt ne vaut pas uniquement dans les rapports entre l'Etat membre concerné, la Communauté et les autres Etats membres, mais s'exprime aussi dans l'ordre juridique interne de l'Etat à l'encontre duquel un manquement a été constaté. Les juridictions nationales ne sauraient ignorer la décision de la Cour de justice.

L'élargissement de l'objet de l'arrêt

Le «recours en manquement a pour fonction de constater qu'un Etat membre n'a pas rempli en droit ou en fait une obligation que lui impose le droit communautaire».[363]

La Cour de justice n'est donc pas autorisée à annuler ou à déclarer invalide la mesure nationale contestée, ni à condamner l'Etat au paiement de dommages et intérêts.[364]

La possibilité pour la Cour de justice de prescrire à l'Etat membre dont l'infraction a été constatée les mesures qu'exigent sa cessation a été au centre

R, *Commission c. Italie*, ordonnance du 27 septembre 1988, Rec., 5647 s.; affaire C-195/90 R, *Commission c. Allemagne*, ordonnance du 12 juillet 1990, Rec., I-3351 s.

362 CJCE, affaire 6/60, *supra* note 134.

363 CJCE, affaire 363/85, *Commission c. Italie*, arrêt du 9 avril 1987, Rec., 1733 s.

364 Voir en ce sens, M. Waelbroeck, *supra* note 101, 71; Calvet, *supra* note 354, n° 117; cependant P. Pescatore, *supra* note 353, 18.

d'une controverse doctrinale. Plusieurs auteurs se prononcent en faveur de la reconnaissance de ce droit.[365]

Les auteurs tenants de cette thèse se réclament souvent de l'arrêt de la Cour du 12 juillet 1973 intervenu dans l'affaire des Aides à la reconversion des régions minières.[366] Dans cette décision, la Cour de justice a affirmé que la Commission peut, dans le cadre de la procédure des articles 169 à 171 du traité de la CEE, demander aux Etats membres de prendre des mesures déterminées afin de se conformer à leurs obligations communautaires. Pour la Cour

> l'objectif du traité étant d'aboutir à l'élimination effective des manquements et de leurs conséquences passées et futures, il appartient aux autorités communautaires ayant mission d'assurer le respect du traité de déterminer la mesure dans laquelle l'obligation incombant à l'Etat membre concerné peut éventuellement être concrétisée dans les avis motivés ou les décisions émis en vertu, respectivement, des articles 169 et 93, paragraphe 2, ainsi que dans les requêtes adressées à la Cour.[367]

Dans l'espèce, la Commission avait estimé qu'en omettant d'exiger des entreprises le remboursement d'aides illicites dont elles avaient bénéficié, l'Allemagne avait commis un manquement. Selon le professeur Michel Waelbroeck[368]

> ... en déclarant la requête recevable, la Cour ne prenait pas parti sur son pouvoir d'ordonner des mesures concrètes, mais elle se bornait à constater que le fait pour un Etat membre de ne pas exiger la restitution d'aides accordées en violation du traité pouvait constituer un manquement.

Aussi, ne lui semble-t-il pas que

> cet arrêt puisse être invoqué à l'appui d'un élargissement des compétences que l'article 171 reconnaît à la Cour.

Il observe que s'il en était autrement on comprendrait mal pourquoi dans ses «Suggestions sur l'Union européenne» la Cour de justice aurait exprimé le vœu d'une modification du traité de la CEE en vue de lui permettre d'indiquer dans ses arrêts les mesures que l'Etat aurait à prendre pour qu'il soit mis fin au manquement.

365 Cahier, *supra* note 307, 29; G. Vandersanden et A. Barav, *Contentieux communautaire* (1977) 125; R. Joliet, *Le droit institutionnel des Communautés européennes, Le Contentieux* (1981) 44; Wohlfart, Everling, Glaesner, Sprung, «Commentaire du traité CEE», Article 171, note 2.

366 CJCE, affaire 70/72, *Commission c. RFA*, arrêt du 12 juillet 1973, Rec., 813 s.

367 *Supra* note 366.

368 M. Waelbroeck, in *Le droit de la CEE*, *supra* note 101, 72-73.

Une chose au moins est certaine, les motifs des arrêts de la Cour comportent parfois des indications destinées à «guider» l'exécution des arrêts. Sans enjoindre les mesures qui s'imposent, la Cour de justice précise les substituts à la législation nationale qui seraient compatibles avec le droit communautaire.[369] H. Calvé[370] relève que

> parfois même, les motifs détaillent à l'intention de l'Etat concerné les conséquences concrètes de l'obligation dont la Cour constate pourtant qu'elle n'a pas été violée par la réglementation litigieuse.[371]

L'affermissement de l'autorité de la chose jugée de l'arrêt

Pour être déclaratoires, les arrêts de la Cour de justice rendus en vertu des articles 169-171 n'en sont pas moins revêtus de l'autorité de la chose jugée.

C'est à affermir cette autorité que la Cour s'attachera très tôt. Elle entreprendra de corriger les conceptions par trop restrictives qu'elle avait pu elle-même sembler encourager en soulignant dans son arrêt *Humblet*[372] l'existence d'une séparation rigoureuse entre l'ordre juridique étatique et l'ordre juridique communautaire. L'arrêt de la Cour de justice ne pouvait donc «s'immiscer dans la sphère des compétences internes de l'Etat» de sorte qu'il laisserait les Etats «derniers maîtres de l'exécution des arrêts prononcés contre eux».[373]

Assez rapidement la jurisprudence de la Cour de justice s'est engagée sur la voie d'une immédiatisation des effets de ses arrêts constatant un manquement étatique parallèlement au développement de sa jurisprudence relative à l'effet direct du droit communautaire, plus précisément aux obligations qu'ils génèrent pour les diverses instances étatiques.

Dès 1972, dans son arrêt *Commission c. Italie*, «Oeuvres d'art»,[374] la Cour de justice, faisant pièce à la prétention de l'Italie de subordonner l'effet d'une règle communautaire à l'abrogation formelle des dispositions nationales qui lui seraient contraires, affirmait que «l'effet du droit communautaire, tel qu'il a été constaté avec autorité de la chose jugée à l'égard de la République italienne, impliquait pour les autorités compétentes prohibition de plein droit d'appliquer une prescription nationale reconnue incompatible avec le traité et, le cas échéant, l'obligation de prendre toutes les dispositions pour faciliter la réalisation du plein effet du droit communautaire».

369 Voir par exemple, CJCE, affaire 124/81, *Commission c. Royaume-Uni*, arrêt du 8 février 1983, Rec., 235 s.

370 Calvet, *supra* note 354 n° 121.

371 Voir CJCE, affaire 2/78, *Commission c. Belgique*, arrêt du 16 mai 1979, Rec., 1761 s.

372 *Supra* note 134.

373 Rasquin, «L'autorité des arrêts et résolutions des organes de protection des personnes privées dans le cadre européen», *RDH* (1973) 707 s., spécialement 726.

374 CJCE, affaire 48/71, *supra* note 156, Rec., 529 s., observations F. Gayet et D. Simon, *CDE* (1973) 301 s.

Par la suite, il sera précisé que l'obligation d'assurer l'exécution d'un arrêt portant constatation d'un manquement incombe «à tous les organes de l'Etat membre (...) dans les domaines de leurs pouvoirs respectifs».[375]

Cette immédiatisation de l'autorité de la chose jugée des arrêts rendus par la Cour de justice par application de la procédure de l'article 169 du traité de la CEE pourrait aussi être rapprochée de la «primauté interne» du droit communautaire.[376] On notera que la Cour a choisi, à dessein, de viser les «autorités compétentes»[377] ou, de manière encore plus explicite, «tous les organes de l'Etat membre».[378] Il appartient donc à chacun des organes ou démembrements de l'Etat condamné d'exécuter l'arrêt de la Cour de justice en fonction de leurs compétences respectives.

Ainsi s'établit-il un parallèle entre ce qu'on pourrait appeler l'immédiatisation des auteurs des manquements et l'immédiatisation de l'obligation d'exécuter l'arrêt par lequel celui-ci est constaté.

L'obligation impartie à chacun des organes ou des démembrements de l'Etat devra être accomplie par eux dans le cadre de l'autonomie institutionnelle. C'est à cela que la Cour se réfère lorsque dans son arrêt du 14 décembre 1982, *Waterkeyn*[379] elle précise que l'exécution de ses arrêts incombe «à tous les organes de l'Etat membre (...) dans les domaines de leurs pouvoirs respectifs». Il n'en demeure pas moins qu'il s'agit pour ces organes d'une obligation de résultat.

L'immédiatisation de la constatation du manquement et le renforcement de l'effet direct sont deux processus qui entretiennent des relations très étroites. Ces rapports ont pu susciter des conceptions divergentes. Partant de la jurisprudence qui vient d'être présentée, on a cru parfois pouvoir affirmer que les arrêts de la Cour de justice constatant un manquement étatique avaient pour effet de paralyser l'application du droit interne[380] ou de produire les mêmes conséquences pratiques qu'une abrogation.[381] Pour la doctrine dominante une analyse exacte des effets à l'égard des juridictions nationales d'un arrêt portant constat d'un manquement suppose qu'il soit distingué selon que la norme communautaire dont la méconnaissance a été constatée est ou n'est pas d'effet direct.

Dans le premier cas, l'obligation pour le juge d'écarter la mesure étatique constituant le manquement procède de l'effet direct de la règle méconnue.[382] La solution trouve son fondement dans la jurisprudence puisque la Cour a

375 CJCE, affaires jointes 314 à 316/81 et 83/82, *Procureur de la République c. Waterkeyn*, arrêt du 14 décembre 1982, Rec., 4337 s.
376 Sur cette notion, voir *supra* page 60 s.
377 Voir *Commission c. Italie*, *supra* note 156.
378 Voir *Waterkeyn*, *supra* note 375.
379 Ibid.
380 Cahier, *supra* note 307, 28.
381 R. Joliet, *supra* note 365, 46.
382 Voir par exemple, G. Vandersanden et A. Barav, *supra* note 365, 126.

jugé que au cas où la violation constatée affecte une règle d'effet direct «les droits appartenant aux particuliers découlent non de cet arrêt mais des dispositions mêmes du droit communautaire ayant effet direct dans l'ordre interne».[383] L'arrêt de la Cour n'ajoute rien aux conséquences qui de toute façon découlent de l'effet direct de la règle violée.[384] Ainsi, serait exclue une médiatisation de l'effet direct par l'arrêt de la Cour.

Moins évident est le cas où la disposition communautaire méconnue est dépourvue d'effet direct. Si de nombreux auteurs font valoir que l'arrêt rendu par la Cour de justice ne saurait transformer la nature de la norme communautaire de sorte que le juge national ne saurait écarter l'application d'une disposition de droit interne qui méconnaîtrait une règle communautaire privée d'effet direct,[385] il en est quelques-uns pour estimer que sous peine d'être privée de toute efficacité, l'autorité de la chose jugée de l'arrêt constatant un manquement exige que les juridictions nationales puissent exclure l'application des mesures condamnées.[386] L'objection fondée sur l'impossibilité de reconnaître qu'une autorité de l'arrêt rendu par la Cour de justice qui oblitérerait la distinction entre le droit communautaire produisant un effet direct et le droit communautaire privé de cette propriété n'est pas nécessairement dirimante. Elle mériterait certainement d'être réexaminée à la lumière d'une conception moins manichéenne du droit communautaire résultant d'une conception davantage relative de la précédente distinction et d'une plus juste appréciation des effets qui s'attachent à la constatation judiciaire d'un manquement étatique. Comme le faisait remarquer A. Barav, ce constat ne comporterait qu'un «effet d'exclusion» conduisant simplement à écarter la disposition nationale contraire sans pour autant comporter l'«effet de substitution» qui, dans la conception traditionnelle, serait propre à l'effet direct.[387] De plus, la raison pour laquelle une partie de la doctrine s'attache à la thèse selon laquelle l'effet d'exclusion procède de l'effet direct de la norme communautaire et non de l'arrêt constatant sa violation, ne peut être que l'absence de justiciabilité de la règle communautaire qui n'énoncerait pas une obligation «claire, précise et inconditionnelle» à la charge des Etats membres, or, l'arrêt de la Cour a bien pour objet de préciser sans ambiguïté l'obligation qui pèse sur ceux-ci de telle sorte que le juge interne ne rencontre plus l'obstacle dû à l'inaptitude de la norme à faire l'objet d'une application judiciaire. Par ailleurs, ce n'est pas l'autorité de la règle mais celle de l'arrêt qui contraint le juge national.

383 *Waterkeyn*, *supra* note 375.

384 Voir en ce sens, D. Simon et A. Barav, «La responsabilité de l'administration nationale en cas de violation du droit communautaire», *RMC* (1987) 165 s., spécialement 167.

385 Voir notamment Isaac, «Observations sous l'arrêt Waterkeyn», *RTDE* (1983) 463 s., spécialement 467.

386 Voir A. Barav, *La Fonction communautaire du juge national,* thèse Université de Strasbourg (1983) 159 et 160.

387 Ibid.

L'«objectif du traité» est d'«aboutir à l'élimination effective des manquements et de leurs conséquences passées et futures».[388] Les conséquences du manquement doivent donc être éliminées *ex tunc*. L'exigence d'une élimination effective des manquements et de leurs conséquences veut que l'Etat en cause soit tenu «de réparer les effets illicites» qui en résultent,[389] ainsi que la répétition des sommes indûment prélevées par l'Etat ou versées par lui.

(b) L'effectivité de la réalisation du droit communautaire

Pour être effectivement applicable la règle communautaire peut avoir besoin d'un complément normatif, d'une application particulière et d'un mécanisme de sanction.[390]

Dans certains cas la mise en œuvre du droit communautaire relève totalement ou partiellement des institutions communautaires. Toutefois, le plus souvent, les Etats membres sont associés à l'application du droit communautaire et, souvent même en assument la plus grande part.

Le rôle des Etats membres est d'une importance extrême. Il ne leur incombe pas seulement de ne pas gêner l'application du droit communautaire, mais de contribuer à l'efficacité de sa mise en œuvre.[391] Le comportement exigé des Etats membres n'est pas une soumission passive au droit communautaire mais une coopération active conformément aux prescriptions de l'article 5 du traité de la CEE.

La Cour de justice n'a cessé d'approfondir et d'élargir les obligations qui découlent de l'article 5 du traité de la CEE, construisant progressivement le concept et le régime d'une fonction étatique d'exécution du droit communautaire.

Elle a, en outre, entrepris de préciser quelles sont les obligations des Etats dans les hypothèses où les institutions communautaires sont, exceptionnellement, dans l'incapacité d'exercer leurs compétences, cette carence faisant courir des risques graves à la continuité de l'action des Communautés et à la réalisation de leurs missions. Le devoir de «fidélité communautaire»[392] impose aux Etats membres d'agir dans l'intérêt de la Communauté sous son contrôle.

i) La mise en œuvre du droit communautaire par les Etats membres

L'effectivité du droit des Communautés européennes dépend, dans une large mesure, de l'action normative, administrative et judiciaire des Etats

388 CJCE, affaire 70/72, *Commission c. Allemagne*, *supra* note 366.
389 *Humblet*, *supra* note 134.
390 G. Isaac, *supra* note 155.
391 Voir J.-V. Louis, «Compétences des Etats membres dans la mise en œuvre des règlements», *CDE* (1971) 628 s.
392 Expression utilisée par analogie avec la *Bündnistreue* du droit allemand.

membres. Aussi convient-il de s'intéresser au statut de l'Etat membre intervenant à ce titre. Cette fonction se situe à la charnière des ordres juridiques communautaires et nationaux: si ses assises procèdent du premier, ses techniques relèvent des seconds. Pourtant même à cet égard l'emprise du droit communautaire se fait toujours plus présente.

Le fondement de l'obligation d'assurer la mise en œuvre effective du droit communautaire

L'intervention des Etats membres s'explique de plusieurs manières.[393]

Ce sont d'abord les dispositions non directement applicables des traités qui peuvent exiger des mesures étatiques en dehors même de toute intervention normative des institutions de la Communauté. Ce sont ensuite les directives qui réalisent un mode de «législation indirecte». Enfin, alors même que les règlements sont «obligatoires dans tous leurs éléments et directement applicables dans tous les Etats membres»,[394] leur concrétisation peut nécessiter des mesures d'application qui incombent aux autorités nationales.[395]

Cette «fonction exécutive» des Etats membres trouve son fondement soit dans l'obligation générale de coopération instituée par l'article 5 du traité CEE ou dans les dispositions équivalentes des traités CECA et CEEA, soit dans les habilitations spécifiques prévues dans les actes du droit communautaire dérivé, encore que assez fréquemment la Cour de justice soit portée à associer ces deux titres juridiques.

La mise en œuvre étatique du droit communautaire en vertu de l'obligation générale de collaboration instituée par les traités

Cette obligation générale est prévue aux articles 5 CEE, 172 CEEA et 86 CECA.

L'article 5 du traité CEE s'est vu attribuer diverses significations qui ne sont pas nécessairement exclusives les unes des autres.

Initialement, l'article 5 a surtout été compris comme annonçant les obligations plus spécifiques stipulées au traité ainsi qu'un principe permettant de les interpréter dans un sens constructif. Il s'agissait, en particulier, d'empêcher que les Etats membres puissent tirer parti de la limitation de la compétence de la Communauté par le principe de spécialité en usant de leurs compétences retenues d'une manière qui préjudicierait à la Communauté.[396]

393 Voir Sohier et Mégret, «Le rôle de l'exécutif national et du législateur national dans la mise en œuvre du droit communautaire», *Droit communautaire et Droit national* (1965) 107 s., spécialement 111 s.

394 Traité CEE, article 189.

395 Voir Pescatore, *supra* note 195.

396 Voir par exemple, CJCE, affaire 6 et 11/69, *Commission c. France, supra* note 145.

Cette conception, somme toute minimale, ne s'accordait pas entièrement avec les termes de l'article 5. Aussi, des auteurs toujours plus nombreux, ont élargi la portée de l'article 5 du traité CEE, qu'ils ont considéré comme «une source autonome d'obligation de ne pas faire pour les Etats membres en dehors et au-delà des obligations spécifiques que le traité leur impose».[397]

L'élargissement progressif de la portée de l'obligation de coopération énoncée à l'article 5 s'est poursuivi par l'accent mis sur les engagements «positifs» contenus dans l'alinéa 1 de l'article 5. Dans son arrêt *Scheer* du 17 décembre 1970,[398] la Cour a jugé que les Etats membres sont tenus de prendre toutes les mesures législatives, réglementaires et administratives nécessaires pour donner leur plein effet aux règlements communautaires. Selon la Cour de justice,

> les Etats membres avaient le droit et, en vertu des dispositions générales de l'article 5 du traité, l'obligation de tout faire pour assurer l'effet utile de l'ensemble des dispositions du règlement.

Cette solution de principe conduira le professeur J.-V. Louis[399] à écrire:

> jamais, les obligations positives des Etats membres n'avaient été à ce point mises en évidence dans la jurisprudence... Il s'agit aux yeux de la Cour d'assurer l'effet utile des règlements.[400]

Les traités investissent donc les Etats membres d'une responsabilité subsidiaire, mais néanmoins essentielle, dans la mise en œuvre du droit communautaire.[401]

Cette obligation n'a cessé d'être rappelée par la Cour de justice. Dans son arrêt du 21 septembre 1983, *Deutsche Milchkontor*[402] on peut lire que

> conformément aux principes généraux qui sont à la base du système institutionnel de la Communauté et qui régissent les relations entre la Communauté et les Etats membres, il appartient aux Etats membres, en vertu de l'article 5 du traité, d'assurer sur leur territoire l'exécution des réglementations communautaires...

397 Van der Esch, «L'unité du marché commun dans la jurisprudence de la Cour, la bonne foi communautaire et le problème des politiques communes», *CDE* (1970) 303 s.

398 CJCE, affaire 30/70, *Scheer*, arrêt du 17 décembre 1970, Rec., 1197 s.

399 J.-V. Louis, *supra* note 391.

400 Ibid. Sur l'article 5 CEE dans son ensemble, voir M. Blanquet, *L'article 5 du traité CEE. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, Thèse Université de Toulouse I, (1992); Temple Lang, «Article 5 of the EEC Treaty: the emergence of constitutionnal principles in the case law of the Court of justice», *Fordham Int'l L.J.*, volume X, (1987) 503 s.

401 Prats, «Incidences des dispositions du traité instituant la CEE sur le droit administratif français», 1 *RTDE* (1968) 19 s., spécialement 21.

402 CJCE, affaires jointes 205 à 215/82, *Deutsche Milchkontor*, arrêt du 21 septembre 1983, Rec., 2633 s.

L'article 5 est souvent combiné avec une disposition particulière investissant les Etats membres de la mission de prendre les mesures nécessaires à l'exécution d'un règlement. Cette habilitation n'est regardée que comme une concrétisation particulière du devoir général de coopération qui incombe aux Etats membres. La Cour relève ainsi dans son arrêt *Fromme*[403] du 6 mai 1983 que

> l'article 8 (...) du règlement n° 729/70, en prévoyant que les Etats membres prennent, conformément aux dispositions législatives, réglementaires et administratives nationales les mesures pour récupérer les sommes perdues à la suite d'irrégularités ou de négligences ne fait que confirmer expressément une obligation qui incombe déjà aux Etats membres en vertu du principe de coopération énoncé à l'article 5 du traité.

La Cour de justice trouve même intérêt à se référer à l'article 5 en appui de l'obligation faite aux Etats membres par l'article 189 d'assurer l'application des directives.[404]

La mise en œuvre du droit communautaire en vertu d'une habilitation spécifique

L'identification des dispositions des actes du droit communautaire valant habilitation des Etats membres à prendre des mesures d'exécution peut créer certaines confusions. En effet, les règlements comportent généralement une disposition finale selon laquelle

> les Etats membres prennent toutes les mesures législatives, réglementaires et administratives de façon que les dispositions du présent règlement (...) puissent être effectivement appliquées à partir du ...

ou formulée en des termes équivalents.

Les Etats membres sont ainsi rappelés à leur devoir de coopération édicté par l'article 5 du traité CEE. Il ne s'agit donc pas d'une habilitation par laquelle les institutions de la Communauté confient aux autorités nationales la mission d'arrêter des mesures nécessaires à la mise en œuvre d'un règlement communautaire.[405] Une disposition générale du genre de celle citée précédemment oblige les Etats membres à désigner les autorités chargées de l'application du règlement, à prévoir les sanctions destinées à assurer le respect des règles communautaires et à éliminer les doutes que les administrations et

403 CJCE, affaire 54/81, *Fromme c. B.A.L.M.*, arrêt du 6 mai 1983, Rec., 1463 s.

404 *Von Colson et Kamann, supra* note 236; affaire 130/83, *Commission c. Italie*, arrêt du 17 juillet 1984, Rec., 2860 s.

405 Voir CJCE, affaire 94/77, *Zerbone c. Amministrazione delle finanze dello Stato*, arrêt du 31 janvier 1978, Rec., 99 s.

les administrés pourraient avoir quant au sort des textes de droit interne qui entrent dans le champ d'application d'un règlement.[406]

La portée de l'obligation d'assurer la mise en œuvre effective du droit communautaire

Sans rouvrir la discussion relative à la nature des compétences exercées par les Etats membres agissant pour l'exécution du droit communautaire, compétence étatique propre, ou, par une sorte de dédoublement fonctionnel, une compétence communautaire déléguée,[407] on s'accordera pour reconnaître qu'il s'agit d'une compétence subordonnée ou encore d'une compétence liée.

Le principe de cette subordination est identique quelle que soit la base juridique de l'intervention étatique. Cette subordination procède de la finalité de la fonction assignée aux Etats membres, comme la Cour de justice l'a souligné dans son arrêt *Scheer*[408] en affirmant que les «fonctions dévolues» aux Etats membres le sont «dans l'intérêt de la Communauté». Ce n'est que «dans la mesure nécessaire à l'exécution de la législation» communautaire que les autorités nationales sont habilitées à intervenir.[409] La nécessité d'assurer l'efficacité du droit communautaire est donc à la fois la condition et la fin de la fonction «exécutive» des Etats membres.

La subordination de la fonction «exécutive» des Etats membres ne saurait être confondue avec la primauté du droit communautaire. Certes, un Etat ne peut aller à l'encontre d'une règle communautaire. La Cour de justice n'a jamais omis de rappeler cette exigence. Dans l'arrêt *Granaria*[410] elle a pris soin de préciser qu'il est exclu que les Etats membres puissent, en l'absence d'une disposition contraire du droit communautaire, recourir à des mesures internes susceptibles d'altérer son application».

Cette subordination ne se réduit certainement pas à l'interdiction de contrevenir au droit communautaire. Elle signifie aussi que la fonction d'«exécution» assumée par les Etats membres est une compétence liée et subsidiaire.[411]

Les mesures étatiques nécessaires pour l'application efficace du droit communautaire sont, conformément au principe d'autonomie institutionnelle des Etats membres, arrêtées dans le cadre des prescriptions de chacun des

406 CJCE, affaire 40/69, *Hauptzollamt Hamburg c. Bollmann*, arrêt du 18 février 1970, Rec., 69 s.
407 Voir sur ce point G. Isaac, *supra* note 155, 186.
408 *Supra* note 398.
409 *Norddeutsches Vieh- und Fleischkontor*, *supra* note 270; affaires jointes 146 et 192/81, *Baywa c. B.A.L.M.*, arrêt du 6 mai 1982, Rec., 1503 s.
410 CJCE, affaire 18/72, *Granaria*, arrêt du 30 novembre 1972, Rec., 1163 s.
411 Voir en ce sens, M. Sohier et C. Mégret, *supra* note 393, 115; P. Pescatore, *supra* note 209, 192.

droits nationaux.[412] A plusieurs reprises la Cour de justice a eu l'occasion de formuler ce principe dans des termes similaires à ceux de son arrêt du 11 février 1971, *Norddeutsches Vieh-und Fleischkontor*[413] où elle déclare que

> dans les cas où la mise en œuvre d'un règlement communautaire incombe aux autorités nationales, il convient d'admettre qu'en principe cette application se fasse dans le respect des formes et procédures du droit communautaire.

De même dans son arrêt *International Fruit Company*,[414] la Cour répète que

> lorsque les dispositions du traité ou des règlements reconnaissent des pouvoirs aux Etats membres ou leur imposent des obligations aux fins de l'application du droit communautaire, la question de savoir de quelle façon l'exercice de ces pouvoirs et l'exécution de ces obligations peuvent être confiés par les Etats à des organes déterminés, relève uniquement du système constitutionnel de chaque Etat.

Ce principe d'autonomie trouve à s'appliquer à toutes les formes que peut revêtir la mise en œuvre du droit communautaire par les Etats membres, que ce soit à travers leurs organes exécutifs, législatifs ou judiciaires. Il a trait à la désignation des instances nationales compétentes.[415] Il s'étend aux règles relatives aux formes et aux procédures de mise en œuvre du droit communautaire qui seront elles aussi, normalement, déterminées par les droits nationaux.[416]

L'autonomie institutionnelle ne saurait être absolue. Quatre principes concourent à son cantonnement: l'uniformité, l'immédiateté, la supériorité et l'effet utile du droit communautaire.[417] Dans son arrêt *Schlüter* du 6 juin 1972,[418] la Cour de justice a jugé que l'application du droit national «doit se concilier avec les nécessités d'une application uniforme du droit communautaire».[419] Cette exigence est formulée avec une particulière netteté dans l'arrêt du 21 septembre 1983, *Deutsche Milchkontor*[420] puisqu'elle affirme que

> conformément aux principes généraux qui sont à la base du système institutionnel de la Communauté et qui régissent les relations entre la Communauté et les Etats membres, il appartient aux Etats membres, en vertu de l'article 5 du Traité, d'assurer sur leurs territoires l'exécution des réglementations communautaires, notamment dans le cadre de la politique agricole commune. Pour autant que le droit communautaire, y compris les principes généraux de celui-ci, ne comporte

412 Rideau, «Le rôle des Etats membres dans l'application du droit communautaire», *AFDI* (1972) 862 s.
413 *Norddeutsches Vieh- und Fleischkontor, supra* note 270.
414 CJCE, affaires jointes 51 à 54/71, *International Fruit Company*, arrêt du 15 décembre 1971, Rec., 1146 s.
415 CJCE, affaire 151/78, *Sukkerfabriken Nykobing Limiberet*, arrêt du 16 janvier 1979, Rec., 1 s.; affaire 240/78, *Atalanta*, arrêt du 21 juin 1979, Rec., 2127 s.
416 *Supra* note 409.
417 Voir R. Kovar, «Droit communautaire et droit procédural national», *CDE* (1977) 230 s.
418 CJCE, affaire 94/71, *Schlüter*, arrêt du 6 juin 1972, Rec., 307 s.
419 Voir aussi *Norddeutsches Vieh- und Fleischkontor, supra* note 270; affaire 34/70, *Syndicat national du commerce extérieur des céréales*, arrêt du 17 décembre 1970, Rec., 1233 s.
420 *Deutsche Milchkontor, supra* note 402.

> pas de règles communes à cet effet, les autorités nationales, procèdent lors de cette exécution des réglementations communautaires, en suivant les règles de forme et de fond de leur droit national, étant entendu ... que cette règle doit se concilier avec la nécessité d'une application uniforme du droit communautaire, nécessaire pour éviter un traitement inégal des opérateurs économiques.

Ainsi se vérifie le caractère subsidiaire de l'application des droits nationaux.

Le renforcement de l'encadrement de l'«autonomie institutionnelle» par le droit communautaire est exemplaire dans le cas des directives. A s'en tenir à l'article 189, alinéa 3 CEE la directive se caractérise comme un acte obligatoire dans l'objectif assigné aux Etats membres qui en sont les destinataires tout en laissant le choix de la forme et des moyens nécessaires pour atteindre ce résultat. Les obligations qui pèsent sur les Etats membres se sont progressivement précisées. Ce serait une erreur de penser que la liberté reconnue à l'Etat pour le choix des modalités de l'exécution de son obligation est absolue. La Cour de justice a souligné les exigences du droit communautaire qui contribuent à relativiser sérieusement la marge de discrétion des autorités nationales qui sont tenues de choisir des instruments susceptibles d'assurer aux directives une pleine efficacité.

L'encadrement de la mise en œuvre des directives porte d'abord sur la qualification de la nature de cette opération, mais également sur les propriétés des mesures prises à cet effet, et, enfin sur les destinataires de l'obligation prévue par l'article 189, alinéa 3 CEE.

Le vocabulaire de la Cour de justice comme celui de la doctrine ne facilite pas la détermination de la nature de l'opération destinée à réaliser la «traduction» des directives en droit interne. Cette terminologie est quelque peu hésitante. Si, dans l'arrêt du 6 mai 1980, *Commission c. Belgique*,[421] les directives sont «destinées à être traduites dans des dispositions internes...», dans une autre décision il est successivement question de «mesures d'exécution» et de «mesures d'introduction».[422] Dans un arrêt ultérieur, la Commission et l'avocat général Mayras parleront de «mesures de transposition».[423]

Certaines de ces expressions ont de regrettables connotations «dualistes». En vérité, l'intervention des Etats n'a pas pour objet ni pour effet de réaliser une transformation des directives, ni une réception qui assujettirait leur invocabilité à l'interposition d'une mesure étatique. Ces solutions ne peuvent se concilier avec la jurisprudence de la Cour de justice relative à l'effet direct des directives. L'absence de mesures étatiques destinées à traduire la directive en droit interne ne peut s'opposer à l'effet direct susceptible de s'attacher aux dispositions d'une directive.[424]

421 CJCE, affaire 102/79, *Commission c. Belgique*, *supra* note 200, spécialement 1487.
422 CJCE, affaire 148/78, *Ratti*, *supra* note 199, Rec., 1629 s.
423 CJCE, affaire 93/79, *Commission c. Italie*, arrêt du 14 décembre 1979, Rec., 3837 s.
424 *Ratti*, *supra* note 422.

La jurisprudence de la Cour de justice est venue restreindre la liberté reconnue aux Etats membres par l'article 189, alinéa 3 qui, loin d'être absolue n'est que relative. Leur liberté est limitée par l'obligation d'utiliser les formes et les moyens de nature à assurer une pleine efficacité aux directives. Ainsi, d'une part, la directive crée pour les Etats membres une obligation absolue de résultat, d'autre part, les exigences posées par la Cour de justice sont telles que leur liberté de choisir les moyens n'est de loin pas absolue.

Le caractère contraignant des directives oblige les Etats membres à prendre dans les délais prescrits toutes les mesures nécessaires pour leur mise en œuvre en droit interne.[425] L'aspect le plus novateur de la jurisprudence de la Cour de justice a trait aux obligations de moyens des Etats membres. La liberté laissée aux autorités nationales du choix des formes et des moyens de la traduction des directives en droit interne s'est trouvé sensiblement réduite. La distinction faite par l'article 189, alinéa 3 CEE entre ce qui dans une directive est impératif, le résultat à atteindre, et ce qui reste de l'appréciation des Etats, la forme et les moyens de sa mise en œuvre se révèle très relative. Ce relativisme tient à l'insistance avec laquelle la Cour de justice est intervenue pour préciser les exigences du droit communautaire à l'égard des conditions de la mise en œuvre des directives par les Etats membres. La Cour enjoint aux autorités nationales «de choisir les formes et les moyens les plus appropriés en vue d'assurer l'effet utile des directives».[426] Précisant ces exigences, elle souligne dans l'arrêt *Enka* que

> la compétence laissée aux Etats membres, en ce qui concerne la forme et les moyens des mesures à prendre par les instances nationales, est fonction du résultat que le Conseil ou la Commission entendent voir atteindre.[427]

Si la directive crée pour les Etats qui en sont les destinataires une obligation de résultat quant au contenu des mesures qu'il leur incombe de prendre, son effet utile les oblige à choisir les formes et les moyens déterminés. La Cour se reconnaît le droit de faire porter son contrôle tant sur la première que sur la seconde de ces obligations.

Ses intentions seront confirmées avec une force particulière dans l'arrêt *Commission c. Belgique*[428] du 6 mai 1981. Le gouvernement belge qui se voyait reprocher de n'avoir pas pris les mesures nécessitées par une directive, se prévalait du droit de déterminer librement «les techniques légales par les-

425 CJCE, *Commission c. Italie*, affaire 221/83, arrêt du 18 septembre 1984, Rec., 3249 s.; affaire 279/83, *Commission c. Italie*, arrêt du 3 octobre 1984, Rec., 3403 s.; affaire 131/84, *Commission c. Italie*, arrêt du 6 novembre 1985, Rec., 3351 s. Jurisprudence constante.

426 CJCE, affaire 48/75, *Royer*, arrêt du 8 avril 1976, Rec., 497 s.

427 CJCE, affaire 38/77, *supra* note 266; voir aussi, CJCE, affaire 152/79, *Lee*, arrêt du 6 mai 1980, Rec., 1495 s.

428 *Commission c. Belgique*, *supra* note 200.

quelles les directives sont mises en vigueur, en précisant qu'elles pouvaient aller de la loi jusqu'à la simple note de service». Pour la Commission,

> cette argumentation ... appelait une mise au point en ce qui concerne ... l'usage de la liberté qui est réservée (aux Etats) en ce qui concerne le choix des formes et des moyens compte tenu de l'objectif poursuivi par la directive en cause.

Les Etats sont donc astreints à user de leur liberté de manière à permettre la réalisation de l'objet des directives.[429] Cette exigence assigne sa finalité et ses limites à la liberté des Etats membres. Elle est une des expressions de l'encadrement de l'«autonomie institutionnelle» et prend appui dans l'obligation mise à la charge des Etats membres par l'article 5 CEE.

La restriction de la compétence reconnue aux Etats par l'alinéa 3 de l'article 189 se concrétise dans deux séries de conditions, les unes absolues, les autres relatives.

La Cour de justice insiste d'abord sur la nécessité de réaliser la traduction des directives en droit interne dans des conditions conformes aux impératifs de sécurité et de certitude juridique. Ces raisons expliquent qu'elle ait jugé que

> de simples pratiques administratives, par nature modifiables au gré de l'administration et dépourvues d'une publicité adéquate, ne sauraient être considérées comme constituant une exécution valable de l'obligation qui incombe aux Etats membres destinataires d'une directive en vertu de l'article 189 du traité.[430]

Ces exigences se retrouvent dans l'arrêt du 23 mai 1985, *Commission c. RFA*.[431] Le gouvernement allemand était critiqué pour n'avoir pas traduit correctement dans son droit interne des directives relatives à l'exercice de la profession d'infirmier. Ce grief lui paraissait injuste dans la mesure où la pratique administrative allemande garantissait l'existence d'une «situation objective» conforme aux directives communautaires. Cette pratique assurait aux intéressés des droits susceptibles d'être invoqués par la voie judiciaire. De plus, divers centres et organismes, dont la liste avait été communiquée à la Commission et aux Etats, garantissaient une information suffisante aux ressortissants communautaires. Enfin, en vertu du principe «de l'auto-limitation de l'administration» les autorités publiques étaient tenues de se conformer aux règles fixées par elles-mêmes. La pertinence de ce dernier argument devait être contestée par l'avocat général Sir Gordon Slynn.[432]

429 Voir en ce sens les conclusions de l'avocat général Sir Gordon Slynn sous CJCE, affaire 29/84, *Commission c. RFA*, arrêt du 23 mai 1985, Rec., 1661 s.

430 CJCE, affaire 145/82, *Commission c. Italie*, arrêt du 15 mars 1983, Rec., 711 s., spécialement 718.

431 *Commission c. RFA*, *supra* note 429.

432 Conclusions précitées note 429.

L'argumentation de la République fédérale n'était pas assimilable à celle exposée par la Belgique dans l'affaire 102/79.[433] Dans cette espèce la Cour de justice avait eu à se prononcer sur la validité de simples instructions administratives comme procédé d'exécution d'une directive. Dans l'affaire 29/84[434] le gouvernement allemand se réclamait de principes juridiques ressortissant tant de son droit interne que du droit communautaire. La Cour se devait donc de préciser les exigences de l'article 189, alinéa 3 CEE. Selon elle, l'exécution d'une directive n'exige pas nécessairement une action législative dans chacun des Etats membres. En particulier, l'existence de principes généraux du droit constitutionnel ou administratif peut rendre superflue l'adoption de mesures législatives ou réglementaires spécifiques à condition, toutefois, que ces principes garantissent effectivement l'application de la directive par l'administration nationale et qu'au cas où la directive vise à créer des droits pour les particuliers, la situation juridique découlant de ces principes soit suffisamment précise et claire et que les bénéficiaires de leurs droits puissent, le cas échéant, s'en prévaloir devant les juridictions nationales. La mise en œuvre d'une directive destinée à créer des droits au bénéfice des ressortissants communautaires doit se réaliser dans des conditions garantissant aux bénéficiaires de ces droits l'effectivité de ceux-ci. Sans exclure que les principes généraux de droit national puissent réaliser la traduction d'une directive dans l'ordre juridique étatique, la Cour de justice parvient à la conclusion que tel n'était pas le cas dans l'affaire qui lui était soumise. En effet, les directives en cause étaient destinées à assurer une application pleinement efficace du régime du traitement national en concrétisant ce principe dans des prescriptions «complexes et détaillées», de sorte que le renvoi à ce principe du droit communautaire et au principe d'égalité du droit allemand ne pouvait se substituer à l'obligation de traduire ces directives dans des «mesures législatives ou réglementaires spécifiques».

Croire que cet arrêt se situe en retrait par rapport à la jurisprudence de la Cour de justice ne serait certainement pas exact. La Cour demeure fidèle à l'exigence essentielle exprimée dans ses décisions antérieures, à savoir que les mesures d'application des directives en droit interne doivent être juridiquement «contraignantes».[435] Cette condition se justifie par des nécessités de sécurité et de certitude des situations juridiques. Une explication plus fondamentale semble pouvoir être, en outre, avancée. Pour présenter des particularités, la directive n'en est pas moins une décision dont les instruments de droit étatique doivent traduire non seulement la substance mais aussi l'autorité. L'obligation de résultat à laquelle les Etats sont tenus en vertu de l'article 189 CEE détermine ainsi la nature des mesures qu'ils sont amenés à

433 *Commission c. Belgique*, *supra* note 200.
434 *Commission c. RFA*, *supra* note 429.
435 CJCE, affaire 239/85, *Commission c. Belgique*, arrêt du 2 décembre 1986, Rec., 365 s.

prendre pour permettre l'application effective des directives dans leur ordre juridique.

La Cour de justice ne s'en tient pas à cette condition à la fois essentielle et minimale. Elle en ajoute d'autres dont l'intensité est fonction de l'objet des directives. C'est ce qu'elle veut signifier en déclarant que les Etats membres doivent «... prendre ... des mesures d'application adéquates à l'objet de chaque directive».[436] Pour se conformer à cette injonction, les autorités nationales doivent tenir compte des indications explicites ou implicites livrées par les directives.

Dans l'affaire 102/79, la Cour de justice est parvenue à la conclusion que les directives en cause étaient «destinées à être traduites dans des dispositions internes ayant la même valeur juridique que celles qui s'appliquent dans les Etats membres au contrôle et à la réception des véhicules à moteur ou tracteurs».

La signification de cette exigence d'équipollence a pu être quelque peu obscurcie par une terminologie incertaine. Dans cet arrêt, il est successivement question de «dispositions ayant la même valeur juridique que celles qui s'appliquent dans les Etats membres à la matière considérée», puis de «dispositions équivalentes à celles... appliquées dans l'ordre interne».[437] On a fait observer qu'une certaine distance peut exister entre ces deux formulations.[438]

Cette ambivalence se constate dans l'affaire *Commission c. Italie.*[439] La Commission pensait pouvoir déduire de la jurisprudence de la Cour de justice «deux exigences fondamentales», dont celle «du parallélisme des normes juridiques». Selon elle, l'arrêt du 6 mai 1979[440] aurait affirmé «d'une part, que les directives d'harmonisation sont destinées à être traduites dans des dispositions internes ayant la même valeur juridique que celles qui s'appliquent dans les Etats membres à la matière qui fait l'objet des directives (principe du parallélisme des normes) et, d'autre part, que les Etats membres sont obligés de donner aux directives une exécution qui corresponde pleinement aux exigences de clarté et de certitude des situations juridiques voulues par les directives (principe de la sécurité des situations juridiques).

Pour l'avocat général Reischl, le principe du parallélisme des normes vaudrait pour l'ensemble des directives de rapprochement des législations.[441] Sans se prononcer sur la théorie du parallélisme des normes, la Cour de justice se contente de répéter les raisons qui l'avaient décidée à estimer qu'à

436 *Commission c. Belgique* , *supra* note 200.
437 Ibid.
438 Voir Green, «Directive, Equity and the Protection of Individual Rights», 9 *EL Rev.* (1984) 294 s.
439 *Commission c. Italie*, *supra* note 430.
440 *Commission c. Belgique* , *supra* note 200.
441 Conclusions de l'avocat général Reischl dans l'affaire 145/82, *supra* note 430.

elles seules des pratiques administratives ne peuvent constituer «une exécution valable de l'obligation qui incombe aux Etats ... en vertu de l'article 189 du traité».

Par la suite, dans son arrêt du 25 mai 1985,[442] la Cour de justice insistera davantage sur les conditions de l'efficacité des directives en droit interne que sur une conception formelle du parallélisme des normes. L'examen de la législation allemande laissait apparaître que, loin de reconnaître aux ressortissants communautaires le droit d'exercer la profession d'infirmier à la seule condition d'être titulaire d'un diplôme reconnu par une directive, cet exercice était subordonné à une appréciation particulière de l'équivalence des formations. Cette constatation allait à l'encontre de la thèse du gouvernement fédéral qui se réclamait d'une pratique administrative constante et de la conjonction de principes généraux des droits allemand et communautaire pour tenter de démontrer l'inutilité d'une transposition spécifique de ces directives.

La Cour ne se laissera pas convaincre, estimant que la construction exposée par le gouvernement allemand n'était «pas de nature à créer une situation suffisamment précise, claire et transparente pour permettre aux ressortissants des autres Etats membres de connaître leurs droits et de s'en prévaloir». La Cour observe encore que l'effet direct ne saurait servir aux Etats pour éluder leur obligation de transcrire en droit interne les directives dont l'objet était précisément de faciliter et de garantir l'application du traitement national. Enfin, «le renvoi à des principes de droit de caractère aussi général que ceux invoqués» ne lui paraissait pas suffire «à établir que le respect des dispositions de directives si précises et détaillées est pleinement garanti par le droit national».

L'arrêt *Commission c. RFA*[443] s'inscrit dans la ligne du principe d'équivalence plus que dans celle du principe de parallélisme des normes.

Si le principe du parallélisme des normes est regardé par la Cour de justice comme une des formes privilégiées de la traduction des directives en droit interne, c'est parce qu'elle est la mieux à même d'éliminer toute incertitude sur la situation juridique existante en raison de la substitution aux normes qui s'appliquaient jusqu'alors de nouvelles dispositions conformes à la directive. Pour autant, la Cour de justice n'exclut pas la validité d'autres procédés.

Dans un arrêt du 25 mai 1982, *Commission c. Pays-Bas*,[444] après avoir confirmé son hostilité envers «de simples pratiques administratives», la Cour

442 *Commission c. RFA*, *supra* note 429.

443 Ibid.; voir aussi, CJCE, affaires C-13/90, C-14/90, *Commission c. France*, arrêt du 4 octobre 1991, Rec., 4227 s., 4331 s.

444 CJCE, affaire 96/81, *Commission c. Pays-Bas*, arrêt du 25 mai 1982, Rec., 1791 s.

de justice exige l'adoption par les Etats membres de «mesures contraignantes».[445]

Un retour à l'arrêt du 25 mai 1985, *Commission c. RFA*[446] autorise une autre constatation. L'obligation pour les Etats de choisir des mesures «appropriées» à l'objet des directives signifie qu'ils ont à tenir compte de leur vocation à créer des droits pour les particuliers. Il leur appartient de veiller à ce que

> la situation juridique ... soit suffisamment claire et précise et que les bénéficiaires soient mis en mesure de connaître la plénitude de leurs droits et, le cas échéant, de s'en prévaloir devant les juridictions nationales.[447]

Au total, la traduction des directives en droit interne doit se réaliser dans des conditions préservant leur intégrité sous le triple rapport de leur substance, de leur autorité et de leur invocabilité. Autrement dit, l'opération ne doit entraîner aucune déperdition de la force normative des directives communautaires.

La mise en œuvre du droit communautaire par des collectivités décentralisées ou fédérées doit répondre aux mêmes impératifs. L'intérêt de l'arrêt du 25 mai 1982, *Commission c. Pays-Bas*[448] tient aussi à ce qu'il a été l'occasion de confronter pour la première fois la Cour de justice au problème de l'exécution des directives au regard des compétences de collectivités décentralisées. Le gouvernement néerlandais soutenait que la gestion de la qualité des eaux, matière d'une directive, relevait aux Pays-Bas de la compétence des autorités régionales et locales. Directement liées par les directives communautaires, ces autorités se conformaient aux prescriptions communautaires dans l'exercice de leurs attributions sous le contrôle des autorités étatiques.

L'avocat général Capotorti estimait qu'une telle situation entraînait de sérieux inconvénients pour le droit communautaire. En particulier, l'absence d'une législation étatique pouvait laisser craindre des errements des réglementations locales qui ne pourraient que difficilement être corrigés. Aussi se prononçait-il en faveur d'une limitation de l'«autonomie institutionnelle» des Etats, l'efficacité des directives nécessitant l'intervention d'une loi.

La Cour de justice se montre plus libérale, sans pourtant céder sur l'essentiel. Elle s'efforce de concilier les exigences de l'autonomie avec celles de l'autorité des directives. Aussi, selon elle,

> s'il est vrai que chaque Etat est libre de répartir comme il le juge opportun les compétences sur le plan interne et de mettre en œuvre une directive au moyen de mesures prises par les autorités régionales ou locales, cela ne saurait cependant le

445 Voir également, CJCE, affaire 291/84, *Commission c. Pays-Bas*, arrêt du 17 septembre 1987, Rec., 3483 s.
446 *Commission c. RFA*, *supra* note 429.
447 Voir aussi, CJCE, affaire 363/85, *Commission c. Italie*, arrêt du 9 avril 1987, Rec., 1733 s.
448 *Commission c. Pays-Bas*, *supra* note 444.

> dispenser de l'obligation de traduire les dispositions de la directive dans des dispositions internes ayant un caractère contraignant.

Ces principes ont été repris dans d'autres décisions. C'est ainsi qu'à propos de la structure fédérale de l'Allemagne, la Cour a jugé[449] qu'il incombe à toutes les autorités des Etats membres, qu'il s'agisse d'autorités du pouvoir central de l'Etat, d'autorités d'un Etat fédéré ou d'autres autorités territoriales, d'assurer le respect des règles du droit communautaire. On retrouve le thème de l'immédiatisation du droit communautaire. Respectueuse de l'autonomie institutionnelle des Etats membres, la Cour souligne qu'il n'appartient pas à la Commission de se prononcer sur la répartition des compétences par les règles constitutionnelles, législatives ou administratives de chaque Etat membre aux autorités centrales, régionales ou locales. Elle peut cependant vérifier si l'ensemble des mesures de surveillance et de contrôle est suffisamment efficace pour permettre une application correcte des prescriptions communautaires.

ii) La suppléance par les Etats membres des défaillances des institutions communautaires

L'article 5 CEE oblige même les Etats membres à pallier, dans certaines circonstances du moins, les défaillances des institutions de la Communauté.

Cette obligation a été systématisée sous la forme du principe de coopération. A défaut d'une réglementation communautaire ou d'une habilitation spécifique le souci d'éviter les inconvénients d'une carence de la Communauté qui peut être en particulier due au blocage du Conseil, la Cour de justice a conçu des solutions pragmatiques. Ainsi, dans son arrêt du 5 mai 1981, *Commission c. Royaume-Uni*[450] elle convient que les Etats membres sont en droit d'intervenir mais à condition d'agir

> comme gestionnaire de l'intérêt commun ... dans le cadre d'une collaboration avec la Commission dans le respect de la mission générale de surveillance que l'article 155 (du traité CEE) confie à cette institution.[451]

L'encadrement d'une telle intervention des Etats membres par le droit communautaire s'est peu à peu resserré. D'abord, la Cour de justice refuse de reconnaître l'existence d'un principe général selon lequel les Etats membres auraient l'obligation de se substituer au Conseil lorsque celui-ci s'abstient de prendre des mesures qui relèvent de sa compétence.[452] En outre, elle précise

449 CJCE, affaire C-8/88, *RFA c. Commission*, arrêt du 12 juin 1990, Rec., I-2321 s.
450 CJCE, affaire 804/79, *Commission c. Royaume-Uni*, arrêt du 5 mai 1981, Rec., 1045 s.
451 Voir aussi, CJCE, affaires jointes 47 et 48/83, *Pluimveeslachaterijen Midden-Nederland et Van Miert*, arrêt du 28 mars 1984, Rec., 1721 s.
452 CJCE, affaire C-165/88, *ORO Amsterdam Beheer BV en Concerto BV*, arrêt du 4 décembre 1989, Rec., 4093 s.

que les mesures qu'un Etat membre prend ou maintient en vue des objectifs communautaires en cas de carence du législateur communautaire ne doivent pas être considérées comme relevant de l'exercice d'une compétence propre, mais comme la mise en œuvre du devoir de coopération que leur impose, dans une situation de carence, l'article 5 CEE, en vue de la réalisation des objectifs de la réglementation communautaire. Ces mesures ne peuvent avoir qu'un caractère intérimaire et provisoire et il doit être mis fin à leur application dès que sont instituées des mesures communautaires.[453]

B. L'autorité du droit communautaire dans l'ordre interne de la Communauté

Envisagée sous cet aspect l'action menée par la Cour de justice se caractérise à la fois par le souci de reconnaître aux actes des institutions de la Communauté une autorité équivalente à celle de leurs homologues étatiques et par celui d'organiser des rapports hiérarchisés entre les diverses sources du droit communautaire.

1. La consécration de la force juridique des actes communautaires

La Cour de justice se montre préoccupée d'éviter toute remise en cause même indirecte ou subreptice de la nature d'acte unilatéral des diverses catégories de décisions que les institutions communautaires peuvent être amenées à prendre. C'est ainsi qu'elle a jugé que la portée objective d'une décision ne pouvait être affectée par une déclaration d'un Etat membre, alors même qu'elle était inscrite au procès-verbal du Conseil,[454] ou qu'un règlement ne pouvait être interprété à la lumière de négociations entre un Etat membre et une institution communautaire.[455] Evidemment, on ne saurait qualifier d'«accord international» un acte qui est caractérisé comme «décision» ou «directive» communautaire tant par son objet que par le cadre institutionnel de son adoption.[456]

La même attention est accordée à l'affirmation de la présomption de validité qui s'attache aux actes des institutions de la Communauté. De manière particulièrement significative la Cour tient à souligner que

> ... comme dans les droits nationaux des divers Etats membres, un acte administratif, même irrégulier, jouit, en droit communautaire, d'une présomption de validité,

453 CJCE, affaire C-158/89, *Weingut Dietz-Matti*, arrêt du 17 mai 1990, Rec., I-2013 s.
454 CJCE, affaire 237/84, *Commission c. Belgique*, arrêt du 15 avril 1986, Rec., 1247 s.; affaire 429/85, *Commission c. Italie*, arrêt du 23 février 1988, Rec., 843 s.
455 CJCE, affaire 278/84, *Allemagne c. Commission*, arrêt du 14 janvier 1987, Rec., 1 s.
456 CJCE, affaire 91/79, *Commission c. Italie*, arrêt du 18 mars 1980, Rec., 1099 s.

jusqu'à ce qu'il ait été annulé ou retiré régulièrement par l'institution dont il émane.[457]

Tous les sujets du droit communautaire ont l'obligation de reconnaître la pleine efficacité des actes des institutions tant que leur non-validité ou, éventuellement leur inexistence, n'a pas été établie par la Cour et d'en respecter la force obligatoire tant que la Cour n'a pas décidé de surseoir à leur exécution.[458]

2. La consécration d'une hiérarchie interne au droit communautaire

Le droit communautaire est constitué par un ensemble de normes hiérarchisées. La notion de légalité communautaire exprimée par l'article 164 du traité de la CEE incorpore ce principe dont la méconnaissance constitue une violation de la règle de droit au sens de l'article 173. Les traités constitutifs des Communautés sont placés au sommet de cette «pyramide normative». Cette prééminence vient de leur nature originaire fondant l'ordre juridique des Communautés: ils confèrent au droit dérivé sa justification, son autorité et ses limites.[459] Tout acte pris par les institutions communautaires doit trouver sa base juridique dans une disposition des traités.[460]

Garantie par de nombreuses voies de droit juridictionnelles la position suprême occupée par les dispositions des traités constitutifs explique aussi qu'elles échappent à tout contrôle contentieux devant les juridictions communautaires.[461]

La prééminence du droit communautaire primaire s'affirme à l'égard de l'ensemble du droit communautaire secondaire.

Si la primauté du droit originaire sur le droit secondaire est incontestable, la hiérarchie qui s'établit entre les normes du droit dérivé est moins évidente et plus complexe. A cet égard, les traités ne fournissent que fort peu d'indications. C'est donc essentiellement de la jurisprudence que résulte leur hiérarchisation.

La hiérarchie des actes institutionnels n'est pas de nature organique mais fonctionnelle. Selon la Cour de justice, il n'existe aucun rapport hiérarchique

457 CJCE, affaire 15/85, *Conzorzio Cooperative d'Abruzzo c. Commission*, arrêt du 27 février 1987, Rec., 1005 s.; affaire 63/87, *Commission c. Grèce*, arrêt du 7 juin 1988, Rec., 2875 s.

458 CJCE, affaires jointes 46/87 et 227/88, *Hoechst c. Commission*, arrêt du 21 septembre 1989, Rec., 2859 s. Sur l'inexistence, voir *Conzorzio Cooperative d'Abruzzo*, *supra* note 457.

459 Voir à propos des règlements, CJCE, affaire 92/63, *Nonnenmacher*, arrêt du 9 juin 1964, Rec., 557 s.; affaire 24/75, *Petroni*, arrêt du 21 octobre 1975, Rec., 1149 s.

460 Wachsmann, «Le contentieux de la base juridique dans la jurisprudence de la Cour», 1 *Europe* (1993) 1 s.

461 A propos de l'irrecevabilité d'un recours en indemnité pour un prétendu préjudice causé par un traité d'adhésion, CJCE, affaire 169/73, *Compagnie continentale c. Conseil*, arrêt du 4 février 1975, Rec., 117 s.

entre les actes du Conseil et ceux de la Commission dès lors que chacune de ces institutions exerce une compétence autonome.[462] En revanche, il existe une hiérarchie entre deux actes dont l'un est pris pour assurer l'exécution de l'autre. Appliqué aux règlements ce principe correspond à la distinction des règlements qui trouvent directement leur base dans le traité lui-même et ceux destinés à assurer leur exécution.[463] Il vaut même lorsque les mesures d'exécution ont pour auteur l'institution qui a adopté la mesure de base.[464]

II. L'extension du domaine de l'ordre juridique communautaire

Les compétences de la Communauté ont toujours été un sujet essentiel des préoccupations de la Cour de justice. Cet intérêt tient en premier lieu au fait que l'existence de compétences propres à la Communauté constitue l'un des fondements de l'autonomie de l'ordre juridique communautaire.[465] L'absence dans les traités instituant les Communautés de dispositions réglant de manière générale la répartition des compétences entre celle-ci et les Etats qui en font partie explique l'importance du contentieux relatif, directement ou indirectement, à ces questions. La nature évolutive des traités et des Communautés contribue également à conférer à la détermination de l'existence d'une compétence communautaire, de sa nature et de sa portée une importance toujours renouvelée.[466]

Si, les compétences internationales des Communautés ont suscité un nombre important de décisions de la Cour de justice statuant dans le cadre de ses attributions contentieuses et consultatives, sa jurisprudence est également riche d'arrêts portant sur les compétences internes des Communautés.

Deux lignes de force se dégagent des arrêts et des avis de la Cour de justice: une tendance évidente à élargir les compétences des Communautés, d'une part; une volonté non moins certaine de protéger ces compétences contre des empiétements étatiques, d'autre part.

462 CJCE, affaire 130/78, *Salumificio di Cornuda, supra* note 225.
463 *Scheer*, *supra* note 398; affaire 25/70, *Köster* , arrêt du 17 décembre 1970, Rec., 1161 s.
464 CJCE, affaire 38/70, *Deutsche Tradax,* arrêt du 10 mars 1971, Rec., 145 s.; affaire 81/72, *Commission c. Conseil*, arrêt du 5 juin 1973, Rec., 575 s.; affaires jointes C-143/88 et C-92/89, *Zuckerfabrik Süderdithmarschen, supra* note 283, Rec. I-534 s.
465 *Van Gend en Loos*, *supra* note 1.
466 Voir Constantinesco, *supra* note 140. K. Lenaerts, *supra* note 204.

A. L'élargissement des compétences communautaires

L'élargissement des compétences des Communautés n'a été possible qu'en recourant à une interprétation constructive des traités communautaires.[467] Il n'est probablement pas utile de revenir sur la question des procédés interprétatifs. Ceux-ci concourent à justifier soit un dépassement des dispositions des traités en l'absence d'une attribution exprès de compétences, soit une extension de la portée des dispositions explicites existantes. Le justement célèbre arrêt *AETR* illustre parfaitement la démarche de la Cour de justice lorsqu'elle déclare

> qu'en l'absence de dispositions spécifiques du traité (CEE) relatives à la négociation et à la conclusion d'accords internationaux dans le domaine des transports ... il convient de se référer au système général du droit communautaire relatif aux rapports avec les Etats tiers.

Ce sont les résultats de la jurisprudence de la Cour de justice qui doivent être analysés.[468]

Pas plus qu'ils ne contiennent de clauses générales d'attribution de compétences, les traités instituant les Communautés ne livrent spontanément un principe directeur qui gouvernerait de manière générale la solution de ce problème. Seules les dispositions matérielles des traités peuvent révéler l'attribution d'une compétence aux Communautés. Comme le souligne le professeur Tizzano

> ... si l'on s'en tient aux textes, la reconstitution des compétences matérielles de la CEE doit être opérée sur la base de chacune des différentes règles du traité, en déterminant non seulement les matières qui en font l'objet, mais nécessairement aussi la nature et la portée des pouvoirs qui sont, dans chaque cas attribuées à la Communauté dans ces matières.[469]

467 Il existe sur les méthodes d'interprétation des traités et du droit communautaire une littérature considérable. Force est de se borner à quelques indications bibliographiques. Voir Bleckman, «Teleologie und dynamische Auslegung des Europäischen Gemeinschaftsrecht», *Europarecht* (1981) 101 s.; Hamson, «Méthodes d'interprétation. Appréciation critique des résultats, dans Rapports de la rencontre judiciaire et académique des 27 et 28 septembre 1978», Luxembourg, Office des publications officielles des Communautés européennes (1976) II, I.; Mertens de Wilmars, «Réflexions sur les méthodes d'interprétation de la Cour de justice des Communautés européennes», *CDE* (1986) 5 s. P. Pescatore, «Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice», dans *Miscellanea Ganshof van der Meersch* (1972-II) 325 s.; D. Simon, *supra* note 19.

468 CJCE, affaire 22/70, *Commission c. Conseil des Communautés européennes*, arrêt du 31 mars 1971, Rec., 263 s.

469 Tizzano, «Les compétences de la Communauté», in *Trente ans de droit communautaire. Commission des Communautés européennes. Perspectives européennes* (1981) 45 s.

L'attribution de compétences aux Communautés procède donc d'une casuistique qui «ne pouvait conduire qu'à une compétence communautaire à caractère discontinu».[470]

Ce constat doit être corrigé. Les compétences des Communautés se sont progressivement ordonnées dans un système que la Cour de justice a su organiser à partir des finalités assignées à l'action communautaire. Pour avoir été particulièrement sensible dans le cas des compétences internationales de la CEE cette systématisation a également marqué ses compétences internes. Les traités ont, d'ailleurs, eux-mêmes entrepris de remédier au risque d'une excessive fragmentation des compétences communautaires inhérent au procédé d'attribution qu'ils mettent en œuvre. L'article 235 CEE concrétise cette préoccupation.

1. La consécration des pouvoirs implicites

Le principe d'attribution qui régit les compétences des Communautés a pu conduire, initialement au moins, une partie appréciable de la doctrine à estimer qu'elles ne pouvaient disposer que de compétences «explicites». Cette thèse a été défendue spécialement dans le domaine des compétences internationales des Communautés, ce qui ne veut pas dire qu'elle n'ait pas prétendu s'appliquer à ses compétences internes.

(a) La consécration des compétences externes implicites

Selon plusieurs auteurs, l'article 228 du traité CEE en précisant les règles de procédure applicables «dans les cas où les dispositions du ... traité prévoient la conclusion d'accords entre la Communauté et un ou plusieurs Etats ou une organisation internationale» excluait toute attribution de compétences implicites.[471] La version allemande du traité de la CEE pouvait sembler encourager cette lecture, de même que celle de la disposition apparemment parallèle du traité CEEA. Les auteurs qui ne s'étaient pas laissés arrêter par ces objections étaient nettement minoritaires.[472]

470 G. Isaac, *supra* note 155, 35.

471 Voir en ce sens, P. Pescatore, «Les relations extérieures des Communautés européennes», Académie de droit international, *RdC* (1961) 97 s.; M. Catalano, *Manuel de droit des Communautés européennes* (1968) 13 s.; F. Wohlfart, *Fondement juridique des relations extérieures entre les Communautés européennes et les Etats tiers* (1964); J. Mégret, «Le pouvoir de la Communauté européenne de conclure des accords internationaux», *RMC* (1964) 527 s., spécialement 805; R.J. Dupuy, «Du caractère unitaire de la CEE dans ses relations extérieures», *AFDI* (1963) 779 s., spécialement 805.

472 J. Raux, *Les relations extérieures de la Communauté économique européenne* (1961) 55; G. Lorcher, *Die Abschlüsse völkerrechtlicher Verträge nach dem Recht der drei europäischen Gemeinschaften* (1965) 120-121.

A l'occasion de l'affaire *AETR*[473] le Conseil a exposé les arguments allant dans le sens de la thèse limitant les compétences internationales de la CEE à celles qui lui sont expressément attribuées. L'avocat général Dutheillet de Lamothe partageait cette façon de voir puisqu'il déclarait qu'il semblait «résulter de toute l'économie du traité de Rome que les auteurs du traité ont voulu strictement limiter la compétence externe de la Communauté aux cas qu'ils ont expressément prévus».[474] Selon lui, seul le recours à l'article 235 CEE pouvait justifier une extension des compétences communautaires.

Ces raisons ne paraîtront pas suffisantes à la Cour de justice pour s'en tenir à la thèse des compétences d'attribution explicites. Les compétences de la CEE en matière de relations internationales peuvent aussi être implicites. En effet,

> en vue de fixer, dans un cas déterminé, la compétence pour la Communauté de conclure des accords internationaux, il convient de prendre en considération le système du traité, autant que ses dispositions matérielles;
> ... une telle compétence résulte non seulement d'une attribution explicite par le traité – comme c'est le cas des articles 113 et 114 pour les accords tarifaires et commerciaux et de l'article 228 pour les accords d'association mais peut découler également d'autres dispositions du traité et d'actes pris, dans le cadre de ses dispositions, par les institutions de la Communauté.

On ne peut douter de la récusation de la thèse restrictive réduisant la compétence internationale de la CEE aux seules compétences qui lui sont expressément attribuées par le traité de Rome. La Cour précise ensuite l'une des circonstances qui autorise où la Communauté peut se voir reconnaître des compétences externes là où le traité ne les a pourtant pas prévues. La Communauté est investie d'une compétence internationale «en particulier, chaque fois que, pour la mise en œuvre d'une politique commune prévue par le traité, la Communauté a pris des dispositions instaurant sous quelque forme que ce soit des règles communes». L'exercice par la Communauté d'une compétence relative à une politique commune entraîne la reconnaissance d'une compétence externe correspondante.

Une première extension de cette solution sera réalisée par l'arrêt *Kramer*.[475] Après avoir commencé par reproduire les termes de son arrêt *AETR*,[476] la Cour de justice ajoute que la compétence de la Communauté pour souscrire des engagements internationaux

> résulte non seulement d'une attribution explicite par le traité, mais peut également découler de manière implicite d'autres dispositions du traité, de l'acte d'adhésion et d'actes pris, dans le cadre de ses dispositions par les institutions de la Communauté.

473 *Commission c. Conseil, supra* note 468.
474 Conclusions de l'avocat général Dutheillet de Lamothe dans l'affaire *AETR*, *supra* note 468, spécialement 294.
475 *Kramer, supra* note 145, 1308 s.
476 *Commission c. Conseil, supra* note 468.

Les compétences implicites de la CEE ne sont pas liées aux seules politiques communes, elles peuvent procéder d'autres dispositions du traité. Il s'agit d'une confirmation d'une proposition qui se trouvait déjà dans l'arrêt *AETR*. L'innovation est que dans l'arrêt *Kramer*[477] la Cour constate l'existence d'une compétence internationale de la Communauté en l'absence de règles communes internes. L'exercice d'une compétence interne n'est donc pas la condition sine qua non de l'attribution d'une compétence externe par voie d'implicitation.

Le principe de l'attribution à la Communauté de compétences implicites sera réitéré dans l'avis 1/76 du 26 avril 1977 relatif au projet d'accord sur l'institution d'un fonds d'immobilisation de la navigation intérieure.[478] Simultanément, cet avis est l'occasion pour la Cour de justice d'amorcer une étape supplémentaire de l'élargissement de la CEE. Dans l'avis[479] du 24 avril 1977 la Cour constate que «la compétence de la Communauté pour conclure un tel accord n'est pas expressément prévue par le traité», mais cela ne l'empêche pas de poursuivre en déclarant qu'elle a déjà eu l'occasion d'affirmer que la compétence pour prendre des engagements internationaux peut non seulement résulter d'une attribution explicite par le traité, mais également découler de manière implicite de ses dispositions. Exploitant plus largement encore le principe de l'attribution implicite de compétences, la Cour de justice rappelle encore qu'elle «a conclu, notamment, que chaque fois que le droit communautaire a établi dans le chef des institutions de la Communauté des compétences sur le plan interne en vue de réaliser un objectif déterminé, la Communauté est investie de la compétence pour prendre les engagements internationaux nécessaires à la réalisation de cet objectif, même en l'absence d'une disposition expresse à cet égard». Pour la Cour

> cette conclusion s'impose notamment dans tous les cas où la compétence interne a déjà été utilisée en vue d'adopter des mesures s'inscrivant dans la réalisation des politiques communes. Elle n'est cependant pas limitée à cette éventualité. Si des mesures communautaires internes ne sont adoptées qu'à l'occasion de la conclusion et de la mise en vigueur de l'accord international ... la compétence de la Communauté pour engager la Communauté vis-à-vis des Etats tiers découle néanmoins de manière implicite des dispositions du traité établissant la compétence interne, pour autant que la participation de la Communauté à l'accord international ... est nécessaire à la réalisation d'un des objectifs de la Communauté.

Confirmant la solution de l'arrêt *Kramer*[480] la Cour ne subordonne pas la compétence externe de la Communauté à l'exercice préalable d'une compétence interne.

477 *Kramer*, *supra* note 145.
478 CJCE, avis du 26 avril 1977 relatif à l'institution d'un Fonds d'immobilisation de la navigation intérieure, Rec., 741 s.
479 Ibid.
480 *Kramer*, *supra* note 145.

Usant d'une interprétation fortement téléologique, la Cour de justice aboutit à consacrer le principe du parallélisme entre le for interne et le for externe de la Communauté.

L'avis 1/76 subordonne la reconnaissance d'une compétence externe implicite à la Communauté à la rencontre de deux conditions:

- l'existence d'une compétence interne destinée à permettre la réalisation d'un objectif déterminé,
- la nécessité d'une action internationale de la Communauté pour l'accomplissement de cette fin.

C'est ainsi que la Cour de justice constate dans son avis 1/76, comme d'ailleurs précédemment dans l'arrêt *AETR*,[481] que les finalités de la politique commune des transports n'auraient pu être utilement atteintes en se limitant à la prise de mesures internes à la Communauté. De même, dans l'arrêt *Kramer*,[482] la protection des ressources marines en haute mer explique la nécessité de conférer à la Communauté le droit de négocier et de conclure des arrangements internationaux.

Sous la réserve de cette condition tenant à la nécessité d'une action externe de la Communauté, au terme d'une évolution dont l'origine se trouve dans l'arrêt *AETR*, la Cour de justice parvient à élargir les compétences internationales de la CEE à la dimension de sa compétence interne réalisant ainsi le principe du parallélisme de ses compétences internes et externes.[483]

(b) La consécration de compétences internes implicites

Le recours aux compétences implicites n'est pas cantonné à la matière des compétences internationales de la Communauté. Il vaut également pour l'attribution de compétences internes. Déjà, bien qu'avec une certaine prudence, la Cour de justice avait utilisé la méthode de l'implicitation. Ainsi, dans l'arrêt du 29 novembre 1956, *Fédération charbonnière de Belgique*[484] on peut lire que

> de l'avis de la Cour, il est permis sans se livrer à une interprétation extensive, d'appliquer une règle d'interprétation généralement admise tant en droit international qu'en droit national et selon laquelle les normes établies par un traité inter-

481 *Commission c. Conseil*, *supra* note 468.

482 *Kramer*, *supra* note 145.

483 Sur cette question, voir notamment, Groux, «Le parallélisme des compétences internes et externes de la Communauté économique européenne. A propos de l'avis 1 /76 de la Cour de justice du 26 avril 1976», *CDE* (1978) 3 s.; Kovar, «Contribution de la Cour de justice au développement de la personnalité internationale de la Communauté», *CDE* (1976) 527 s.; Kovar, «Les compétences implicites: jurisprudence de la Cour et pratique communautaire», in P. Demaret (éd.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (1986) 15 s. Pour une application récente, voir CJCE, avis du 19 mars 1993, 2/91, avis relatif aux conventions OIT, non encore publié au *Recueil*.

484 *Fédéchar*, *supra* note 42.

national ou par une loi impliquent les normes sans lesquelles les premières n'auraient pas de sens ou ne permettraient pas une application raisonnable et utile.

A la vérité, cet arrêt a suscité des lectures différentes: pour les uns il est une illustration de la méthode dite de l'«effet utile»,[485] pour les autres il consacre bien la doctrine des pouvoirs implicites.[486]

Si dans l'arrêt du 29 novembre 1956 la référence à la théorie des pouvoirs implicites peut sembler discrète, d'autres arrêts sont plus nets.[487] Ainsi, dans l'affaire 20/59 après avoir constaté que dans le domaine des transports, le texte du traité refuse à la Haute Autorité tout pouvoir de prendre des mesures d'exécution, la Cour de justice a estimé qu'il convenait de rechercher «si une compétence normative de la Haute Autorité ne dérive pas implicitement d'autres textes du traité ou de son économie générale», parce que la doctrine et la jurisprudence sont d'accord pour admettre que les règles établies par un traité impliquent les normes sans lesquelles ces règles ne peuvent être appliquées utilement ou raisonnablement». Néanmoins, la Cour estime devoir souligner que la compétence réglementaire de la Haute Autorité était de nature «exceptionnelle et subordonnée à une renonciation des Etats membres qu'en l'espèce le traité ne consacre ni expressément ni implicitement».

La jurisprudence relative à la CEE contient aussi certains exemples d'application du principe des compétences implicites. Dans l'arrêt du 9 juillet 1987 qui a trait à la compétence de la Communauté pour instaurer une procédure de communication préalable et de concertation sur les politiques migratoires vis-à-vis des Etats tiers, la Cour de justice s'est directement référée au concept de «pouvoirs implicites», en considérant «que, lorsqu'un article du traité CEE, en l'occurrence l'article 118, charge la Commission d'une mission précise, il faut admettre, sous peine d'enlever tout effet utile à cette disposition qu'il lui confère, par là même, nécessairement les pouvoirs indispensables pour s'acquitter de cette mission».[488]

L'extension des compétences de la Communauté à l'éducation et à la formation procède d'une démarche similaire.[489]

485 Voir R. Ormond, *L'interprétation des traités européens selon leur «effet utile»*, thèse, Paris I, 1975.

486 R. Kovar, *Le pouvoir réglementaire de la CECA* (1964) 139.; K. Lenaerts, *supra* note 204, spécialement 471, note 398.

487 CJCE, affaire 20/59, *République italienne c. Haute Autorité*, arrêt du 15 juillet 1960, Rec., 663 s.; affaire 25/59, *Pays-Bas c. Haute Autorité*, *supra* note 302.

488 CJCE, affaires jointes 281, 283, 284, 285 et 287/85, *République fédérale d'Allemagne, République française, Royaume des Pays-Bas, Royaume de Danemark et Royaume-Uni c. Commission*, arrêt du 9 juillet 1987, Rec., 8345 s.

489 CJCE, affaire 293/83, *Gravier*, arrêt du 13 février 1985, Rec., 593 s.

2. L'interprétation de l'article 235 CEE

Les inconvénients du système d'attribution de compétences organisé par les traités communautaires n'avaient pas échappé à leurs auteurs. Ces compétences pouvaient ne pas suffire pour réaliser les objectifs assignés aux Communautés. Les articles 235 du traité CEE, et 203 du traité CEEA sont précisément destinés à faire face à une telle situation. Dans une moindre mesure c'est aussi la fonction de l'article 95, alinéa 1 du traité CECA.

Selon l'article 235 CEE: «Si une action de la Communauté apparaît nécessaire pour réaliser, dans le fonctionnement du Marché commun, l'un des objets de la Communauté, sans que le présent traité ait prévu les pouvoirs d'action requis à cet effet, le Conseil, statuant à l'unanimité sur proposition de la Commission, et après consultation du Parlement européen, prend les dispositions appropriées».[490]

On a pu voir dans l'article 235 CEE «la matérialisation de la théorie des compétences implicites».[491] Pour autant, la Cour de justice ne s'est pas estimée empêchée de recourir à la théorie des compétences implicites.[492]

Alors même que les conditions exigées pour la mise en œuvre de l'article 235 CEE sont réunies, le Conseil n'est pas tenu d'en user. Ce n'est pour lui qu'une faculté.[493]

L'article 235 CEE doit être utilisé pour la réalisation de l'un des objets de la Communauté dans le fonctionnement du marché commun. Cette exigence a été interprétée de manière extensive par la pratique communautaire puisque les objectifs généraux définis aux articles liminaires du traité ont été pris en considération comme les objectifs sectoriels.[494] A s'en tenir aux termes de l'article 235, cette disposition instituerait une procédure destinée à pallier l'absence des pouvoirs d'action nécessaires à la réalisation d'un des objets de la Communauté. La possibilité d'user de l'article 235 a semblé plus incertaine lorsque le traité a conféré à la Communauté des pouvoirs d'action qui s'avèrent inappropriés ou insuffisants. La pratique s'est prononcée en faveur de la mise en œuvre de l'article 235 dans des hypothèses où, sans que la Communauté soit dépourvue de tout pouvoir, ceux dont elle était investie ne

490 Pour un commentaire de l'article 235 CEE, voir notamment Lesguillons, «L'extension des compétences de la CEE par l'article 325 CEE», *AFDI* (1974) 886 s.; G. Olmi, *La place de l'article 235 dans le système des attributions de compétences à la Communauté, Mélanges en l'honneur de Fernand Dehousse* (1979) 279 s.; Schwartz, «Le pouvoir normatif de la Communauté, notamment en vertu de l'article 235, une compétence exclusive ou parallèle», *RMC* (1976) 280 s; Tizzano, «L'article 235 et le développement des compétences communautaires», in *Gedächnisschrift für L.-J. Constantinesco* (1983) 371 s.

491 Flaesch Mougin, «Commentaire de l'article 235 CEE», in Jacqué, Kovar, Simon, *supra* note 47, 1509 s.

492 Voir conclusions de l'avocat général Trabucchi, CJCE, affaire 8/73, *Massey Ferguson*, arrêt du 12 juillet 1973, Rec., 897 s.

493 *AETR*, *supra* note 468.

494 Sur ce point voir C. Flaesch Mougin, *supra* note 491.

lui permettaient pas d'agir efficacement.[495] En l'espèce, la Cour de justice a confirmé la validité d'un règlement adopté par le Conseil sur la base de l'article 235 alors que le traité lui reconnaissait le pouvoir d'arrêter des directives dans le domaine considéré mais que celles-ci s'avéraient insuffisantes pour garantir une application uniforme de la réglementation communautaire. L'article 128 CEE ayant été jugé insuffisant pour fonder le programme Erasmus, la Cour a estimé que le Conseil avait à bon droit fait usage de l'article 235 conjointement avec la première de ces dispositions.[496] Une telle combinaison s'observe aussi réalisée à propos des articles 113 et 235 du traité CEE. Toutefois, soucieuse du respect de l'équilibre institutionnel, la Cour de justice procéda à l'annulation des actes adoptés par le Conseil au motif que l'article 113 CEE constituait une base juridique suffisante.[497] L'importance de l'aspect constitutionnel de contentieux tient à ce que l'article 235 CEE à la différence d'autres dispositions du traité prévoit que le Conseil décide à l'unanimité.[498]

Anne Wachsmann[499] a constaté un «déclin» de l'article 235. Ce déclin doit être entendu dans le sens où la Cour de justice n'a pas voulu suivre le Conseil dans sa tendance à vouloir justifier trop fréquemment l'utilisation de l'article 235 au détriment d'autres dispositions du traité CEE par une interprétation restrictive de celles-ci, on ne saurait prétendre en conclure que la Cour reviendrait sur les acquis de sa jurisprudence permettant d'user de l'article 235 chaque fois que véritablement le traité aurait omis de prévoir les moyens nécessaires à la Communauté pour atteindre ses objectifs.

B. La protection des compétences communautaires

Il serait illusoire de croire que les compétences reconnues à la Communauté ne suscitent pas chez les Etats membres des appétits qui s'expriment de manière plus ou moins explicite. A plusieurs reprises La Cour de justice s'est trouvée confrontée à des prétentions étatiques tendant à remettre en cause telle ou telle compétence communautaire. Deux principes permettront de garantir une protection efficace aux attributions de la Communauté: le principe de l'irréversibilité des transferts de compétences ou, dans une formulation plus compréhensive, l'intangibilité des compétences communautaires et le principe de «préemption» des compétences des Etats membres par l'exercice de la compétence de la Communauté.

495 *Massey Ferguson*, *supra* note 492.
496 CJCE, affaire 242/87, *Commission c. Conseil*, arrêt du 30 mai 1989, Rec., 1149 s.
497 CJCE, affaire 54/86, *Commission c. Conseil, «SPG»*, arrêt du 26 mars 1987, Rec., 1517 s.
498 Voir Milas, «La concurrence entre les bases légales des actes communautaires», *RMC* (1985) 445 s.; Bradley, «The European Court and the Legal Basis of Community Legislation», *CML Rev.* (1988) 379 s.; Wachsmann, *supra* note 460.
499 Wachsmann, *supra* note 460, 2.

1. L'intangibilité des compétences communautaires

L'intangibilité des compétences de la Communauté est une exigence essentielle soulignée avec une force particulière par la Cour de justice dans son arrêt du 15 juillet 1964, *Costa*:[500]

> le transfert opéré par les Etats, de leur ordre juridique interne au profit de l'ordre juridique communautaire des droits et obligations correspondant aux dispositions du traité, entraîne une limitation définitive de leurs droits souverains.

L'intangibilité des compétences attribuées à la Communauté recouvre deux principes distincts mais aussi complémentaires.

Le premier de ces principes a permis à la Cour de justice de s'opposer à toute prétention des Etats membres de remettre en cause l'attribution de compétences à la Communauté. La volonté de faire pièce à toute tentative de revenir sur une compétence communautaire, c'est-à-dire par un biais ou un autre de réaliser subrepticement une sorte de «décommunautarisation» ou, en d'autres termes, une «renationalisation» même partielle d'une compétence appartenant à la Communauté est une des lignes directrices de la jurisprudence de la Cour de justice.

Toute tentative qui, sous le couvert d'une compétence partagée, dissimulerait un empiétement des Etats sur la compétence de la Communauté. Déjà dans son avis du 11 novembre 1975,[501] la Cour se prononçant sur les rapports entre les articles 113, 114 CEE, d'une part, et l'article 71 CECA, d'autre part aux termes duquel «la compétence des gouvernements des Etats membres [...] n'est pas affectée par l'application du présent traité», estimait qu'il est

> ... exclu que cette disposition puisse rendre inopérants les articles 113 et 114 du traité CEE et affecter les attributions de compétence à la Communauté pour la négociation et la conclusion d'accords internationaux relevant du domaine de la politique commerciale commune.

Pour la Cour de justice la politique commerciale commune poursuivie par l'article 113 CEE est destinée à assurer «la défense de l'intérêt global de la Communauté, à l'intérieur duquel les intérêts particuliers des Etats membres doivent trouver à s'ajuster mutuellement», aussi la compétence de la Communauté doit nécessairement être exclusive, interdisant toute «compétence parallèle des Etats membres et de la Communauté».

De même, dans l'avis 1/76 du 24 avril 1977,[502] la Cour de justice avait à examiner la compatibilité avec le traité CEE de l'intervention des Etats membres dans la conclusion d'une convention internationale relative à l'institution d'un Fond européen d'immobilisation de la navigation intérieure

500 *Costa* c. *ENEL*, *supra* note 1.
501 CJCE, avis du 11 novembre 1975, Rec., 1359 s.
502 CJCE, avis du 24 avril 1977, 1/76, *Fond d'immobilisation de la navigation intérieure*, Rec., 741 s.

sous la forme d'un «accord mixte». Certes, la Cour reconnaîtra, dans l'espèce, la validité de cette formule, mais sa conviction est fondée sur une considération particulière puisque l'accord en cause nécessitait une modification des Conventions de Mannheim, relative à la navigation sur le Rhin et celle de Luxembourg concernant la Moselle conclues entre six des Etats appartenant à la Communauté. Cette justification délimite la portée de l'intervention des Etats dans la conclusion de la Convention consacrée à l'institution du Fond d'immobilisation de la navigation intérieure. C'est cet engagement particulier, pris au regard de l'article 234, alinéa 2, du traité, qui explique et justifie la participation des six Etats indiqués à l'accord, aux côtés de la Communauté. La Cour peut conclure que

> dans ces circonstances, la participation des six Etats membres comme parties contractantes à l'accord n'est pas de nature à empiéter sur la compétence externe de la Communauté.[503]

L'intangibilité des compétences de la Communauté signifie aussi que les défaillances des institutions communautaires dans l'exercice des compétences qu'elles tirent des traités ne sauraient autoriser les Etats membres à se considérer déliés de leurs obligations et ne pourraient en aucun cas «dénouer les liens que les Etats membres ont convenu d'établir entre eux et anéantir les obligations qui en découlent pour chacun d'eux».[504] La Cour a jugé que la caducité des dispositions du traité CEE ne se présume pas et qu'

> un dessaisissement des attributions ... conférées et le retour des objets qu'elles concernent dans le domaine de compétence des seuls Etats, ne pourraient intervenir qu'en vertu d'une disposition expresse du traité.[505]

Comme dans l'arrêt *Costa*[506] la solution consacrée par la Cour de justice prend appui sur la nature de l'ordre juridique communautaire.

Dans une autre série d'arrêts relatifs à la protection des ressources biologiques de la mer, la Cour ajoute que la carence du Conseil qui n'était pas parvenu à prendre des mesures temporaires n'avait pas eu pour effet «de priver la Communauté de sa compétence en la matière et de restituer ainsi aux Etats membres une latitude discrétionnaire dans le domaine considéré»,[507] précisant ensuite que

> le transfert de la compétence en la matière, étant total et définitif au profit de la Communauté, une telle carence n'a pu en aucun cas, restituer aux Etats membres la compétence et la liberté d'agir unilatéralement en ce domaine.[508]

503 Sur la pratique des accords mixtes voir aussi, CJCE, avis 1/78 du 4 octobre 1979, *Accord international sur le caoutchouc naturel*, Rec., 2871 s.
504 CJCE, affaire 7/71, *Commission c. France*, *supra* note 143.
505 Ibid.
506 *Supra* note 2.
507 CJCE, affaire 32/79, *Commission c. Royaume-Uni*, *supra* note 310, Rec., 2923 s.
508 CJCE, affaire 804/79, *Commission c. Royaume-Uni*, *supra* note 450.

2. La «préemption» des compétences étatiques

Dans le système communautaire «la concurrence est de règle, sauf si des indications textuelles ou contextuelles permettent de reconnaître l'exclusivité (des) compétences» de la Communauté.[509]

La notion de compétence concurrente doit être définie avec d'autant plus de soin qu'elle a suscité des interprétations ambiguës. Au sens exact du terme, elle désigne le cas où pour une seule et même matière la Communauté et les Etats membres sont compétents. Ce cas doit être distingué de celui où les compétences étatiques et communautaires sont dans une relation de collaboration, la Communauté déterminant les objectifs et les principes tout en laissant aux Etats le soin de les concrétiser dans leur réglementation propre. Les directives expriment cette modalité d'agencement des compétences.

Les conditions des compétences concurrentes sont réglées par le principe dit de la «préemption» selon lequel les Etats membres ne sont habilités à exercer leurs compétences qu'autant et dans la mesure où la Communauté n'a pas exercé les siennes.

Le régime des compétences concurrentes a été précisé progressivement par la Cour de justice dans l'affaire *Kramer*.[510] La Cour commence par reconnaître la compétence de la Communauté «pour prendre des engagements internationaux tendant à la conservation des ressources de la mer». Cette compétence étant établie, elle en vient à examiner si les institutions de la Communauté ont effectivement usé de leur compétence. Constatant que ce n'était pas le cas, la Cour de justice conclut que

> la Communauté n'ayant pas encore exercé pleinement ses fonctions en la matière ... les Etats membres avaient le pouvoir d'assumer, dans le cadre de la convention sur les pêcheries de l'Atlantique du Nord-Est, des engagements relatifs à la conservation des ressources biologiques de la mer et qu'ils avaient le droit d'en assumer l'application dans le domaine de leur juridiction.

Enfin, la Cour souligne les limites de la compétence des Etats qui ne subsiste que pour autant que la Communauté n'a pas mis en œuvre la sienne:

> ... il y a lieu de préciser ... que cette compétence des Etats membres n'a qu'un caractère transitoire.

Ce schéma est également suivi par la Cour de justice dans le domaine des compétences internes (*Amsterdam Bulb BV*).[511] Alors que les institutions

509 K. Lenaerts, *supra* note 38, 42. Les compétences de la CEE ne sont exclusives que dans les cas où l'unité de la Communauté s'impose d'une manière particulièrement forte, voir par exemple la politique commerciale commune ou la protection des ressources de la mer. En ce sens, voir notamment CJCE avis 1/75 du 11 novembre 1975, *supra* note 501, du moins à l'expiration d'une période transitoire.

510 *Kramer*, *supra* note 145.

511 *Amsterdam Bulb*, *supra* note 190.

communautaires étaient intervenues pour fixer par des règlements des normes de qualité pour divers produits horticoles, les autorités néerlandaises avaient, de leur propre chef, arrêté une réglementation analogue pour certains produits qui, tout en entrant dans les prévisions du règlement de base du Conseil, n'avaient pas fait l'objet de mesures d'exécution de la part de la Commission. La Cour de justice a donc eu à se prononcer sur la portée de la compétence concurrente des Pays-Bas, compte tenu de l'abstention de la Commission qui n'avait usé que partiellement de l'habilitation qui lui avait été concédée par le Conseil pour adopter des mesures d'application s'étendant à l'ensemble des produits visés par le règlement de base. La Cour a relevé que l'abstention de la Commission ne pouvait être comprise comme exprimant son intention d'interdire aux Etats membres d'intervenir dans le champ laissé libre par la réglementation communautaire.[512]

La protection des compétences communautaires doit être assurée avant même que la «préemption» ne se soit produite. Dans l'exercice de leurs compétences les Etats membres dans un esprit de loyauté communautaire ne doivent rien entreprendre qui puisse gêner l'exercice de leurs compétences par les institutions communautaires. Cette exigence trouve à s'exprimer dans plusieurs arrêts de la Cour de justice. C'est ainsi que dans l'affaire *Commission c. Irlande*[513] la Cour a jugé que si les Etats demeurent compétents tant que la Communauté n'a pas exercé pleinement sa compétence, il doivent tenir compte «des obligations de coopération résultant pour eux du traité et notamment de son article 5». Les Etats sont, en tout état de cause, tenus au respect de l'ensemble des règles du droit communautaire.[514] Il incombe aux autorités étatiques qui agissent «dans une situation caractérisée par la carence des institutions communautaires» de tenir compte en élaborant leur réglementation des objectifs des traités et des règles posées par les institutions de la Communauté.[515] Ainsi, les compétences concurrentes des Etats se caractérisent, en premier lieu, par leur précarité puisque leur existence comme leur extension est liée au non-exercice par la Communauté de ses compétences, et, ensuite par leur subordination aux règles et aux finalités du droit communautaire. K. Lenaerts[516] observe qu'en l'absence de préemption la compétence étatique n'en est pas moins affectée par la primauté des règles communautaires. Il ne s'agit certainement pas d'une compétence discrétionnaire.

512 Sur la «préemption» voir M. Waelbroeck, «Scope of Community Pre-emption of Matters Covered by a Common Organization of the Markets», *CML Rev.* (1977) 94 s.

513 CJCE, affaire 61/77, *Commission c. Irlande*, arrêt du 16 février 1978, Rec., 417 s.

514 CJCE, affaire 154/77, *Dechmann*, arrêt du 29 juillet 1978, Rec., 1573 s.

515 *Dietz-Matti*, *supra* note 453; dans l'arrêt du 16 février 1978, affaire 61/77, *Commission c. Irlande*, *supra* note 513, la Cour précise que les mesures prises par les Etats membres doivent être «conformes aux exigences du droit communautaire».

516 K. Lenaerts, *supra* note 38, 540-141.

Conclusion

Comment ne pas conclure en constatant l'originalité et l'importance de l'œuvre de la Cour de justice. C'est elle qui a su donner vie à l'ordre juridique communautaire, favoriser son développement et, lorsque le besoin s'en faisait sentir protéger son intégrité.

Cette œuvre s'organise sur la base de principes que la Cour de justice a posés dès ses premières décisions: l'effet direct et la primauté du droit communautaire. Progressivement d'autres exigences existentielles de l'ordre juridique de la Communauté ont émergé de la jurisprudence, essentiellement celles de la priorité de l'intérêt commun sur les intérêts nationaux, du devoir de solidarité, de l'obligation de coopération mutuelle des Etats membres et des institutions communautaires. Ces principes sont autant d'expressions particulières des valeurs contenues dans la notion de Communauté. Elles en traduisent la nature en soulignant, au-delà des obligations passives incombant aux Etats, leur appartenance à une Communauté de destin.

International and European Trade and Environmental Law after the Uruguay Round

by

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Academy of European Law (ed.),
Collected Courses of the Academy of European Law, Volume IV, Book 1, 123–228.

Table of Contents

Biography

– 26 August 1945	Born in Hamburg
– 1964-1970	Studies in law and economics at the Universities of Berlin, Heidelberg, Freiburg (Germany), Geneva (Switzerland) and the London School of Economics
– 1968	First State examination in law (Freiburg)
– 1971-1978	Assistant at the University of Hamburg and at the Heidelberg Max-Planck-Institute of International Law and Comparative Public Law
– 1974	Legal trainee in the EC Commission at Brussels
– 1976	Doctor iuris utriusque (summa cum laude) Heidelberg
– 1977	Second State examination in law (Stuttgart)
– 1978	Federal Prize by the German Ministry of Science for publications in the field of international law
– 1978-1981	Legal counsellor in the Federal Ministry of Economic Affairs at Bonn
– 1981-1990	Legal counsel in the GATT Secretariat at Geneva
– 1980-1992	Rapporteur of the 'Committee on Legal Aspects of a New International Economic Order' of the International Law Association
– 1983/1986	Lecturer in International Law at the University of Fribourg (Switzerland)
– 1984-1990	Visiting Lecturer at the 'Europa Institut' of the University of the Saarland
– 1989	Habilitation for International, European and Swiss Public Law at the University of Fribourg (Switzerland)
– Since 1989	Professor of International, European and Swiss Public Law and Director of the Institute of European Law at the University of St. Gallen (Switzerland)
– 1990-1994	Legal consultant and elected member of GATT dispute settlement panels in the GATT at Geneva
– Since 1992	Rapporteur of the 'International Trade Law Committee' of the International Law Association
– Since 1993	Visiting Professor at the Graduate Institute of International Studies at Geneva

– 1991/1994	Visiting Professor at the University of Michigan Law School (USA), at the University of Fribourg (Switzerland) and at the Academy of European Law at the European University Institute at Florence (Italy)
– Since 1981	Married, 4 children

Principal Publications

– *Wirtschaftsintegrationsrecht und Investitionsgesetzgebung der Entwicklungsländer* (1974).

– *GATT Analytical Index. Notes on the Drafting, Interpretation and Application of the General Agreement on Tariffs and Trade* (4th edition 1985, 5th edition 1989).

– *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

– Hilf, Petersmann (eds), *GATT und Europäische Gemeinschaft* (1986).

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– Beierlin, Bothe, Petersmann (eds), *Festschrift für R. Bernhardt* (1995).

More than 90 book contributions and articles in legal and economic journals in the field of international, European, German and Swiss public law and policy. More than 100 book reviews in various journals.

International and European Trade and Environmental Law after the Uruguay Round

Introduction

Since the 1980s, the resort to trade restrictions for purposes of environmental policy has given rise to an increasing number of international dispute settlement proceedings both on the worldwide level in the context of the General Agreement on Tariffs and Trade (GATT) and on the regional level in the European Community (EC) and among the member countries of the North American Free Trade Agreement (NAFTA). The *first part* (Chapter I) of this essay, which is based on a series of lectures given in 1993 at the Academy of European Law at the European University Institute at Florence, analyzes and compares the evolution and interrelationships of international trade law and international environmental law in the context of the worldwide legal and institutional framework of the GATT and of the 1994 Uruguay Round Agreements establishing a new World Trade Organization (WTO). The *second part* (Chapter II) analyzes the evolution of European trade law and environmental law in the regional context of EC integration and compares the different worldwide and regional approaches to the various 'interface problems' of trade and environmental policies. The concluding *Outlook* summarizes some of the conclusions and policy recommendations following from the comparison of international and European trade and environmental law.

The legal context and the 'integration problems' of the global GATT/WTO world trade and legal system differ considerably from those of the regional integration law of the EC. Yet, there are also many common legal problems and parallels between GATT and EC trade and environmental rules and dispute settlement practices. The author's long-standing experience as legal adviser in GATT and as German representative and legal consultant in EC practice confirms that a comparative analysis of GATT and EC trade and environmental rules and dispute settlement practices, and a better understanding of their similarities and systematic differences, can assist lawyers and policy-makers in their ever more important task of ensuring that international and European trade and environmental law mutually support each other.

I. International Trade Law and International Environmental Law in the Worldwide Framework of GATT and the WTO

A. International Trade Law and International Environmental Law: Structural Differences, Common Objectives

1. Characteristic Elements of International Trade Law

The historical evolution and legal structures of international trade law differ in important respects from those of international environmental law. For instance:

- Public international trade law is based on worldwide international agreements, such as the 1947 General Agreement on Tariffs and Trade, the 1979 Tokyo Round Agreements and the 1994 Uruguay Round Agreements. GATT law ranks and legally limits the alternative trade policy instruments in accordance with economic theory and sets up a coherent institutional framework for the making, administration, adjudication and enforcement of trade rules and for the coordination of trade policies.
- The worldwide GATT rules are supplemented by an increasing number of regional *free trade area* agreements, such as the NAFTA in North America and, in Europe, the European Free Trade Association (EFTA), the European Economic Area (EEA), the 'Europe Agreements' of the EC with Eastern European countries, and other bilateral free trade agreements of the EC, e.g. with Mediterranean countries. In addition, there are also regional agreements providing for *customs unions*, such as the EC and its Association Agreements with Cyprus, Malta and Turkey. The contents of these free trade area and customs union agreements are shaped and coordinated by the general substantive rules (notably Article XXIV) and procedures of GATT (notably Articles XXIV:6,7, XXVIII).
- The worldwide and regional trade rules are based on, and reflect the practical experience and wisdom of, century-old treaty standards for trade in goods, such as most-favoured nation treatment, national treatment, and standard safeguard clauses for public policy purposes.
- GATT law proceeds from the principle of state sovereignty over policy goals, i.e. the freedom of GATT member countries to decide on their own national legal, economic and other policy objectives, including their level of trade protection and of environmental protection. GATT member countries remain free to intervene in their domestic economies in order to correct domestic 'market failures' (such as environmental pollution) and supply 'public goods' through non-discriminatory internal regulations (e.g. environmental taxes, product and production standards, packaging and labelling requirements). The legal ranking of the alternative trade policy instruments in GATT law commits governments to the use of transparent, non-discriminatory and proportionate trade policy instruments (e.g. tariffs) and prohibits the use of non-transparent, discriminatory and disproportionately harmful policy instruments (e.g. discriminatory non-tariff trade barriers).

- GATT law has brought about a worldwide harmonization of customs, import licensing, anti-dumping and other foreign trade laws in the 125 GATT member countries. The 1994 WTO Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures also promote the harmonization and use of internationally agreed technical regulations, product standards, product-related process and production methods (PPMs) and conformity assessment procedures. But they leave each member country free to apply higher national standards provided they do not unnecessarily restrict trade. In other domestic policy areas, GATT law – unlike the regional integration law of the EC and EEA – does *not* require the harmonization of internal laws, such as tax laws and environmental laws.

2. Divergent Elements of International Environmental Law

Compared to international trade law, international environmental law is a more recent and less developed field of international law with different legal structures. For example:

- There is no 'General Agreement on the Protection of the Environment' similar to GATT, to the 'General Agreement on Trade in Services' (GATS) or to the Agreement Establishing the WTO. Nor is there an institutional 'umbrella organization', for instance similar to the World Intellectual Property Organization, for the international coordination of the (approximately) 180 Multilateral Environmental Agreements (MEAs). International environmental law thus still lacks coherent worldwide institutional mechanisms for the making, administration and adjudication of international environmental rules. Most of the about 800 bilateral and multilateral environmental agreements are limited to specific kinds of pollution or endangered species of fauna and flora. They lack effective multilateral enforcement mechanisms (such as the GATT and WTO dispute settlement systems).
- General international law and UN recommendations play only a minor role in international trade relations due to the comprehensive scope of multilateral treaty law. However, they are important means of environmental policy-making and of the prevention and settlement of international disputes over environmental issues. Examples include the general principles of international law governing state sovereignty over national resources, state responsibility for transboundary pollution damage and the codification of general principles of international environmental law and of 'soft law rules' in the universally agreed 'UNCED principles' adopted by the UN Conference on Environment and Development in 1992.
- International environmental law is directed primarily at the protection of scarce resources at the production level (e.g. emission standards, production and product standards) and at the consumption level (e.g. immission standards, labelling and other consumer protection standards) rather than at the regulation of trade transactions. Thus, out of some 180 MEAs, only 18 seem to include trade provisions on the restriction of imports and/or

exports for environmental purposes.[1] Environmental rules limiting the use of specified environmental resources tend to interfere more with national sovereignty than international trade law.

- Unlike GATT, international environmental law is not based on a comprehensive ranking and legal limitation of alternative policy instruments according to their efficiency. In practice, governments often prefer direct 'command and control' instruments of environmental policy (such as prohibitions, permits, quotas, production and product standards) over economic 'price instruments' favoured by economists (such as environmental taxes or auctioning of pollution certificates).
- With a few exceptions (such as certain EC countries and the USA), domestic law requirements for citizen rights and citizen law suits still seem to be less developed in the environmental laws of many countries than in their domestic customs, anti-dumping and other foreign trade laws (cf. e.g. GATT Article X:3).

3. *Obstacles to Ensuring the Mutual Consistency of International Trade and Environmental Law*

At the national level of private interest groups and specialized ministries, as well as in international organizations and conferences, trade policy-making processes tend to be separated from environmental policy-making. Yet, within countries, it is much easier for a single state legislator, government or national courts to ensure the overall consistency of national economic, environmental and other laws and administrative practices. At the worldwide level, the international movements of goods, services, persons, capital and payments, as well as the protection of environmental resources, are regulated in hundreds of separate agreements and are often inadequately coordinated. Until the Uruguay Round Agreements of 1994, most international agreements outside the EC dealt with the transnational movements of goods, services, persons, capital and payments in a compartmentalized manner without expressly addressing general 'horizontal problems' such as the pollution of the environment. Thus, neither the GATT of 1947 nor the original texts of the EEC Treaty of 1957 and of the EFTA Treaty of 1960 explicitly referred to the protection of the environment or to the numerous bilateral and multilateral environmental agreements concluded by their respective member countries. It is only recently in the 1994 WTO Agreement and in regional integration agreements, such as the Single European Act of 1986 and the 1993

1 United Nations Environment Programme (UNEP), Register of International Treaties and other Agreements in the Field of the Environment, 1994. The trade provisions in 17 multilateral environmental agreements are listed in *International Trade 1990-1991*, Vol. 1, GATT 1992, 45-47. The list does not include the Wellington Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific, which entered into force in May 1991 and authorizes 'each Party (to) ... take measures consistent with international law to ... prohibit the importation of any fish or fish product, whether processed or not, which was caught using a drift-net' (Article 3.2).

Agreements on the EEA and NAFTA, that trade and environmental rules and policies are explicitly coordinated and the international movements of goods, services, persons, capital, payments and pollution are regulated in a comprehensive manner in one and the same agreement (see *Table 1*).

The 1992 UNCED principles on trade and environment reflect a worldwide consensus not only among economists but also among governments that trade and environmental rules should be mutually supportive in promoting an efficient use of scarce resources. But this perception is not yet shared by many environmental groups and by protectionist lobbies interested in using environmental measures as a means of restricting market access and increasing protection rents. The EC, the USA and other countries are increasingly resorting to unilateral trade restrictions to protect the environment not only at home but also abroad. Examples include the EC import restrictions on whales, seal skins, dangerous wastes and chemicals, or the famous US 'primary' and 'secondary' embargoes on imports of tuna caught with fishing methods that lead to unnecessary killing of dolphins. Also *within* the EC, Holland has unilaterally restricted imports of birds that exist only in Scotland and can be freely hunted there. Germany restricted imports of Indonesian frogs for environmental purposes, even though these frogs are not recognized under the Convention on International Trade in Endangered Species (CITES) as an endangered species. The legality of such import restrictions has so far never been contested in dispute settlement proceedings whenever the restrictions were based on MEAs, such as CITES, the Vienna Convention and Montreal Protocol and London Amendment on the Protection of the Ozone Layer, or the Basel Convention on Control of Transboundary Movements of Hazardous Wastes. But these MEAs also require the restriction of trade with third countries and raise legal problems in this respect.

In both GATT and the EC, there is a rising tide of disputes over the use of trade restrictions for environmental purposes. So far, less than 10 out of more than 250 formal GATT dispute settlement proceedings under GATT Article XXIII and under the corresponding dispute settlement provisions of the various GATT Codes have related to environmental policy measures. But all of the environmental GATT disputes have arisen since the 1980s. Several additional GATT complaints over import restrictions for environmental purposes (e.g. by the EC on hormone-fed beef and on pelts from fur-bearing mammals caught with leghold traps) were not pursued in formal dispute settlement proceedings. The increasing resort to trade-related environmental measures (TREMS) suggests that the number of international dispute settlement proceedings over TREMS will continue to increase in the WTO and in regional trade agreements in the coming years. For the settlement of such disputes it is important to bear in mind that liberal trade and environmental rules serve essentially similar functions (Section 4 below) and are confronted with similar regulatory problems (Section 5).

TABLE 1:

International Economic Order and International Economic Law

International Economic Order					
Sectors and Levels of regulation	Goods (e.g. waste)	Services (e.g. waste disposal)	Persons (workers, entrepreneurs)	Capital (direct or portfolio investment)	Payments
National Private Law	e.g. economic freedoms, contract law, private property rights and commercial arbitration as legal preconditions of an international division of labour				
National Public Law	e.g. constitutional rules, human rights, general economic laws, regulations and organizations				
International Public Law	e.g. GATT, EFTA	e.g. ICAO, ITU	e.g. ILO, OECD	e.g. IBRD, ICSID	e.g. IMF, GATT
	e.g. Uruguay Round Agreements, EEA Agreement, Europe Agreements, NAFTA				
Supranational EC Law	e.g. EC Treaty, European Union Treaty, general principles of EC law				
= **International Economic Law** (in the broad sense comprising private and public, national and international legal regulations of the interdependent economic activities) and open **'constitutional democracies'** as **'layered legal systems'**					

4. *Common Regulatory Functions of International Trade and Environmental Law*

From a legal and economic perspective, international trade and environmental rules – like domestic trade and environmental rules – serve essentially the same three 'constitutional functions' (see *Table 2*):

a) First, to reconcile conflicts among the short-term interests of producers (e.g. in protectionism and in 'externalizing' pollution costs at the expense of consumers), as well as of States (e.g. short-term interests in exploiting oligopoly power and transboundary pollution at the expense of other countries), with their agreed long-term interests in liberal trade, 'sustainable development' and in the 'polluter-pays principle' by means of general rules enhancing spontaneous decentralized order between producers, traders, consumers and governments.

b) Second, to set up organizations designed to limit 'market failures' (such as 'pollution externalities' and other 'spontaneous disorder') and supply 'public goods' (such as liberal trade and protection of the environment).

c) Third, to lay down long-term national as well as international 'constitutional rules' of a higher legal rank designed to limit 'government failures' (such as trade protectionism and environmental degradation) as well as 'constitutional failures' (such as inadequate protection of consumer rights and of 'public goods' such as protection of the 'global commons'). One of the basic 'constitutional experiences' of European Community law has been that the effectiveness of the 'market freedoms' of the EC Treaty and of the domestic implementation of EC Directives on environmental law is dependent on whether the citizens have individual rights and judicial remedies at their disposal to ensure that governments promote the general private interests of their citizens (e.g. in liberal trade and the 'polluter-pays principle').[2] This experience is important also for international environmental law. The environmental policy objective of 'internalizing' external costs requires not only the integration of environmental costs into the economic system. It also requires the integration of citizens into the political and legal systems by granting them rights and judicial remedies to protect themselves against 'pollution externalities'.[3]

2 This point is elaborated in Petersmann, 'National Constitutions, Foreign Trade Policy and European Community Law', *EJIL* (1992) 1-35. For the similar experience in the context of the European Convention on Human Rights as a result of the individual invocation and judicial protection of fundamental human rights see, e.g., Frowein, 'The European Convention on Human Rights as the Public Order of Europe', *AEL* Vol. I-2 (1990) 267 seq.

3 This was also emphasized in the 'Brundtland Report': World Commission on Environment and Development, Our Common Future, 1987, at 65: 'the pursuit of sustainable development requires ... a political system that secures effective citizen participation in decision-making'. See also Principle 10 of the 'Rio Declaration' adopted in June 1992 by the UN Conference on Environment and Development (UNCED): 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level...' (reprinted in ILM (1992) 876 seq.).

TABLE 2: Constitutional Problems of Social Order

Kinds of Rules and of Order	National Order	International Order
General rules on freedoms, property rights, equality and contract law enabling agreed transactions and 'spontaneous order'	'Hobbesian Dilemma' (conflicts of short-term interests) ↓ General Rules (e.g. individual fundamental rights reflecting common long-term interests) ↓ 'spontaneous decentralized order' (e.g. markets) ↓ 'market failures' and spontaneous disorder (e.g. pollution) ↓	'International Anarchy' ('beggar-my-neighbour policies') ↓ General International Law (e.g. 'sovereign equality' and other 'rights and duties of states') ↓ Spontaneous order (e.g. balance of power and 'self-help' systems, international division of labour) ↓ 'Market failures' and 'government failures' (e.g. cross-border pollution) ↓
'Result-oriented' rules, procedures and organizations with legislative, administrative and judicial functions	(Sub)National Organizations are necessary a) to limit private 'market failures' such as: – abuses of power – pursuit of short-term self-interests with adverse 'external effects' b) to supply 'public goods' (e.g. protection of the environment), and c) to limit 'government failures' (e.g. 'green protectionism') ↓	International Organizations are necessary a) to limit private transnational 'market failures' such as – abuses of power – pursuit of short-term self-interests with adverse 'external effects' b) to supply 'international public goods' (e.g. 'global commons'), and c) to limit 'government failures' (e.g. 'green imperialism') ↓
Constitutional rules enabling 'constitutional order'	Constitutional restraints (e.g. fundamental rights, objective principles of rule of law and democracy) and institutional 'checks and balances' on government powers ↓ 'Lockean Dilemma' (inadequate constitutional restraints on foreign policy powers, asymmetries in information and in foreign policy-making)	Need for international constitutional restraints on national and international organizations (e.g. principles of rule of law in the UN and EC) ↓ Inadequate supply of 'international public goods' ('constitutional failures' e.g. in the protection of 'global commons')

The accelerating rate of environmental degradation has prompted countries to recognize explicitly in more recent international trade agreements – such as the 1986 Single European Act which introduced into the EEC Treaty a separate title on Community actions for the protection of the environment (Articles 130r, s, t), the 1993 EEA and NAFTA Agreements, and the 1994 Agreement establishing the WTO – the need to integrate economic, trade and environmental policies so that they supplement and strengthen each other. Moreover, obligations to promote 'sustainable growth respecting the environment' (Article 2 of the 1992 Maastricht Treaty on European Union) and 'the optimal use of the world's resources in accordance with the objective of sustainable development' (Preamble of the 1994 WTO Agreement) are increasingly incorporated into modern international trade agreements. The Ministerial 'Decision on Trade and Environment', adopted at the end of the Uruguay Round by 124 countries and the EC, expresses the now worldwide consensus among governments

> that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.[4]

More specific obligations to cooperate in the elaboration of environmental standards are to be found no longer solely in international environmental agreements, but also in international trade law. Thus, according to Article 3 of the 1994 Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures for the protection of human, animal or plant life or health,

> to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement.

5. *Common Regulatory Principles and Problems of International Trade and Environmental Law*

In order to promote a more efficient use of scarce resources, international trade law and international environmental law must aim both at reducing market distortions, such as 'pollution externalities' and the resultant divergences between private and social costs. For instance, the trade policy objective of replacing less efficient domestic production by more efficiently produced imports (e.g. of tropical timber) may not be achieved if the production processes abroad do not take into account environmental policy principles

4 See *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, GATT 1994, at 469.

(e.g. of 'polluter-pays', 'preventive action' and 'rectification at source', as prescribed in Article 130r of the EC Treaty). In regulating 'market failures' as well as 'government failures', international trade law and international environmental law must both respect the basic constitutional principles of international and national law, such as protection of the 'sovereign equality' of states (Article 2:1 UN Charter) and of the equal freedoms and property rights of their citizens through 'rule-oriented' cooperation (e.g. general prohibitions and liability rules regarding cross-border pollution with serious 'external effects').[5] The 'functional unity of international trade and environmental law' follows from the fact that both fields of law are developed by the same actors, serve common legal functions, rest on common legal principles and are confronted with common regulatory problems (see *Table 3*).

The most difficult common regulatory problem is due to the fact that both trade and environmental policy powers lend themselves to protectionist abuses because they involve powers to tax and restrict domestic citizens and to redistribute income among domestic groups. The regulatory discretion of governments operates as an invitation to 'rent-seeking' interest groups to 'lobby' and influence the exercise of the regulatory powers to their favour. By contrast, the general 'public interests' e.g. of consumers and tax-payers (e.g. in liberal trade and protection of the environment) tend to be politically less influential e.g. due to the large number and dispersed interests of consumers, their 'rational ignorance' and 'free-riding incentive' towards consumer organizations. The general 'public interest' therefore needs to be legally protected against the risks of 'green protectionism', power-oriented 'eco-imperialism' and other abuses of trade and environmental policy powers. But this common '*constitutional problem*' of international trade and environmental law – i.e. to legally restrain the asymmetries in policy-making processes, which favour concentrated, organized producer interests (e.g. in protectionism and pollution externalities) to the detriment of general consumer interests (e.g. in liberal trade and sustainable use of natural resources) – continues to be largely unresolved. Many international trade and environmental disputes are 'secondary conflicts', which result from 'primary conflicts' of interests *within* nations rather than *between* nations and 'spill over' into inter-governmental conflicts whenever 'rent-seeking' group interests of import-competing producers are protected by governments at the expense of domestic consumers and foreign competitors.

5 On the increasing limitation of 'state sovereignty' by guarantees of fundamental rights in UN and EC human rights law, see Petersmann, 'Rights and Duties of States and Rights and Duties of their Citizens', in U. Beierlin, M. Bothe, E.-U. Petersmann (eds), *Festschrift für Professor R. Bernhardt* (1995).

TABLE 3:

Functional Unity of International Trade and Environmental Law

Common actors	Common legal principles	Common regulatory problems	Common kinds of legal regulation and 'order'
Private individuals Private juridical persons (e.g. TNCs)	Protection of individual freedoms, property rights, legal liability, 'due process' and other fundamental rights	How to overcome our **'constitutional ignorance'** (e.g. of the global economic and environmental interdependence)?	**Transaction law** (e.g. private and public contract law, exchanges of property rights)
States, state organs and public enterprises International organizations	Individual 'private sovereignty' and collective 'state sovereignty' Objective constitutional restraints on government powers (e.g. rule of law, non-discrimination, peaceful settlement of disputes, transparent policy-making, use of proportionate policy instruments, legal liability e.g. for transboundary injury) Institutional 'checks and balances'	How to promote decentralized national and international **'spontaneous order'** among citizens as well as among states without **'market failures'** (e.g. environmental pollution) as well as without **'government failures'** (e.g. protectionism and environmental degradation)?	**General and abstract constitutional rules for 'spontaneous order'** with unknown results (e.g. national and international legal guarantees of freedom, equal treatment, legal security and legal liability for pollution damage) **Specific intervention rules** aimed at **'directed order'** and assigned tasks (e.g. national and international market organizations and environmental regulations)

Questions: Why do constitutional democracies and modern international law proceed from the same constitutional principles? What legal consequences are to be drawn from this functional unity? Why can general rules and specific interventions not be combined in any manner one likes? How to ensure the overall consistency of International Economic Law and Order?

The EC Treaty so far provides the most developed integrated set of international trade and environmental rules with 'constitutional safeguards'. But there are increasing proposals for better integration of also the *worldwide* GATT and WTO rules with multilateral environmental agreements and general principles of international environmental law. Thus, following the model of Article 130r of the EC Treaty, the future WTO Committee on Trade and Environment may decide to explicitly incorporate into WTO law basic principles of environmental law and policy (such as the 'precautionary principle' and the principles of 'preventive action', 'rectification at source' and 'polluter-pays') so as to better integrate trade and environmental rules and enable WTO dispute settlement panels to refer to such environmental principles in their interpretation of WTO law.[6] Or, following the model of Articles 100, 100a and 130s of the EC Treaty, some WTO member countries may want to harmonize their environmental standards, and enhance the mutual consistency of WTO law with multilateral environmental agreements, through a WTO-Agreement on TREMS, similar to the Uruguay Round Agreement on Trade-Related Intellectual Property Rights (TRIPS).[7]

In the EC, the Court of Justice has already had to decide on a complaint by the EC Commission that France had violated its obligations under the 1973 CITES Convention and under the EC's implementing rules (see below Chapter II.B.1). In GATT dispute settlement practice, no contracting party has so far ever complained of alleged conflicts between GATT rules and multilateral environmental agreements. Some Tokyo Round and Uruguay Round Agreements, notably those on technical barriers to trade and (phyto)sanitary standards, establish a legal presumption that e.g.

> sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994 (Article 3:2 of the 1994 Agreement on the Application of Sanitary and Phytosanitary Measures).

6 The above-mentioned Uruguay Round 'Decision on Trade and Environment' provides that the terms of reference of the WTO Committee on Trade and Environment include, *inter alia*, 'to make recommendations on whether any modifications of the provisions of the multilateral trading system are required ... to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration'.

7 The above-mentioned Uruguay Round 'Decision on Trade and Environment' also provides that the WTO Committee on Trade and Environment shall address 'the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements', as well as 'the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements'.

B. Protection of the Environment as a Regulatory Task of Private and Public, National and International Law: The Problem of the Optimal Level of Legal Regulation

The conclusion from the legal analysis in Chapter I.A, i.e. that international trade law and international environmental law should supplement and mutually strengthen each other, is supported by an economic analysis of national and international environmental law and of the 'optimal instruments' of environmental policy-making.

1. Alternative Instruments of Environmental Policy

Environmental economics treats pollution as a 'market failure' and as a problem of inefficient resource allocation: environmental resources tend to be excessively used if their market prices do not fully reflect their scarcity and their social cost. Hence the need to 'internalize' pollution externalities by means of rules based on the now universally agreed 'polluter-pays principle' so as to ensure that the environmental cost of economic activities, and the real scarcity of environmental resources, are actually reflected in the prices of goods and services. But there are a number of alternative policy instruments for 'internalizing' external environmental costs. For instance, if a chemical plant pollutes nearby agriculture, the government may consider the following five regulatory approaches (see *Table 4)*:

1) Stricter liability rules for polluters and better judicial protection of the property rights of 'pollutees' so as to induce pollution abatement through private litigation (e.g. through injunctions and damage claims by injured parties).
2) Enhancement of private 'Coase negotiations'[8] and voluntary schemes in which, if property rights are protected and compensatory payments admitted, the affected parties might also agree e.g. on continued 'pollution rights' in exchange for compensation paid by the polluter out of his production profits.
3) Direct government regulation through 'command and control instruments' (e.g. environmental prohibitions and production standards), if decentralized spontaneous private law remedies are not effective e.g. as a result of 'free-riding' on the part of polluters, high transaction costs and information problems on the part of pollutees (e.g. difficulty of proving the causality of the environmental damage in the presence of a large number of polluting chemical plants).

8 On the reciprocal nature of 'externality problems' such as pollution, which can be efficiently solved not only by reducing the emissions but also by compensating the continued immissions if the marginal profits from the polluting activity are higher than the damage caused by the pollution, see Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics* (1960) 1-44.

TABLE 4:

Protection of the Environment as a Problem of Private and Public, National and International Law

Actors	Regulatory Instruments and Problems	Level of Regulation
CH ← F **CH → F** [CH = Chemical plant] [F = Farmers]	1) Property rights, liability rules, rights of action 2) 'Coase negotiations' on property rights, compensation Regulatory problem: **'market failures'**	Private law Private law
⇕ ⇕	3) Direct regulation (e.g. through prohibitions, quotas, permits, production and product standards) 4) Economic instruments (e.g. charges, subsidies, deposit-refund systems, emissions trading, liability insurance, non-compliance fees) Regulatory problem: **'government failures'**	Administrative law Administrative law
Legislature **Executive** **Courts** ⇕	5) Constitutional rights (e.g. to health, property, environmental protection), obligations (e.g. to protect the environment) and institutional-procedural reforms (e.g. environmental impact assessments, judicial protection)	
Constitutional law-maker	Regulatory problem: **'Constitutional failures'**	Constitutional law
⇕ ⇕ **F-CH (foreign plants)**	6) International court proceedings or 7) 'Coase-negotiations' between polluters/pollutees	Int'l private law Int'l private law
⇕	8) Public International Law Agreements or	Int'l public law
Governments	9) Dispute settlement proceedings among states (including retortions and reprisals)	Int'l public law
EC-Institutions	10) EC-common market rules 11) EC-regulations, directives, decisions	EC primary law EC secondary law
	Regulatory problem: Supply of international public goods (environmental protection) through international and EC law	

4) Governmental use of more efficient 'economic instruments of environmental policy' (e.g. environmental polluter charges, user charges, product charges, subsidies, tradeable pollution quotas, deposit refunds), which set incentives for voluntary pollution reduction even beyond those emission standards permitted under administrative emission quotas.
5) Since often neither private law remedies nor administrative law remedies succeed in implementing the 'polluter-pays principle' and the 'principle of full cost resource pricing' (e.g. because of the numerous obstacles to 'Pareto-optimal' environmental 'Pigou-taxes'[9]), governments also increasingly resort to 'constitutional law remedies', such as explicit constitutional requirements to protect the environment (e.g. in Article 24 of the Greek Constitution and Article 21 of the Dutch Constitution) and corresponding individual rights (e.g. in Article 66 of the Portuguese Constitution and Article 45 of the Spanish Constitution).

2. Internationalization of Environmental Issues

Domestic environmental problems, which do not involve transborder pollution, can be resolved by domestic policy choices according to the country's own priorities. Domestic environmental issues can become internationalized mainly if domestic pollution causes transborder spill-overs and 'serious damage' which, depending on the usual degree of pollution and the respective state of pollution prevention technology, must not be tolerated by the neighbouring states affected. Transborder pollution may also arise in an indirect way by polluting 'global commons', such as the ozone layer, the atmosphere and the High Seas, with adverse repercussions on the protection of human, animal or plant life or health in other countries. GATT rules place very few legal constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported goods. But trade restrictions are hardly ever a first-best policy instrument for dealing with domestic environmental problems arising at the production or consumption level.

If, in the above-mentioned example, the environmental pollution e.g. in Germany is caused not only by domestic producers but also extra-territorially by *foreign* chemical plants in neighbouring France and Switzerland, the number of policy instruments becomes even larger (see *Table 4*). As a consequence, the choice of the right policy mix is even more difficult in the case of transborder pollution and depends, *inter alia*, on whether the focus is on the environmental effectiveness of the policy instruments, their economic efficiency, administrative flexibility, political acceptability or distributional

9 See A. Pigou, *The Economics of Welfare* (1920).

equity.[10] For instance, governments may deal with problems of cross-border pollution in the following ways:

6) Avoidance of inter-governmental disputes through decentralized international private law solutions e.g. by protecting the 'pollutees' by means of municipal legal and judicial remedies (as in the EC Court judgment of 1976 and the two Dutch court decisions of 1979 and 1983 that up-stream French polluters of the river Rhine were legally liable to compensate downstream users of the Rhine waters in Holland).[11]
7) International 'Coase negotiations' between the private parties affected, or between their respective home countries, on the internalization and compensation of transnational pollution damage (as in the case of the inter-governmental consultations and agreements between France, Germany and the Netherlands on the long-standing pollution of the river Rhine by French potassium mines in Alsace).
8) Other inter-governmental environmental agreements on concerted pollution standards and environmental protection measures (possibly supplemented by financial adjustment assistance by the World Bank).
9) Inter-governmental dispute settlement proceedings on damage prevention and damage compensation (such as the famous *Trail-Smelter* arbitration of 1941), or alternative retortions and reprisals.
10) Supra-national 'primary law rules', such as the free trade rules (e.g. Article 30) and environmental safeguard clauses of the EC Treaty (e.g. under the EC Court's 'rule-of-reason' for the interpretation of Article 30, or under Articles 36, 100a:4, 100a:5, 130t of the EC Treaty).
11) Supra-national 'secondary law', such as the large number of EC Regulations and Directives in the field of environmental law.

3. The 'Rectification at Source' Principle

The important conclusion from the above discussion is that environmental policy instruments, which address the causes of environmental degradation in accordance with the principles of environmental law (e.g. of 'rectification at source', 'precautionary action', 'preventive action' and 'polluter-pays' laid down in Article 130r of the EC Treaty), should intervene at the production

10 For a detailed discussion see, e.g., Petersmann, 'Freier Warenverkehr und nationaler Umweltschutz in EWG und EWR', *Aussenwirtschaft (Swiss Review of International Economic Relations)* (1993) 95 seq., 100-106; 'Sustainable Development. The Effect of the Internalization of External Costs on Sustainable Development', *Report by the UNCTAD Secretariat* (1994) 18 seq.

11 See Case 21/76, *Mines de Potasse d'Alsace*, [1976] ECR 562 and, for an analysis of the two Dutch court cases, A. Kiss, D. Shelton, *International Environmental Law* (1991) 127 seq. The Dutch court decisions are reported in *Netherlands Yearbook of International Law* (1984) 471 seq. On municipal law remedies for breaches of international environmental law see also C. Gray, *Judicial Remedies in International Law* (1987) 219 seq.

level or at the consumption level rather than at the trade level. In the above-mentioned example of transnational pollution from a chemical plant, an import restriction on the chemical products concerned would not prevent the polluter from continuing the pollution, production and sale of his product abroad. The list of alternative regulatory instruments (above Nos. 1-11) should therefore not include trade restrictions unless they are mutually agreed between the countries concerned as a 'second-best policy instrument' (e.g. in the 1973 CITES Convention where the 'first-best policy instrument' of non-discriminatory internal hunting and sales prohibitions for the endangered species may not be sufficiently enforceable in less developed countries). Only in the rare case where the foreign polluter has no other choice but to sell all his products in the polluted country, might an import tariff serve as an efficient incentive to induce the polluter to 'internalize' his transborder pollution.

4. 'Public Choice' Problems of Environmental Policy

The continuing degradation of the international environment illustrates the widespread persistence of 'market failures' and 'intervention failures' in the field of environmental policies, as well as the apparent difficulties of the 'public choice' of efficient environmental policy instruments and of negotiating effective international environmental agreements. These difficulties are to a large extent due to the manifold asymmetries and protectionist biases in domestic and international decision-making about environmental policies, where e.g. farm lobbies and transport lobbies have for many decades succeeded in pressuring governments to support environmentally harmful agricultural and transport policies.[12] Since, from an economic perspective, economic and environmental regulations redistribute income among domestic groups, and concentrated producer interests are easier to organize and politically more influential than the dispersed 'general interests' of consumers and tax-payers,[13] discretionary regulatory powers (e.g. under the EC's common agricultural, transport and commercial policies) are an invitation for 'rent-seeking' by organized producers interested in receiving 'protection rents' from governments in exchange for political support. Periodically elected politicians and also bureaucrats often depend on such political support and

12 For a summary of the 'public choice analysis' of environmental pollution, see Petersmann, *supra* note 10, at 95 seq. For empirical evidence see, e.g., G.J. Stigler, *The Citizen and the State. Essays on Regulation* (1975), who arrives at the 'central thesis that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit' (at 114 seq.).

13 On the economic theory of interest groups (e.g. the lower organization costs and information costs of concentrated producer interests compared to general interests of consumers and taxpayers), see M. Olson, *The Logic of Collective Action* (1965); A. Downs, *Economic Theory of Democracy* (1957).

have self-interests in implementing economic and environmental regulations in a 'vote-maximizing' or 'career-maximizing' manner meeting the demands of their 'clientèles'.[14]

5. *The Need for 'Constitutionalizing' Trade and Environmental Policy-Making*

In view of the many asymmetries in decision-making processes concerning trade and environmental policies, 'constitutional economics'[15] recommends changes in the long-term constitutional rules on the supply of 'public goods' and on discretionary government interventions. Yet, how can such constitutional reforms be achieved if, as 'public choice' theory suggests, organized interest groups pursue their self-interests not only within the existing rules and institutions but also allocate resources toward changing the rules and organizations to their benefit? Even though liberal trade and protection of the environment have long since been recognized as 'public goods' in national constitutional laws, they are much more difficult to secure at the *international* level due to the 'prisoners' dilemma' of international cooperation.[16] There also continues to be a widespread belief in J. Locke's long-standing 'incompatibility hypothesis', according to which international relations are

14 On the inadequacy of the 'public interest theory' of government, which has dominated law and economics up to the 1950s and has neglected the risk of 'government failures', and on the imperfections of 'political markets' and of their control through 'democratic votes' (e.g. due to the small impact and infrequency of individual votes, the 'rational ignorance' of voters, the greater monopolization in political markets than in economic markets, and the greater 'rent-seeking' opportunities of producer interests), see, e.g., E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) 178 seq. The modern economic theory of bureaucracy emphasizes that many 'bureaucratic choices' – e.g. between 'cooperative strategies' *vis-à-vis* polluters (such as negotiated solutions, subsidies, granting of exemptions) and alternative sanctions (such as prohibitions, judicial proceedings, fines) – are influenced not only by the 'general interest' of the citizens but also by the utility-maximizing career interests of bureaucrats (e.g. in more staff, power, time, income), cf. W.A. Niskanen, *Bureaucracy and Representative Government* (1971); P. Dunleary, *Democracy, Bureaucracy and Public Choice* (1992).

15 For a survey see R.B. McKenzie (ed.), *Constitutional Economics. Containing the Powers of Government* (1984); D.R. Lee, R.B. McKenzie, *Regulating Government. A Preface to Constitutional Economics* (1987); Buchanan, 'Constitutional Economics', in *The New Palgrave. A Dictionary of Economics*, Vol. 1 (1987) 585 seq.

16 International relations theory uses the game of the Prisoners' Dilemma (PD) in order to exemplify why cooperation is often difficult to achieve without adequate information and confidence even though all players would benefit from such cooperation. The PD relates to the tale of two guilty prisoners suspected of a major crime. If the public prosecutor has only enough evidence to convict them of a misdemeanour, each prisoner will benefit if neither confesses the crime. To elicit confessions, the public prosecutor can create the PD by separating the prisoners (i.e. preventing information and cooperation among them) and offering each of them the following deal: if either prisoner confesses while the other does not, all charges against the confessor will be dropped, while the non-confessor will receive the maximum possible sentence. Game theory shows that these incentives will typically induce confession by both prisoners, resulting in high prison sentences which could have been avoided by cooperation and silence.

dominated by power and by national self-interest and the conduct of foreign affairs is therefore incompatible with stringent constitutional restraints on the national foreign affairs powers ('primacy of foreign policy').[17] The asymmetries in political decision-making processes are reinforced where 'international externalities', such as transborder pollution and protectionism exist, if the benefits accruing to the nationals in the injuring country are more obvious than the harm caused to foreigners in the injured country. For a number of international and domestic policy reasons,[18] governments often find it easier to legally limit their foreign policy discretion and 'beggar-thy-neighbour policies' through reciprocal *international* agreements on mutually beneficial international cooperation (such as the GATT), rather than unilaterally through *domestic* constitutional reforms.

C. The Ranking of Trade and Environmental Policy Instruments in GATT Law

1. The GATT Principle of Domestic Policy Autonomy

GATT law leaves each contracting party free to have non-discriminatory internal taxes and regulations (Article III), production subsidies (Articles III:8, XVI:1), state trading enterprises (Article XVII), customs duties provided they do not exceed agreed tariff bindings (Article II), and even other trade restrictions if they are 'necessary' to achieve certain specified public policy purposes (e.g. Articles XVIII-XXI). This GATT principle of 'national sovereignty' protects diverging domestic policies, experimentation and 'competition among rules', and is an important determinant of the 'comparative advantage' of countries. In order to reconcile the domestic policy autonomy of GATT contracting parties with the GATT requirements of open markets (cf. Articles II, XI:1) and of non-discriminatory conditions of competition (cf. Articles I, III, XIII, XVII), GATT's 'border adjustment rules' permit the application of internal taxes and product regulations to imported products (cf. Articles II:2, III), and the exemption of products sold abroad from domestic taxes or regulations (cf. Article VI:4). Moreover, GATT contracting parties may unilaterally resort to anti-dumping or countervailing duties if foreign dumping or subsidies cause injury to competing domestic producers (cf. Article VI). In the absence of such transnational 'external effects', however, the GATT principles of unconditional most-favoured-nation treatment (Article I) and of 'national treatment' of imported products (Article III) require the respect of the domestic policy autonomy of other GATT contracting

17 On this 'Lockean dilemma' of the inadequate 'constitutionalization' of national foreign affairs powers, and on the refutation of the 'incompatibility hypothesis', see E.-U. Petersmann, *supra* note 14, at 288 seq.

18 Ibid., at 403 seq.

parties and the granting of non-discriminatory market access to their products independent of the domestic policies in the exporting country.

As the General Agreement was drafted at a time when environmental protection was not accorded the political priority it currently holds in many countries, protection of the environment was not explicitly mentioned in the 1947 text of the GATT. But GATT's principle of 'sovereignty over national policy goals' implies the freedom of each member country to decide on its own environmental taxes, production, marketing, product, consumer, labelling and other internal regulations subject to the 'national treatment' requirement, i.e. that the 'products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use' (Article III:4). GATT member countries also remain free to decide on the *level* of their tariff protection regardless of whether the tariffs serve environmental objectives (e.g. in the case of tariffs on tropical timber designed to finance the reforestation of tropical forests) or other policy objectives. GATT law thus imposes few constraints on a country's freedom to protect its domestic environment through non-discriminatory environmental taxes and product regulations, domestic production and consumption regulations, production subsidies, international environmental agreements, and even through unilateral trade restrictions if they are non-discriminatory and 'necessary to protect human, animal or plant life or health' (Article XX(b)) or relate 'to the conservation of exhaustible natural resources' (Article XX(g)).[19] Since the legitimacy and efficiency of environmental standards depend on the particular circumstances of each country (such as the income and preferences of its citizens, its population density, pollution levels and absorption capacities), GATT's recognition of state sovereignty is warranted also in the field of environmental policy standards. Such standards should be considered as a factor of the national 'comparative advantage' as long as they do not cause transboundary pollution.

2. The Ranking of Trade Policy Instruments in GATT Law

The various trade policy instruments are legally ranked in GATT law in accordance with the economic theory of 'optimal intervention' and with the requirements of parliamentary control: the more efficient a trade policy instrument is, and the more it is subject to parliamentary legislation and con-

19 See Petersmann, 'Trade Policy, Environmental Policy and the GATT. Why Trade Rules and Environmental Rules Should Be Mutually Consistent', *Aussenwirtschaft (Swiss Review of International Economic Relations)* (1991) 197-221.

trol, the fewer legal restraints GATT law imposes on its use (see *Table 5*).[20] Thus, non-discriminatory internal taxes and other internal regulations may be freely used by each GATT contracting party (Article III) and are usually the most efficient policy instruments for correcting 'market failures', such as abuses of economic power and pollution of the environment. If a country wants to protect its domestic producers from import competition, production subsidies tend to be the 'first-best' policy instrument and, under GATT law, are permitted subject to the possibility of countervailing duties (Article VI) and 'non-violation complaints' in GATT dispute settlement proceedings (Article XXIII). Import tariffs are a 'second-best' instrument of trade policy (because they distort both production and consumption) and, under GATT law, are allowed subject to tariff bindings (Articles II, XXVIII) and safeguard clauses (e.g. Articles VI, XIX). Quantitative import restrictions are only a 'third-best' policy instrument in view of their additional price distortions; they are therefore prohibited under GATT law (Article XI) subject to safeguard clauses (e.g. Articles XII, XVIII-XXI). Quantitative export restrictions are even worse 'fourth-best' policy instruments (e.g. in view of their additional competitive distortions and the transfer of 'protection rents' from the importing to the exporting country); hence, they are generally prohibited under GATT law (Articles XI, XIII).

20 For an explanation of this mutual consistency of the legal ranking of trade policy instruments in GATT law with the economic theory of optimal intervention and the political requirement of parliamentary accountability, see Roessler, 'The Constitutional Function of the Multilateral Trade Order', in M. Hilf, E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993) 53-62. See also Petersmann, *supra* note 14, at 57 seq., 221 seq.

TABLE 5:

The Public Choice of Trade Policy Instruments

Instruments of Import Protection	Economic Ranking (Efficiency)	Political Ranking (Parliamentary Control)	Legal Ranking (GATT)
Production subsidy	First-best (production distortion)	Direct budgetary transfers subject to legislation	Allowed but possibly 'countervailable' and 'actionable' (Arts. VI, XVI:1, XXIII GATT and 1994 Subsidy Code)
Import tariff	Second-best (production and consumption distortion)	Transparent taxes, government revenue and protection rents subject to legislation	Allowed subject to tariff bindings (Arts. II, XXVIII) and safeguard clauses (e.g. Arts. VI, XIX)
Import restrictions – global quota – country quotas	Third-best (additional distortions of price competition; private protection rents in lieu of tariff revenue; legal insecurity)	Less transparent, administrative distribution of market shares and protection rents to importers and foreign exporters	Prohibited subject to GATT's safequard clauses (e.g. Arts. XI, XII, XVIII-XXI) and non-discrimination requirements (e.g. Arts. XIII, XX)
Voluntary export restraints (VER)	Fourth-best (additional transfers of quota rents abroad, additional legal insecurity)	Non-transparent transfers of protection rents at home and abroad without parliamentary and judicial control	Prohibited (Art. XIII GATT) with only temporary exceptions (1994 Safeguards and Textiles Agreements)

3. *'Constitutional Functions' of GATT Rules for the Protection of Freedom and Rule of Law Against Protectionist Power-Politics*

A comparison of the economic ranking of environmental policy instruments and of their legal ranking in GATT law suggests that the GATT rules can act as an incentive for the application of transparent, non-discriminatory and economically efficient instruments of environmental policy that are capable of being controlled by national parliaments and courts:

- The freedom of each GATT contracting party over its internal taxation and regulation (Articles III, II:2(a)) implies almost unlimited freedom over the use of *internal, non-discriminatory instruments of environmental policy* targeting the source of the pollution in an efficient manner directly at the production or consumption level (e.g. environmental taxes, product standards or labelling requirements).
- The 1994 Uruguay Round Agreement on Agriculture, as well as the Uruguay Round Agreement on Subsidies and Countervailing Measures, make explicitly clear that GATT contracting parties may also use *environmental subsidies*.[21]
- *Environmental tariffs* are permitted provided they are non-discriminatory (Article I) and do not exceed voluntary tariff bindings (Article II).
- *Non-tariff trade barriers* may only be used for environmental purposes if they are non-discriminatory, necessary and also meet the other requirements of GATT Articles XI:2(c) or XX.
- The GATT and Uruguay Round Agreements on Technical Barriers to Trade explicitly recognize the right to depart from international standards so as to apply *higher national standards for environmental reasons*. The Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures recognizes a broad discretion of each country in its decision on the 'appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health' (Article 5).
- The Uruguay Round Agreement on Trade-Related Intellectual Property Rights recognizes the right of members to 'exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment ...' (Article 27).

The economic ranking of trade and environmental policy instruments according to their economic efficiency therefore corresponds largely to their legal ranking in GATT law, with the exception of GATT's safeguard clauses which also permit recourse to discriminatory measures (Article VI) and non-tariff trade barriers (Article XIX). GATT's legal ranking also favours policy instruments which – like taxes, subsidies and tariffs – tend to be more effec-

21 Cf. e.g. Annex 2 to the Agreement on Agriculture and Article 8 of the Agreement on Subsidies.

tively controlled by parliaments than administrative import licensing or 'voluntary' export restrictions. The GATT principles of transparency, non-discrimination, rule of law, judicial review (cf. Article X:3 of GATT) and use of proportionate policy instruments strengthen the corresponding national law principles of transparent policy-making, non-discrimination, rule of law, judicial review and proportionality in the field of transnational trade and environmental policies. The GATT principle of 'trade policy by means of tariffs only', and the GATT prohibitions of non-tariff trade barriers, protect freedom of trade (e.g. individual rights to import and export).

By inducing governments to apply those environmental policy instruments which are efficient from the point of view of environmental economics, GATT law also restrains protectionist abuses of discriminatory policy instruments ('green protectionism'). The GATT requirements of unconditional most-favoured nation treatment (Articles I, III) prohibit power-oriented foreign interferences into the environmental policies of other countries ('green imperialism'). The 'constitutional functions' of GATT law in limiting discretionary regulatory powers by general principles of freedom and rule of law are particularly important in the EC, whose 'common commercial policy shall be based on uniform principles' (Article 113:1 of the EC Treaty) that are largely derived from GATT law.

D. GATT Dispute Settlement Proceedings on Trade-Related Environmental Measures (TREMS)

The GATT dispute settlement system has been used more frequently for the settlement of 'environmental disputes' between states than any other international dispute settlement mechanism.[22] By October 1994, seven panel reports on trade measures for environmental policy objectives had been submitted to the GATT Council under Article XXIII. A few additional GATT complaints against the use of TREMS, such as Canada's complaint in 1985 against the EEC's ban on importation of skins of certain seal pups and the US complaint in 1987 against the EC's import restrictions on beef produced from hormone-fed animals, did not lead to formal dispute settlement rulings.[23] It has already been noted that none of the several hundred international environmental agreements has ever been challenged in GATT. Nor have any of the approximately 300 national environmental regulations, which were notified to GATT over the past ten years in the context of the 1979 Agreement on

22 See Petersmann, 'International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT', *Journal of World Trade* (1993) 43-81.

23 For a discussion of some of these disputes, see E.-U. Petersmann, *supra* note 19, at 197, 211 seq.

Technical Barriers to Trade, been challenged in a GATT dispute settlement proceeding.

1. GATT Panel Reports on TREMS

As GATT law leaves it to each individual GATT contracting party to decide on its own environmental policies, none of the seven GATT panel reports under Article XXIII challenged the environmental or health objectives pursued by the government concerned. But all seven reports found that the discriminatory elements of the respective trade restrictions were inconsistent with GATT rules and not 'necessary' (Article XX) for achieving the stated environmental objectives:

a) The *1982 panel report on the US prohibition of imports of tuna and tuna products from Canada* found that the import embargo was inconsistent with Article XI:1 and, because the USA had neither catch limits for its own fishing fleets on most of the species of tuna nor restrictions on domestic consumption of tuna and tuna products in the USA, the US embargo on Canadian tuna had not been 'made effective in conjunction with restrictions on domestic production or consumption' of tuna as required by Article XX(g).[24]

b) The *1987 panel report on US taxes on petroleum and other environmental taxes* found that the taxes on petroleum discriminated against imported products in violation of Article III:2. The US did not even argue that this tax discrimination had been necessary for achieving the environmental objectives.[25]

c) The *1988 panel report on Canada's restrictions on exports of unprocessed herring and salmon* found the export prohibitions to be inconsistent with Article XI:1 and not justified under Articles XI:2(b) or XX(g) because, *inter alia*, the Canadian export restrictions were not 'primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish'.[26]

d) The *1990 panel report on Thailand's restrictions on importation of cigarettes* related to the protection of health and found the import restrictions to be inconsistent with Article XI:1 and not justified under Article XX(b) because Thailand could avail itself of alternative, GATT-consistent non-discriminatory tobacco-control strategies applicable to both imported and domestic cigarettes, which – according to several World Health Organization recommendations – were more effective in protecting citizens against the risks of smoking. 'Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation

24 BISD 29 S/91-109.
25 BISD 34 S/136-166.
26 BISD 35 S/98-115 (paragraph 4.7).

of foreign cigarettes was an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b)'.[27]

e) The *1991 panel report on US restrictions on imports of tuna* (Tuna I) concluded that the import embargo was inconsistent with Article XI:1 and not justified by Article XX(b) and (g) because, *inter alia*, a unilateral import embargo was not 'necessary' for the protection of dolphins in the High Seas as long as the USA

> had not exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements which would seem to be desirable in view of the fact that dolphins roam the waters of many States and the high seas.[28]

f) The *1994 panel report on US import restrictions on tuna* (Tuna II) found that neither the 'primary nation embargo' nor the 'intermediary nation embargo' could be justified under Article XX because, *inter alia*, 'both the primary and intermediary nation embargoes on tuna were taken by the United States so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins', and the GATT contracting parties had not agreed to give each other in Article XX the right to impose trade embargoes to force other countries to change their domestic environmental policies.[29]

g) The *1994 panel report on US taxes on automobiles* found that the luxury tax on automobiles and the environmental 'gas guzzler tax' on automobiles were non-discriminatory and not inconsistent with GATT Article III:2. By contrast, the 'corporate average fuel economy' requirement was found to accord foreign cars and car parts less favourable conditions of competition than to like domestic products in a manner inconsistent with Article III:4 and not justified under Article XX(d) or (g).[30]

The GATT dispute settlement proceedings on TREMS demonstrate not only that unilateral 'green protectionism' and 'green imperialism' are real threats to multilateral trade. They also prove that the GATT dispute settlement procedures offer effective means of containing these threats without limiting the national sovereignty of countries to decide on their own environmental policy objectives and employ effective instruments of environmental policy. The panel reports clarify that – as regards the use of *domestic* instruments of environmental policy – GATT law only requires their non-discriminatory use (Article III); in case of trade restrictions supplementing domestic production requirements (such as the 'corporate average fuel economy' requirement), the

27 BISD 37 S/200-228 (paragraph 81).
28 BISD 39 S/155-205 (paragraph 5.28).
29 GATT document DS 29/R of June 1994.
30 GATT document DS 31/R of October 1994.

trade measures must be 'necessary' for, or 'primarily aimed' at, the protection of health or environmental resources (Article XX). Compared to the regional law of the EC, GATT law does not require that trade-related environmental measures be 'proportionate'. GATT law also leaves more scope for 'competition among different national regulatory standards', as recommended by environmental economics, without limiting the right of contracting parties to apply higher national standards or to negotiate internationally agreed standards of environmental policy.

2. *Clarification of GATT Rules on TREMS through GATT Dispute Settlement Proceedings*

The GATT dispute settlement process has contributed to the clarification of a large number of interpretative issues relating to the consistency of TREMS with GATT Articles I, III, IX, XI and XX:

(a) Environmental Labelling Provisions

The 1991 Panel Report on US Restrictions on Imports of Tuna[31] found that general environmental labelling provisions did not fall under GATT Article IX on 'marks of origin'. An optional use of a 'Dolphin Safe' label was found by the panel to be consistent with GATT Articles I:1 and III because it neither restricted the sale of tuna products with or without such a label nor granted any governmental advantage.

(b) Product and Production Regulations

In earlier GATT practice regarding the GATT requirement of national treatment of imported and domestic *'like products'* (Article III), the permissibility of product differentiations under Article III has been determined on a case-by-case basis in terms of factors such as the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality; and the usual classification of goods in tariff and tax nomenclatures.[32] The 1987 Panel Report on Japan's customs duties, taxes and labelling practices on imported alcoholic beverages described the function of Article III:2 in the following terms:

> Just as Article I:1 was generally construed, in order to protect the competitive benefits accruing from reciprocal tariff bindings, as prohibiting 'tariff specializa-

31 The Panel Report, *supra* note 28 has so far not been adopted by the GATT Council at the request of both parties to the dispute. But in the GATT Council deliberations on this report, all GATT contracting parties, with the exception of Mexico and the USA, proposed adoption of the Panel Report.

32 Cf. BISD 18 S/97, 102; BISD 34 S/83, 115.

> tion' discriminating against 'like' products, only the literal interpretation of Article III:2 as prohibiting 'internal tax specialization' discriminating against 'like products' could ensure that the reasonable expectations, protected under GATT Article XXIII, of competitive benefits accruing under tariff concessions could not be nullified or impaired by internal tax discrimination against like products.[33]

In the 1992 Panel Report on US beer regulations, the panel emphasized that

> [t]he purpose of Article III is ... not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'

as prohibited in Article III:1.[34]

The panel concluded that the US product differentiations between 'low alcohol beer' and 'high alcohol beer' were based on health policy purposes and, because they did not 'afford protection to domestic production' in terms of Article III:1, were not inconsistent with Article III.

The 1994 Panel Report on US automobile taxes also emphasized 'that issues of likeness under Article III should be analyzed primarily in terms of whether less favourable treatment was based on a regulatory distinction taken so as to afford protection to domestic production'.[35] The panel found no conclusive evidence that the aim or effect of the threshold of the US luxury tax on automobiles selling for more than 30,000 dollars had been to change the conditions of competition for the benefit of US automobiles. As the luxury tax differentiations between automobiles selling for more or less than 30,000 dollars were not found to afford protection to the domestic production of automobiles, the panel concluded that

> automobiles above and below that threshold value could not, for the purposes of the luxury tax, be considered as like products under Article III:2, first sentence, and that different treatment could therefore be accorded under the luxury tax to automobiles above and below the threshold.[36]

Based on a similar reasoning, the panel also found that the US 'gas guzzler tax', which was imposed on domestic producers or importers of automobile model types with low fuel economy in order to conserve fossil fuels, had not

33 BISD 34 S/83, 114.
34 BISD 39 S/206-299.
35 GATT Doc. DS 31/R, para. 5.9.
36 DS 31/R, para. 5.15.

changed conditions of competition in a manner affording 'protection to domestic production' (Article III:1). Consequently,

> in terms of Article III:2, and for the purposes of the gas guzzler tax, foreign automobiles below the 22.5 mpg threshold were not 'like' domestic automobiles above the threshold, and different and less favourable treatment under the gas guzzler measure could therefore be accorded to them.[37]

In examining whether the exclusion from the gas guzzler tax of light trucks was consistent with Article III, the panel found that this exclusion had not modified the conditions of competition between foreign and domestic producers of light trucks and the 'efficiency of the measure was not by itself relevant in assessing its conformity under Article III'. Hence:

> imported automobiles were not 'like' domestic light trucks, and different and less favourable treatment under the gas guzzler measure could therefore be accorded to them.[38]

In its examination of the US 'corporate average fuel economy' regulation, which requires that the average fuel economy of automobiles manufactured by a US car producer or sold by a car importer not fall below a certain level, the panel 'noted that for a measure to be subject to Article III, it does not have to regulate a product directly. It only has to affect the conditions of competition between domestic and imported products'. Notwithstanding the fact that the 'Corporate Average Fuel Efficiency' requirement was not applied to cars as such, but that it regulated the conduct of manufacturers and importers, the panel followed from the text of Article III:4

> that the direct application of a regulation to a producer did not mean that the regulation did not 'affect' the conditions of competition of the product.[39]

The panel found that the separate counting of the 'domestic fleet' and of the 'imported fleet' of cars, and the application to imported products of the 'fleet averaging' requirement based on the ownership or control relationship of the US car manufacturer or car importer, accorded less favourable conditions of competition to cars and car parts of foreign origin than those accorded to like domestic products, and were thus inconsistent with Article III:4. The panel explicitly confirmed

> that Article III:4 does not permit treatment of an imported product less favourable than that accorded to a like domestic product, based on factors not directly relating to the product as such.[40]

37 DS 31/R, at para. 5.26.
38 DS 31/R, at paras. 5.33-5.35.
39 DS 31/R, para. 5.45.
40 DS 31/R, para. 5.54.

The 1991 Tuna Panel Report found 'that the Note ad Article III covers only those measures that are applied to the product as such', and that the US regulations on

> the domestic harvesting of ... tuna to reduce the incidental taking of dolphin ... could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.

The Panel followed that 'the United States import prohibition would not meet the requirements of Article III' and was inconsistent with Article XI:1 of the GATT.[41] The 1994 Tuna II panel report confirmed

> that Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the policies or practices of the country of origin with those of the country of importation. The Panel found therefore that the Note ad Article III could only permit the enforcement, at the time or point of importation, of those laws, regulations and requirements that affected or were applied to the imported and domestic products considered as *products*. The Note could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country.[42]

In its 'concluding remarks', the 1991 Tuna Panel Report inferred from GATT Article III that 'a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own'. This *obiter dictum* is similar to another GATT panel finding of 1952 that a Belgian law on family allowances was inconsistent with GATT Articles I:1 and III:2 because it required the levy of a charge on imported goods if the country of export did not have a similar system of family allowances.[43] National laws on family allowances or on fishing methods for tuna cannot affect the products as such. By contrast, the Uruguay Round Agreement on Technical Barriers to Trade implies that products may be 'unlike' in terms of GATT Article III if their 'product characteristics or their related processes and production methods' (PPMs) are unlike. The prohibition in GATT Articles I:1 and III of making GATT concessions conditional on the domestic policies of the exporting country is therefore not absolute. For instance, the restriction of imported products depending on whether they are consistent with non-discriminatory PPMs in the importing country may be consistent with GATT Articles III and XI if the PPMs are 'product-related' and equivalent to product standards because non-observance of the

41 BISD 39 S/195, 196.
42 DS 29/R, para. 5.8.
43 Panel Report on Belgian Family Allowances, in BISD 1 S/59-62.

PPMs would leave a trace in the product or entail health and environmental product risks. Moreover, PPMs inconsistent with GATT Articles III or XI may be justifiable under GATT Article XX.[44]

(c) Environmental Taxes and Border Tax Adjustments

As regards environmental taxes, the 1987 Panel Report on US Taxes on Petroleum[45] found that

> Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products

and that

> a change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement

regardless of the current trade impact of the tax discrimination involved. The Panel also determined that the GATT rules on border tax adjustments

> do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment.

But the Panel pointed out that

> if a contracting party wishes to tax the sale of certain domestic products (because their production pollutes the domestic environment) and to impose a lower tax or no tax at all on like imported products (because their consumption or use causes fewer or no environmental problems), it is in principle free to do so. The General Agreement's rules on tax adjustment thus give the contracting party in such a case the possibility to follow the polluter-pays principle, but they do not oblige it to do so.

44 The consistency with GATT Article III of product differentiations based on internationally agreed PPMs (e.g. prohibition of using CFCs), and the consistency with GATT Article XX of discriminatory trade restrictions for environmental purposes such as those under the Montreal Protocol on the Protection of the Ozone Layer, remain to be clarified in GATT practice. It is important in this respect that GATT Article XX prohibits only 'arbitrary or unjustifiable discrimination' and thereby recognizes that differential treatment of countries may be justifiable (e.g. depending on whether they apply the limitations on the production and use of CFCs set out in the Montreal and London Protocols on the protection of the ozone layer). The economic theory of optimal intervention would suggest that 'optimal tariffs' may only in very exceptional circumstances be an efficient instrument of environmental policy, for instance if a large importing country buys all products of a polluting firm in a small neighbouring country and the tariffs on these imported products are 'necessary' for 'internalizing' illegal transboundary pollution damage caused by the foreign production facilities.

45 The Panel Report was adopted in June 1987 and is published in BISD 34 S/136 seq.

As mentioned above, the 1994 Panel Report on US automobile taxes found that the US luxury tax on automobiles selling for more than 30,000 dollars, as well as the environmental 'gas guzzler tax' on domestic producers and importers of automobile model types with low fuel economy, were non-discriminatory and consistent with Article III:2.

(d) The 'Public Policy Exceptions' in GATT Article XX

i) Freedom to Set National Environmental Standards (Article XX(b) and (g))

The 1990 Panel Report on Thailand's Import Restrictions on Cigarettes[46] stated that GATT Article XX(b) 'clearly allowed contracting parties to give priority to human health over trade liberalization' provided the trade measures were 'necessary' in terms of Article XX(b). The 1991 Panel Report on Imports of Tuna likewise noted 'that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards'. Similarly, 'Article XX(g) allows each contracting party to adopt its own conservation policies'. The 1991 Tuna Panel Report confirmed that the conditions set out in Article XX(b) and (g) which limit resort to this exception – namely that the measures taken must be 'necessary to protect ... life or health' or 'related to the conservation of exhaustible natural resources', and that they do not 'constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade' – refer to the trade measure requiring justification under Article XX, not however to the life, health or conservation policies adopted by the contracting party.[47]

These interpretations seem to confirm that the 'general exceptions' in Article XX are designed to allow contracting parties to give priority to the 'public policies' listed in Article XX over trade liberalization by authorizing trade restrictions necessary for the pursuit of overriding public policy goals, including protection of life, health and environmental resources.

ii) Prohibition of 'Unjustifiable Discrimination' and of a 'Disguised Restriction on International Trade' (Introductory Paragraph of Article XX)

The 1982 Panel Report on US Prohibitions of Imports of Tuna and Tuna Products from Canada[48] found, *inter alia*, 'that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable' since similar actions had been taken by the United States against imports from other countries and for similar reasons. The Panel 'furthermore felt that the US action should not be considered to be a disguised restriction on international trade, noting that the US prohibition of imports of tuna and tuna prod-

46 BISD 37 S/200-228.
47 BISD 39 S/199, para. 5.27.
48 The Panel Report was adopted in February 1982 and published in BISD 29 S/91 seq.

ucts from Canada had been taken as a trade measure and publicly announced as such'. But this interpretation of the prohibition of a 'disguised restriction' has been rightly criticized in subsequent GATT practice[49] because the function of the prohibition of 'disguised restrictions' is not only to ensure transparency, but to supplement the prohibition of 'unjustifiable discrimination' among GATT contracting parties by a prohibition of indirect protection of domestic producers. It remains to be clarified in GATT practice what the precise meaning of the 'disguised restriction on international trade' is and to what extent differences in domestic environmental policies may justify differential trade policy measures on the ground that Article XX admits certain discrimination between countries where the same conditions do *not* prevail.

iii) Necessity of Trade Measures (Article XX(b))

The 1990 Panel Report on Thailand's Import Restrictions on Cigarettes, in its examination of the US argument that Thailand could achieve its public health objectives through internal measures consistent with GATT Article III and that import restrictions inconsistent with Article XI:1 were therefore not 'necessary' within the meaning of Article XX(b), concluded

> that the import restrictions imposed ... could be considered as 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.[50]

The Panel noted that other countries had introduced, in accordance with recommendations by the World Health Organization, non-discriminatory labelling regulations, ingredient disclosure regulations, bans on unhealthy substances and other non-discriminatory tobacco-control strategies, which allowed governments to control the quality of cigarettes, reduce their consumption and inform the public of the dangers of smoking. The Panel concluded therefore

> that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The panel found, therefore, that Thailand's prac-

49 See, e.g., GATT Council Minutes C/M/155 at 13.

50 See also the 1989 Panel Report on Section 337 of the US Tariff Act, BISD 36 S/345, 392, para. 5.26: 'a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions'.

> tice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b).[51]

The 1991 Tuna Panel Report determined that the *unilateral* import restrictions by the USA, which had been found to be inconsistent with Article XI:1, would not meet the requirement of necessity set out in Article XX(b) as long as the United States had not demonstrated to the Panel

> that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative agreements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.

Moreover, the Panel found that a trade measure could not be considered to be necessary within the meaning of Article XX(b) if the trade restriction was based on 'unpredictable conditions [that] could not be regarded as necessary to protect the health or life of dolphins'.[52]

The 1994 Tuna II Panel Report found, *inter alia*, that

> both the primary and intermediary nation embargoes on tuna were taken by the United States so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins.

The panel considered that the objectives of the General Agreement could be maintained only by a narrow interpretation of Article XX(b), which permitted contracting parties to deviate from the basic obligations of GATT by taking trade measures to implement policies within their own jurisdiction. The panel concluded that trade embargoes taken so as to force other countries to change their environmental policies within their own jurisdiction could not be considered 'necessary' for the protection of animal life or health in the sense of Article XX(b).[53]

The 1992 GATT Panel Report on US restrictions on alcoholic and malt beverages construed the 'necessity requirement' in GATT Article XX as both a 'least GATT-inconsistent test' as well as a 'least trade-restrictive test' in the sense that a GATT contracting party invoking Article XX as a justification for departures from other GATT provisions must demonstrate its choice of the least trade-restrictive measure available.[54]

51 BISD 37 S/200, 225, para. 81.
52 BISD 39 S/155, 199-200, para. 5.28.
53 DS 29/R, paras. 5.38-5.39.
54 BISD 39 S/206, 283, paras. 5.43 and 5.52.

iv) 'Measures Relating to the Conservation of Exhaustible Natural Resources' (Article XX(g))

Article XX(g) does not specify how the trade measures must be 'relating to the conservation' of 'exhaustible natural resources' and how they have to be 'made effective in conjunction with restrictions on domestic production or consumption'. The 1988 Panel Report on Canada's export restrictions on unprocessed herring and salmon[55] followed from the purpose and context of Article XX(g) that:

> the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The panel concluded, for these reasons, that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g). The panel, similarly, considered that ... a trade measure could ... only be considered to be made effective 'in conjunction with' production restrictions if it was primarily aimed at rendering effective these restrictions.

The 1991 and 1994 Tuna Panel Reports agreed with the reasoning of this panel report 'on the understanding that the words 'primarily aimed at' referred not only to the purpose of the measure, but also to its effect on the conservation of the natural resource'.[56] The Tuna II Panel Report found:

> If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.

The panel concluded

> that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g).[57]

55 BISD 35 S/98-115.
56 DS 29/R, para. 5.22.
57 DS 29/R, paras. 5.26-5.27.

The 1994 Panel Report on US automobile taxes concluded, *inter alia*,

> that less favourable treatment, in terms of conditions of competition, accorded to large imported cars due to separate foreign fleet accounting and inconsistent with Article III:4, was not primarily aimed at the conservation of natural resources and therefore could not be justified by Article XX(g).

The panel further found that,

> subject to the requirements of the introductory clause of Article XX, the fact that other less trade restrictive measures, such as a fuel tax, could be used equally and more effectively to encourage fuel efficiency did not imply that the measure could not be justified under Article XX(g).[58]

But this finding leaves open whether the prohibition of a 'disguised restriction on international trade' in the introductory clause of Article XX does imply a requirement to adopt the least trade-restrictive measures of environmental policy.

v) Use of Article XX for the Protection of Environmental Resources Abroad?

The 1991 Tuna Panel Report examined and rejected what it called an 'extra-jurisdictional interpretation'[59] of Articles XX(b) and XX(g). The Panel noted that the text of Article XX(b) referred to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. But the Panel inferred from the drafting history of Article XX(b) 'that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country'. This historical argument does not appear convincing for several reasons.[60]

58 DS 32/R, paras. 5.61 and 5.63.

59 This term appears misleading in so far as the import restrictions of the USA were applied within the jurisdiction of the United States to products imported into the United States and served a purpose (i.e. protection of dolphins in the High Seas) which can be viewed as a legitimate concern of the US and possibly a 'common good'. What the Panel seems to have meant was the political purpose of the US import restrictions to unilaterally influence the Mexican fishing regulations and put pressure on Mexican fishing vessels to use US environmental standards for fishing tuna with 'purse-seine' nets.

60 According to the general rules of international treaty interpretation, as set out in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, the drafting history is only a 'supplementary means of interpretation' to which recourse may be had only 'in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'. The primary means of treaty interpretation mentioned in Article 31 – namely the text, context, 'object and purpose' of the treaty, subsequent agreements and treaty practice, and 'any relevant rules of international law applicable in the relations between the parties' – rather suggest that GATT Article XX may also justify national and internationally agreed

The Panel finding rested, however, mainly on the following functional concerns:

> The Panel considered that if ... each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement ..., [the] General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

The 1994 Tuna II Panel Report rightly qualified and clarified the above-mentioned findings, which had given rise to misleading interpretations. The latter panel report observed that:

- *first*, the text of Article XX(b) and (g) does not spell out any limitation on the location of the persons, animals, plants and natural resources to be protected;
- *second*, two previous panel reports had considered Article XX(g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision;[61]
- *third*, measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX (such as paragraph (e) relating to products of prison labour) and other Articles of the GATT with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure;

measures for the protection of the 'global commons' (such as the ozone layer) and other environmental resources outside the national jurisdiction of the importing country (such as endangered species protected under the CITES Convention). Since all GATT contracting parties have recognized the responsibility of states 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction' (Principle 2 of the 1992 Rio Declaration on Environment and Development), this customary rule of international law must be taken into account in the interpretation of GATT rules and calls for interpreting Article XX in a manner allowing e.g. export restrictions for dangerous chemicals or wastes if their disposal abroad may give rise to environmental hazards. Likewise, Article XX should also be construed in conformity with the sovereign right under general international law to conclude *inter-se*-agreements for the protection of the environment, even if they modify GATT rules between certain of the parties in conformity with the criteria set out in Article 41 of the Vienna Convention on the Law of Treaties. While such *inter-se*-agreements may not legally justify trade restrictions *vis-à-vis* third countries, GATT law admits not only the use in multilateral environmental agreements of non-discriminatory trade measures which apply 'to an imported product and to the like domestic product and (are) collected or enforced in the case of the imported product at the time or point of importation' (Interpretative Note ad Article III in Annex I to the GATT). But Article XX also allows 'justifiable discrimination' between countries where the same conditions do *not* prevail. Also the drafting history of Article XX suggests that the drafters were concerned about both foreign and domestic health and resources, cf. Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', *Journal of World Trade* (1991) 37 seq.

61 BISD 35 S/98; 29 S/91.

– *fourth*, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their country, nor are states barred, in principle, from regulating the conduct of vessels having their nationality, or any persons (e.g. fishermen) on these vessels, with respect to persons, animals, plants and natural resources outside their territory.

The panel concluded therefore that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the USA pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(b) and (g).

E. Environmental Rules in the 1994 Agreement Establishing the World Trade Organization (WTO)

The successful conclusion of the Uruguay Round negotiations met one of the main demands by the 1992 UN Conference on Environment and Development for international cooperation to promote sustainable development through trade. Not only are the efficiency gains from trade liberalization (including the increased export opportunities and reduced dependence of developing countries on natural resource exploitation) expected to be much higher than the pollution cost of increased international transports and to generate more public resources for environmental protection and important direct environmental gains (e.g. from less intensive farming and less water pollution by fertilizers and pesticides). But environmental concerns have also been explicitly addressed in a number of the Uruguay Round Agreements included in the 1994 Agreement Establishing the WTO.[62]

1. The Agreement Establishing the WTO

The WTO Agreement integrates the GATT, the Tokyo Round Agreements and the Uruguay Round Agreements into one single legal and institutional framework. The Preamble to the WTO Agreement, unlike that of the GATT, explicitly refers to the objective of sustainable development and to the need to protect and preserve the environment. It states:

> Recognizing that their [i.e. the contracting parties'] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and

62 For the text of the Uruguay Round Agreements, see *supra* note 4.

> preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

2. The Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement requires that in respect of technical regulations, which under the 1994 TBT Agreement also include PPMs relating to the final characteristics of the product, products imported from the territory of any member shall be accorded treatment no less favourable than that accorded to like products of national origin (national treatment) and to like products originating in any other country (most-favoured-nation treatment). Mandatory technical regulations, voluntary standards and conformity assessment procedures shall not be more trade-restrictive than necessary to fulfil a legitimate objective, including *inter alia*, 'protection of human health or safety, animal or plant life or health, or the environment' (Article 2:2). But the Agreement recognizes that each country has the right to set the level of protection that it deems appropriate in these areas, 'taking account of the risks non-fulfilment would create' (Article 2:2).

The Agreement encourages countries to use international standards 'except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems' (Article 2:4). However, there is no requirement to harmonize domestic regulations and standards. Technical regulations based on relevant international standards 'shall be rebuttably presumed not to create an unnecessary obstacle to international trade' (Article 2:5). The Agreement also sets out procedures for conformity assessments and for their reciprocal recognition (Articles 5-9).

3. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

The SPS Agreement recognizes the right of each government to take measures to protect human, animal and plant health, and to determine the level of health protection considered appropriate on the basis of an evaluation of the risks involved. But the Agreement aims at ensuring

> that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence (Article 2:2),

except for temporary precautionary restrictions (Article 5:7). SPS measures shall neither 'unjustifiably discriminate between Members' nor 'constitute a

disguised restriction on international trade' (Article 2:3). If there are a number of measures which could ensure the level of health protection which a government considers to be appropriate,

> Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility (Article 5:6).

Like the TBT Agreement, the SPS Agreement's dispute settlement procedures provide for the dispute settlement panel to seek scientific expert advice as appropriate, including from a technical experts group or from other international organizations (Article 11:2).

4. The Agreement on Agriculture

The Agreement promotes the long-term reform, liberalization and market-orientation of agricultural policies by commitments in the areas of market access, domestic support and export competition. The commitments to reduce market access barriers and domestic support for agricultural production will also set incentives for less-intensive farming and better protection of the environment. The exemptions from the various reduction commitments permit, *inter alia*, direct 'payments under environmental programmes' provided they are 'limited to the extra costs or loss of income involved in complying with the government programme' (Annex 2, Section 12) and 'have no, or at most minimal, trade-distorting effects or effects on production' (Annex 2, Section 1).

5. The Agreement on Subsidies and Countervailing Measures

The Agreement defines 'prohibited subsidies' (Articles 3, 4), 'actionable subsidies' (Articles 5-7) and 'non-actionable subsidies', on which countervailing duties cannot be applied (Articles 8, 9). According to Article 8.2(c), 'assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms' are considered a non-actionable subsidy,

> provided that the assistance:
> i) is a one-time non-recurring measure; and
> ii) is limited to 20 per cent of the cost of adaptation; and
> iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
> iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

v) is available to all firms which can adopt the new equipment and/or production processes.

According to Annexes I(h) and II of the Subsidies Agreement,

> inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

This could imply that e.g. environmental carbon taxes, which have been recently introduced by a number of OECD countries (like Denmark, Finland, Norway, the Netherlands and Sweden), may be imposed on imported goods and rebated on exported goods under GATT's rules on border tax adjustments (cf. Articles II:2, III, VI:4).[63]

6. The Agreement on Trade-Related Intellectual Property Rights (TRIPS)

The Agreement pursues the three-fold objective

> to reduce distortions and impediments to international trade, ... to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade (Preamble).

By providing more enforceable protection to intellectual property rights, the Agreement is expected to encourage more research, innovation and better access to technology, including environmental technology. Article 27 defines the 'patentable subject matter' and explicitly authorizes members to

> exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law (paragraph 2).

Paragraph 3 allows governments to

> also exclude from patentability
> (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

63 Such an interpretation was apparently not intended by the drafters, who even seem to have reached a 'gentlemen's agreement' that the reference to taxes on energy inputs would apply only for the benefit of a limited number of countries (such as India) which still apply a system of cumulative indirect taxes, and would not be used for broader policy conclusions regarding border adjustments and energy taxes. Cf. Demaret, Stewardson, 'Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes', *Journal of World Trade* (1994) 5 seq., at 30.

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof...

7. The General Agreement on Trade in Services (GATS)

Article XIV(b) of the GATS contains a general exception clause similar to Article XX(b) of the GATT authorizing 'measures necessary to protect human, animal or plant life or health'. The ministerial Uruguay Round 'Decision Concerning Paragraph (b) of Article XIV of the GATS' notes that

> since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Article XIV.

In order to determine whether any modification of Article XIV is required to take account of environmental measures, the Decision provides for the establishment of a Working Party to

> examine and report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development. The Working Party shall also examine the relevance of intergovernmental agreements on the environment and their relationship to the Agreement.

8. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

The DSU applies to all the 'multilateral trade agreements' listed in the Annexes to the 1994 WTO Agreement. Even though it builds upon the past GATT dispute settlement system and incorporates the past GATT case-law under Article XXIII of GATT, it provides for an unprecedented 'legalization', 'automaticity', extension and 'quasi-judicialization' of the dispute settlement procedures of the world trading system.[64] There is no other worldwide organization with such a comprehensive, legally mandatory, speedy and – due to the possibility of 'cross-retaliation' – powerful dispute settlement system. Hence, the DSU is likely to be used in the future also for the settlement of international disputes over TREMS. It seems important in this respect that the DSU explicitly authorizes dispute settlement panels to 'seek information from any relevant source and consult experts' or 'request an advisory report in writing from an expert review group' (Article 13). In

64 See Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948', *CML Rev.* (1994) 1157-1244.

the 1990 GATT dispute settlement proceeding against Thailand's restrictions on importation of cigarettes, for instance, the dispute settlement panel requested expert advice from the World Health Organization on the health risks of smoking and on the effectiveness of non-discriminatory tobacco-control strategies.

F. The GATT/WTO Work Programme on Trade and Environment

1. Institutional Developments

The 'Working Group on Environmental Measures and International Trade' (EMIT), which had been established by the GATT Council back in 1971 in order to prepare a contribution to the 1972 UN Conference on the Environment, convened in November 1991 and adopted the following three items as agenda for its future work:

a) trade provisions contained in existing multilateral environmental agreements *vis-à-vis* GATT principles and provisions;
b) multilateral transparency of national environmental regulations likely to have trade effects;
c) trade effects of new packaging and labelling requirements aimed at protecting the environment.

Following the 1992 UN Conference on Environment and Development (UNCED), the GATT Contracting Parties decided in December 1992 on the 'UNCED follow-up process', which became another agenda item of the EMIT Working Group.[65] This decision acknowledged that the multilateral trading system had a central role to play in fostering 'sustainable development' and in helping to address the problems of environmental degradation and over-exploitation of natural resources. It also noted that GATT was neither competent nor equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment.

In 1993/94, the GATT Group on Environmental Measures and International Trade, the GATT Committee on Trade and Development, the GATT Council, the Trade Negotiations Committee, the GATT Working Group on Export of Domestically Prohibited Goods and other Hazardous Substances, and the new Sub-Committee on Trade and Environment, established by the Preparatory Committee for the WTO, devoted a large number of meetings to the examination of TREMS and UNCED follow-up work. In a Decision of 15 December 1993, adopted together with the Final Act of the Uruguay Round, the Trade Negotiations Committee decided to draw up a work programme on 'trade and environment' and emphasized again that

65 See BISD 39 S/330-331.

- there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable Multilateral Trading System on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other; and
- the competence of the multilateral trading system ... is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members.[66]

These considerations were reaffirmed in the ministerial 'Decision on Trade and Environment', adopted on the occasion of the signing of the Final Act embodying the results of the Uruguay Round negotiations at Marrakesh on 14 April 1994, which provides for the establishment of a WTO Committee on Trade and Environment and, pending the establishment of this Committee at the first meeting of the General Council of the WTO, of a Sub-Committee on Trade and Environment established by the Preparatory Committee. The Decision lists a large number of trade-related environmental matters, which are to be examined by these Committees. Many of these subject matters of the GATT/WTO work programme on trade and environment were already discussed during the 13 sessions of the EMIT Working Group or, subsequently, by the Sub-Committee on Trade and Environment. These ongoing discussions have so far *not* led to a consensus that the agreed objectives of 'sustainable development' and protection of the environment require further adjustments of GATT/WTO law.

2. *Relationship Between the GATT/WTO Trading System and Trade Measures Pursuant to Multilateral Environmental Agreements*

In accordance with Principles 11 and 12 of the 1992 Rio Declaration, there continues to be broad consensus that *unilateral* trade restrictions to influence the environmental policies of another country, including attempts to impose 'environmentally friendly' non-product related PPM requirements on imported goods, are inconsistent with GATT law and should be avoided because transboundary environmental problems should be addressed by way of international agreement. As regards *multilaterally agreed* trade restrictions for environmental purposes, only 18 out of about 180 MEAs concluded so far include provisions for trade measures. Some of these trade provisions (e.g. on the import ban on products produced with, but not containing ozone-depleting substances) have so far not been used, and none of these trade measures has ever been challenged in a GATT dispute settlement proceeding. But consideration is being given to include trade measures in some recent MEAs, e.g. on climate change, protection of bio-diversity and of the world's forests.

66 The text of this Decision is reproduced in *Trade and the Environment*, GATT 17 February 1994, at 9.

During the negotiations on e.g. the 1987 Montreal Protocol and its 1990 London Amendment on the Protection of the Ozone Layer and the negotiations on the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the GATT contracting parties participating in these MEAs had been of the view that the trade provisions in these agreements, including restrictions on imports from, and exports to, third countries (e.g. of ozone-depleting substances, hazardous wastes), were consistent with their obligations under GATT law and did not require an amendment or waiver of GATT rules. Notably trade restrictions and special dispute settlement procedures applied *among* parties to an MEA would prevail as a special *inter-se*-agreement. But the discriminatory character of some of the trade provisions *vis-à-vis* third countries – such as the prohibition of imports of ozone-depleting substances from third countries, and of products containing such substances (e.g. semi-conductors produced with the use of CFCs), without a corresponding prohibition of imports from parties to the Convention and Protocols on the Protection of the Ozone Layer – may prompt third countries to challenge their GATT-consistency. Whether such discrimination *vis-à-vis* third GATT member countries is 'justifiable' (e.g. because the 'same conditions' in terms of Article XX do not prevail between countries with production and consumption controls on CFCs and countries without such controls), and whether discriminatory trade restrictions are 'necessary' in terms of Article XX GATT, remains controversial.

The discussions in the EMIT Group have so far not led to a consensus that amendments of GATT law are called for in order to promote effective environmental policies. But a number of proposals continue to be under discussion so as to avoid conflicts with GATT law whenever MEAs include trade measures *vis-à-vis* non-parties or for the protection of environmental resources outside the national jurisdiction. For instance:

a) Similar to the presumption of the 'necessity' of technical regulations based on relevant international standards (cf. Article 2.6 of the 1994 TBT Agreement), or to the 'general exception' in GATT Article XX(h) for 'measures undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the *Contracting Parties* and not disapproved by them or which is itself so submitted and not so disapproved', one approach for preventing conflicts could be to collectively define criteria under which MEAs could be presumed to be GATT-consistent. For instance, trade restrictions on ecologically sensitive goods (such as hazardous products, ozone-depleting substances or endangered species) in MEAs could be rebuttably presumed to be 'necessary' and not 'unjustifiably discriminatory' in terms of Article XX of GATT if (1) the MEAs deal with transboundary regional or global environmental problems, (2) have an open membership and (3) include as many GATT contracting parties as are necessary for the granting of a 'waiver' (e.g. two-thirds). The criteria

could further specify that – since environmental preferences, absorption capacities and opportunity costs differ from country to country and may justify differing environmental PPMs – differential trade measures *vis-à-vis* non-members must either be product-related or, if the negative environmental impact of a foreign PPM is not embodied in the product as such, that they may be justifiable under GATT law only if the lower environmental protection commitments of non-parties cause transboundary pollution to 'global commons' or directly to the parties to the MEA.

b) Another proposal is to create an explicit 'environmental window' in the GATT by inserting 'protection of the environment' into the 'general exceptions' listed in GATT Article XX, or by clarifying in a collective interpretation that the language of Article XX(b) and (g) is broad enough to cover all global or regional environmental problems addressed in MEAs. Measures for the protection of the environment have so far always been recognized to 'protect human, animal or plant life or health' (Article XX(b)) or 'the conservation of exhaustible natural resources' (Article XX(g)) in terms of Article XX. Legal certainty could, however, be improved by a formal recognition that Article XX is broad enough to cover all transboundary global or regional environmental problems addressed in MEAs.[67]

c) Still another proposal is to insert into GATT law (possibly by means of a 'Decision') a 'trumping clause', as has been agreed in the NAFTA in the case of a conflict between, on the one hand, obligations under NAFTA and, on the other, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (as amended at London in 1990 and at Copenhagen in 1992), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the 1973 CITES Convention.

d) The 137 signatories to the Montreal Protocol, the 124 parties to the CITES, the 72 signatory countries of the Basel Convention, the more than 95 member countries of the 1992 UN Framework Convention on Climate Change, or the more than 90 member countries of the 1992 Convention on Biological Diversity may easily receive the necessary support for a majority decision on a 'GATT waiver' pursuant to Article XXV:5. An *ex post* waiver approach is, nonetheless, considered to have a number of disadvantages, such as legal uncertainty until the granting of the waiver, time-consuming delays and limited duration of a waiver. Case-by-case waivers and alternative approval procedures, as have been provided for in GATT Article XX(h) for international commodity agreements, would also provide less guidance for future negotiators of MEAs than general *ex ante* interpretations of Article XX.

67 From an anthropocentric view of environmental protection, as it has been recognized in Principle 1 of the 1992 Rio Declaration ('Human beings are at the centre of concerns for sustainable development'), most environmental problems endanger 'human, animal or plant life or health'. But countries remain free to adopt a 'bio-centric approach' and protect environmental resources (such as air, soil, water, animals and plants) regardless of whether they are necessary for protecting human welfare.

State practice under existing MEAs seems to confirm the widespread concern to avoid unilateral trade measures inconsistent with GATT rules. Thus, the contracting parties of the 1987 Montreal Protocol decided in November 1993 and in October 1994 that it was technically not feasible to impose a ban or restrictions on the import of products from third countries produced with, but not containing, controlled substances from Annexes A or B. The possibility of restricting imports of goods produced with ozone-depleting substances has so far not been used. It was also noted that nearly all countries with major manufacturing capacity of goods produced with Annex A substances had already ratified the Protocol, and the number of non-parties with major manufacturing capacity was considered to be insignificant.

In the context of CITES, Article X permits trade with third countries if the competent authorities in the non-party have issued comparable documentation which substantially conforms with the requirements of CITES. Contracting parties rely on recommendations by the Animals and Plants Committees to determine where trade measures may need to be applied in order to ensure that trade in the protected species is regulated properly. In two cases involving Thailand (1991-1992) and Italy (1993), the Standing Committee of CITES recommended to the contracting parties under Article XIV to impose import and export prohibitions for CITES species on those countries so as to put pressure on them to implement domestic legislation in compliance with their CITES provisions.

In March 1994, the parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal adopted a Decision to ban all exports of hazardous wastes which are destined for final disposal from OECD to non-OECD countries and phase out by the end of 1997 all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD countries. Intra-OECD transboundary movements of hazardous wastes may continue pursuant to the Convention's procedures of 'prior informed consent'.

The 1992 Convention on Biological Diversity entered into force in December 1993 and illustrates that the 'WTO-consistency' of MEAs may give rise to new kinds of legal problems. The objectives of the Convention include the conservation of biological diversity, the sustainable use of its components and the equitable sharing of the benefits arising out of the utilization of genetic resources. The Convention does not provide for trade restrictions. But one trade-related aspect of the Convention concerns the recognition in Article 16 that intellectual property rights relating to bio-technology may have an influence on the implementation of the Convention and shall be supportive of the Convention's objectives.

3. *Multilateral Transparency of National Environmental Regulations Likely to Have Trade Effects*

Transparency of TREMS is seen as an important means of enhancing legal certainty, reducing transaction costs and preventing international disputes from arising. There was broad agreement in the EMIT Group that compliance with the notification requirements under the existing GATT provisions (such as Article X and the 1979 Dispute Settlement Understanding) and the future WTO law (such as the 1994 TBT and SPS Agreements and the Trade Policy Review Mechanism) would ensure multilateral transparency of most national environmental regulations. Some countries expressed concerns over the adequacy of transparency of 'economic instruments' (such as environmental taxes and subsidies), voluntary measures taken by the private sector (such as eco-labelling schemes), measures by sub-federal government authorities, and governmental production, packaging, handling, recycling and disposal requirements designed to promote environmentally friendly resource-use 'from cradle to grave'. One proposal is to establish enquiry points open to all interested parties, public and private, to provide information on such TREMS. But there are also concerns to avoid over-extending information and notification requirements.

4. *Trade-Related Packaging and Labelling Requirements Aimed at Protecting the Environment*

The usefulness of market-conforming labelling schemes for promoting environmentally sound producer and consumer choices is generally admitted. But there is also increasing recognition that the influence of local industry on the choice of product criteria and threshold levels for awarding eco-labels, and restrictions on the access of foreign suppliers to certification and labelling systems, may be abused for anti-competitive purposes. The EMIT Group did not try to prescribe what kind of packaging and labelling measures should or should not be used for the protection of the environment. Instead, the emphasis was on the potential trade effects of voluntary and mandatory measures; approaches to the setting of criteria and threshold levels in the design of the measures; the scope for standardization, harmonization and mutual recognition; trade problems arising from the use in packaging and labelling requirements of PPMs rather than product characteristics; and special costs faced by small-size foreign suppliers, particularly from developing countries.

Two types of packaging requirements have been discussed. If requirements stipulate what kinds of packaging can or cannot be used in a particular market, they can restrict trade in both packaged goods and packaging materials from countries where recycled material is not readily available, is costly, or where long transport distances require the use of more packaging per unit of product supplied. If their objective is to reduce pressure on domestic waste

disposal facilities, rather than to reduce the resource-intensity of packaging abroad, such product-related packaging requirements may be consistent with GATT rules. Requirements prescribing the recovery, re-use, recycling or disposal of packaging, once it has served its original purpose, may be applied not only through technical regulations and standards but also through economic measures such as deposit refund schemes, taxes, charges, and fees for accessing waste handling systems in the country of destination. Smaller industries may be less able to afford the costs of take-back requirements, and requirements that suppliers recover their packaging waste from overseas markets may not be a commercially viable option. Some concerns have been expressed about whether recovery, re-use or recycling requirements are covered by the TBT Agreement, and how deposit refund schemes are to be treated in GATT terms.

Eco-labelling schemes are increasingly based on life-cycle analyses of a product's PPMs and environmental qualities. They may then come into conflict with the product-based rules of the GATT/WTO trading system, for instance if they discriminate between 'like products' and make market access conditional on complying with domestic PPMs. Yet, most existing eco-labelling schemes continue to be voluntary rather than mandatory in nature and may then not fall within the scope of Article III of GATT. Mandatory labelling schemes are also likely to be consistent with Article III if they differentiate between products on the basis of their environmental characteristics without discriminating against imported 'like products'. As unlabelled products may face market disadvantages, the risks of one-sided local industry influence in, and the importance of effective access for foreign suppliers to, the domestic process of defining product criteria and threshold levels for awarding eco-labels has been emphasized. Eco-labelling criteria based on PPMs may involve costs, competitive disadvantages and the need to disclose confidential business information to overseas suppliers. As it may be neither desirable nor possible to harmonize differences in environmental preferences and conditions, there may also be little room for harmonizing differing eco-labelling schemes. However, mutual recognition of eco-labels and of the criteria used for their award should be promoted.

Mandatory and voluntary eco-labelling schemes are covered by the TBT Agreement if they are based on product characteristics or on PPMs which alter or affect the final quality of the product (in contrast to PPMs that cannot be seen or identified in the final product and are not covered by the TBT Agreement's definition of 'technical regulations' and 'standards'). They have therefore to comply with the TBT Agreement's obligations of non-discrimination, the prohibition of unnecessary obstacles to trade, the encouragement of the use of international standards and of mutual recognition of equivalent standards, and the notification and transparency obligations. The TBT

Agreement thereby responds to some of the concerns about misuse of eco-labelling schemes and their trade-restrictive effects.

5. UNCED Follow-up

The discussions in the EMIT Group led to the confirmation of a large number of UNCED principles, such as: the shared view that trade and environmental rules and policies should be mutually supportive; the need for an international consensus on environmental measures addressing transboundary or global environmental problems; and the rejection of unilateral extraterritorial trade sanctions as a means to induce foreign countries to change their non-product-related PPMs and environmental policies.[68] Many delegations recommended the examination of other problems in UNCED's 'Agenda 21', such as: participation of non-governmental organizations; dispute settlement provisions in MEAs; the future treatment in GATT/WTO of PPMs and their link to the GATT concept of 'like products'; the particular problems of less-developed countries; the potential trade effects of economic instruments such as environmental taxes and subsidies; and the impact of environmental protection on competitiveness. Practically all of these subjects became part of the work programme in the Ministerial Decision on Trade and Environment adopted on 14 April 1994.

6. The 1994 Decision on Trade and Environment

The Ministerial Decision on Trade and Environment, adopted on the occasion of signing the Final Act Embodying the Results of the Uruguay Round, defines the terms of reference of the WTO Committee on Trade and Environment as well as its initial work programme. Like the EMIT Group, the Committee is not a negotiation forum. It shall only 'identify the relationship between trade measures and environmental measures' and 'make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required'. The Committee shall report to the first biennial meeting of the Ministerial Conference at Singapore after the entry into force of the WTO.

The Committee shall initially address the following matters, in relation to which any relevant issue may be raised:

- the relationship between the multilateral trading system and TREMS, including MEAs;
- charges and taxes for environmental purposes;

68 On the widely shared view of the basic compatibility of the UNCED guiding principles with GATT rules and the underlying 'economic theory of optimal intervention', see Petersmann, *supra* note 22.

- requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
- transparency of TREMS;
- the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs;
- the effect of environmental measures on market access, especially in relation to developing countries, and the environmental benefits of removing trade restrictions and distortions;
- the issue of exports of domestically prohibited goods;
- the work programme envisaged in the 1994 Decision on Trade in Services and the Environment and in the relevant provisions of the TRIPS Agreement.

Following the conclusion of the Uruguay Round, several issues of this work programme were taken up within GATT and in the work of the new Sub-Committee on Trade and Environment. For instance, in June 1994 the GATT Secretariat hosted a public symposium on trade, environment and sustainable development, with the participation of a large number of representatives from non-governmental organizations, so as to provide information on the work in progress in the GATT on trade and environment and bring together recognized experts in the field to examine and debate the role that trade policies can play in environmental protection and conservation and in accelerating sustainable development.[69] In September 1994, the Sub-Committee on Trade and Environment devoted its meeting to the relationship between the provisions of the multilateral trading system and (a) charges and taxes for environmental purposes and (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling. The meeting in October 1994 was devoted to the relationship between the provisions of the multilateral trading system and TREMS, including MEAs. The meeting in November 1994 analyzed the effect of environmental measures on market access, especially in relation to less-developed countries, and the environmental benefits of removing trade restrictions and distortions. A related issue is the developing countries' call for compensation for environmental services, such as the export of greenhouse gas absorption services by countries with large forest resources, which so far receive no payment. A common *leitmotiv* in all these discussions is that, because GATT and the WTO are not environmental agencies, the main challenge of the discussions in GATT and the WTO will be to find the proper 'policy mix' that can respect the environmental goals and avoid unnecessary trade restrictions and distortions.

69 See: Report on the GATT Symposium on Trade, Environment and Sustainable Development, GATT Doc. TE 008 of 28 July 1994; Papers presented at the GATT Symposium on Trade, Environment and Sustainable Development, GATT Doc. TE 009 of 28 July 1994.

G. Need for Further Clarifications of the GATT-Consistency of TREMS

In its 'concluding remarks', the 1991 Tuna Panel Report noted 'that the provisions of the General Agreement impose few constraints on a contracting party's implementation of domestic environmental policies'. The preceding survey confirms that GATT law permits the use of first-best, second-best and third-best instruments of environmental policy (such as production subsidies, environmental taxes and import tariffs) but limits the use of fourth-best policy instruments such as quantitative trade restrictions on non-hazardous products (e.g. tuna). But the GATT-consistency of various TREMS, notably of unilateral or multilaterally agreed import restrictions to protect environmental resources abroad (e.g. the EC import bans on whale products and seal skins), continue to be controversial and may require further clarification.

1. GATT Article III (National Treatment)

GATT's border adjustment rules allow each country to address domestic environmental externalities (e.g. production pollution and consumption pollution) in a trade-neutral way and to accommodate local producers' concerns about distortive effects of environmental measures on their competitiveness. Their limitation to product-related internal taxes, charges, product standards and product-related PPMs however, gives rise to the question to what extent the increasing use of taxes on environmentally sensitive production inputs (such as energy and transportation) and of environmental PPMs (such as recycled content requirements) will be consistent with GATT's border adjustment rules. For instance:

– Will the new environmental provisions in the WTO Agreement – such as the explicit reference to sustainable development and protection of the environment in the preamble to the WTO Agreement, or the explicit recognition in Annex I (h) and in Annex II of the Subsidy Agreement of 'energy, fuel and oil used in the production process' as 'inputs physically incorporated' in the exported product – lead to new interpretations of the concept of 'like products' and of GATT's border tax adjustment rules in respect of carbon dioxide or other energy taxes? Would the application of carbon taxes on the 'energy inputs' of imported products be consistent with the 'like product' concept of Article III?[70]

70 See, e.g., Düerkop, 'Trade and Environment: International Trade Law Aspects of the Proposed EC Directive Introducing a Tax on Carbon Dioxide Emissions and Energy', *CML Rev.* (1994) 807-844, at 823 ('The proposed tax would fall under the category of 'taxes occultes' and is therefore not subject to border adjustment according to GATT practice'). But Düerkop argues (at 823) that the new Subsidy Code provisions will lead to a change in GATT practice on border tax adjustments.

The 1994 panel report on *US taxes on automobiles* also raises questions as to the extent to which environmental regulations may differentiate among similar products. For instance:

- What criteria are appropriate for determining whether specified product differentiations (such as the exemption of 'light trucks' from the scope of application of the US 'gas guzzler tax') have the purpose or effect of affording foreign producers less favourable conditions of competition? Is it permissible to use recycled content requirements, based on the environmental conditions in the importing country (e.g. waste in over-supply), as a *de facto* or *de iure* discrimination against 'like products' from exporting countries where the waste to be recycled may be in short supply?

As regards environmental product requirements and PPMs, the application of the new TBT and SPS Agreements to all WTO member countries may imply that the existing freedom under GATT Article III to adopt non-discriminatory internal regulations may be limited under the WTO Agreement by the 'necessity' and 'least-trade-restrictiveness' requirements of the TBT and SPS Agreements. The precise impact of the revised TBT Agreement on packaging, labelling, recycling, waste management and other requirements 'related to the product characteristics' remains to be clarified, as the TBT Agreement does not seem to be applicable to un-incorporated PPMs. There seems to be a widely shared view that harmonization of non-product-related PPMs may not be desirable as long as locally different PPMs do not cause transboundary pollution. For environmental conditions, preferences and local absorption capacities may differ from country to country. Import restrictions depending on non-product-related PPMs abroad, apart from being an impractical and inefficient policy instrument, may then amount to interference into countries' sovereign rights to determine their environmental standards. Whether GATT's border adjustment rules and their limitation to product-related PPMs need to be revised, remains to be clarified.

2. *GATT Articles XVI and VI (Subsidies, Countervailing Duties and Anti-dumping Duties)*

The new Subsidy Agreement's 'specificity standard' (Article 2) for defining a 'subsidy' seems to exclude treating 'generally available', lower foreign environmental standards as a countervailable 'regulatory subsidy'.[71] The detailed EC rules on 'environmental subsidies' suggest that future disputes over the legal admissibility of environmental subsidies may also prompt the

71 On the economic concept of 'regulatory subsidies' see, e.g., Trachtman, 'International Regulatory Competition, Externalization and Jurisdiction', *Harv. Int'l L.J.* 34 (1993), 47-104, at 81 seq.

WTO contracting parties to define more precise criteria for the legal consistency of 'green subsidies' with WTO law and for their countervailability.

Proposals for 'eco-dumping duties' on 'below cost sales' of imported products which do not 'internalize' their environmental costs and use this price advantage for lowering their export prices, seem to lack an economic rationale. Like anti-dumping laws and practices in general, such proposals risk running counter to competition laws and policies, e.g. in the EC and the USA, and may serve as a pretext for 'green protectionism' and 'green imperialism' (e.g. by subjecting foreign producers to the environmental PPMs of the importing country). Empirical evidence suggests that

> environmental measures have not been the source of significant cost differentials among the major competitors and have had minimal effects on overall trade between OECD and non-OECD countries.[72]

Underlying the 'eco-dumping' argument is a call for import protection for domestic industries with higher environmental PPMs, which can be addressed more appropriately under GATT's existing safeguard clauses and border adjustment rules.

3. Article XX (General Exceptions)

GATT Article XX needs to be clarified in several respects. For instance:

- Is Article XX broad enough to cover all trade-related environmental objectives since the ultimate purpose of environmental measures is 'to protect human, animal or plant life or health'?
- Does Article XX justify TREMS for the protection of the 'global commons' only if they are 'necessary to protect human, animal or plant life or health' (Article XX(b)) in the country applying the TREMS, or if they are 'primarily related' to the 'conservation of exhaustible natural resources' (Article XX(g)) in that country?
- Does Article XX(a) justify import restrictions if foreign production methods (e.g. use of cruel leghold traps) are held to be 'immoral'? How can the 'slippery-slope risk' of extending such arguments to other areas of social policy (such as minimum wages and worker rights) be contained?
- Must Article XX be construed in conformity with the sovereign freedom to conclude *inter-se*-agreements on the reciprocal protection of the do-

72 See 'Environmental Policies and Industrial Competitiveness', OECD (1993) at 7. The OECD study notes 'that the costs of compliance with environmental regulations have had little or no impact on the overall competitiveness of countries' (at 7). On the micro-economic level, 'the net positive and negative competitiveness effects of environmental regulations will differ by sector in accordance with a number of factors' (at 10). There is also 'little evidence that there are countries which actively attract polluting industries to obtain economic advantages' (at 12).

mestic environment, such as CITES, the 1989 Basel Convention, the 1989 Lomé-Convention and the 'Prior Informed Consent System' set up by the UN Environmental Program and the Food and Agricultural Organization for dangerous chemicals?

- Can MEAs and Article XX justify import restrictions *vis-à-vis* non-members of MEAs as a means of inducing third countries to accept the agreed production and consumption limitations for environmental purposes (e.g. on CFCs and CFC-containing products), especially if the lower environmental standards of the third countries give rise to transboundary pollution?
- Is deforestation of tropical forests a matter of exclusive national jurisdiction because, rather than causing transboundary pollution, it only reduces unpaid exports of 'carbon absorption services' for the greenhouse gas emissions of other countries?
- How is the prohibition in Article XX of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' to be construed?
- Should the prohibition in Article XX of 'a disguised restriction on international trade' be construed as a 'necessity' requirement, as has been done by the ECJ in respect of the identically worded requirement in Article 36 of the EC Treaty? Could such an interpretation of GATT Article XX be reconciled with the previous GATT dispute settlement practice relating to Article XX (e.g. the 1994 *automobiles taxes* case), where the panel did not examine the prohibition of 'a disguised restriction on international trade' and found that e.g. Article XX(g) could be applied without a 'necessity requirment'?

4. *What is the Relationship of GATT/WTO Law to International Environmental Law?*

As in the EC case-law relating to TREMS, future WTO dispute settlement proceedings will be confronted with the question of whether, and to what extent, WTO dispute settlement proceedings can and should take into account international environmental law. Moreover, should a future WTO-Round negotiate a TREMS-Agreement (e.g. modelled on the Uruguay Round Agreement on TRIPS) with references to existing multilateral environmental agreements as a means of harmonizing environmental standards? National PPMs without transboundary environmental effects may legitimately differ by country according to local environmental conditions and preferences. International harmonization of environmental PPMs may, however, be desirable in the case of transboundary and global environmental problems, particularly where differences among environmental PPMs may have trade-distorting effects. Such harmonization is best done through MEAs and may also justify their incorporation into GATT/WTO law so as to ensure the mutual consistency of trade and environmental rules. There may also be a need

for agreed *ad hoc* interpretations so as to ensure mutually consistent interpretations of WTO rules (e.g. TRIPS provisions on 'plant breeder rights', biotechnologies and genetic materials) with MEAs (such as the 1992 Convention on Biological Diversity).[73]

II. European Trade Law and European Environmental Law in the Regional Context of EC Integration

A. Comparative Legal Aspects of GATT and EC Rules on Trade and Environment

1. Some Commonalities of GATT and EC Law

(a) No Mention of 'Environmental Protection' in the Original Treaty Texts

The EEC Treaty of 1957 provides for a customs union in accordance with the requirements of GATT Article XXIV. Like the original text of the GATT, the 1957 text of the EEC Treaty did not explicitly refer to the 'environment', 'environmental protection' or 'environmental policy'. Some of the EC's customs union rules – such as the prohibition of tax discrimination in Article 95 and the 'public policy exceptions' in Article 36 – were almost literally copied from the corresponding GATT provisions in Articles III:1,2 and XX.

As regards the foreign trade policy of the EC, the few general rules in Articles 110-115 of the EC Treaty do not specify the 'general principles' upon which, according to Article 113, 'the common commercial policy shall be based'. This sketchy regulation of the EEC's common commercial policy was possible because, at the time of the negotiation of the EEC Treaty, all EEC Member States had already accepted GATT law as a code of conduct for trade policy-making. The EEC Treaty explicitly stipulates that the GATT rights and GATT obligations 'shall not be affected by this Treaty' (Article 234), and that the Commission shall 'ensure the maintenance of all appropriate relations with ... the General Agreement on Tariffs and Trade' (Article 229). According to the 'GATT case-law' of the ECJ, GATT law is legally binding on the EC and operates as an 'integral part of the Community legal system' with legal primacy over 'secondary' EC law.[74] However, according to the ECJ's '*Banana Judgment*' of 5 October 1994, the ECJ will not review

73 See on this issue, e.g., W. Lesser, *Institutional Mechanisms Supporting Trade in Genetic Materials: Issues under the Biodiversity Convention and GATT/TRIPS* (1994).

74 On the relationship between GATT law and EC law, see Petersmann, 'Application of GATT by the Court of Justice of the EC', *CML Rev.* 20 (1983) 397-437; Jacobs, 'Review by the Court of Justice of Commercial Policy Measures: Recent Trends and Future Prospects', in M. Maresceau (ed.), *The EC's Commercial Policy after 1992: The Legal Dimension* (1993) 63-77; Castillo de la Torre, 'The Status of GATT in EEC Law', *Journal of World Trade* (1993), 35-43.

the GATT consistency of secondary EC law unless the regulation, directive or decision concerned was explicitly designed to implement the GATT obligations of the EC and its member countries. Thus, notwithstanding the fact that – according to the EC Treaty – GATT law is 'binding on the institutions of the Community and on Member States' (Article 228:7) and the GATT obligations of the EC member countries 'shall not be affected by the provisions of this Treaty' (Article 234:1), the Community law principle of 'primacy of international legal obligations over secondary Community law' is no longer effectively enforced by the ECJ. EC Council regulations, like Regulation No. 404/93 on the common organization of the market in bananas, are presumed to be lawful even if two previous GATT dispute settlement reports found the EC Council regulation inconsistent with the GATT obligations of the EC.[75]

(b) A Large Number of GATT and EC Dispute Settlement Proceedings Over TREMS

Both GATT and EC law differ from most other international economic organizations in their comprehensive dispute settlement and enforcement mechanisms. Since the 1980s, complaints over 'green protectionism' and over the 'extraterritorial' application of environmental production standards to imported products gave rise to an increasing number of dispute settlement proceedings over the relationship between trade and environmental rules in both GATT and EC dispute settlement practice. The relevant legal standards of review, applied by GATT dispute settlement panels and the ECJ, are – at least in part – based on similar legal principles, such as requirements of non-discrimination, necessity and use of least-trade restrictive measures of environmental policy.

(c) Subsequent Incorporation of Environmental Rules into both GATT and EC Law

Increasing concern over the degradation of the environment led the contracting parties of both GATT and the EC to formally amend GATT as well as the EEC Treaty in order to promote a better integration of trade and environmental rules. Since the Single European Act of 1986 and the 1994 Agreement

75 On the Community law principle of 'primacy of international legal obligations over secondary Community law', see Petersmann, 'Commentary on Article 234 of the EEC Treaty', in H. Groeben, J. Thiesing, C. Ehlermann (eds), *Kommentar zum EWG-Vertrag* (4th ed., 1991) at 5726 seq. On the unfortunate implications of the *banana case* (Case C-280/93, *Germany v. Council,* judgment of 5 October 1994, not yet reported) for the status of international law as 'integral part of the Community legal system', see Petersmann, 'The GATT Dispute Settlement System as an Instrument of the Foreign Trade Policy of the EC', in N. Emiliou, D. O'Keefe (eds), *European Community External Trade Law after the Uruguay Round* (1995).

Establishing the WTO, both the GATT/WTO law and the EC Treaty explicitly recognize 'the objective of sustainable development'[76] and include specific rules and safeguard clauses for the protection of the environment. Both GATT/WTO law (e.g. GATT Articles III, XX and the 1994 Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures) and EC law (e.g. Articles 36, 100a:4 and 5, 130t) permit the use of 'economic instruments' of environmental policy (such as eco-taxes, eco-labelling, eco-tariffs, eco-subsidies) as well as 'regulatory instruments' (such as product standards and PPMs). Both recognize the right of member countries to adopt higher national standards for the protection of the domestic environment. GATT and EC member countries also agree that trade and environmental policies should be mutually supportive since trade liberalization promotes a more efficient allocation and use of scarce resources.

2. *Major Differences among GATT and EC Rules on Trade and Environment*

There remain important differences between the GATT and EC Treaty provisions on trade and environment (see *Table 6*). For instance:

(a) More Limited National Policy Autonomy in the EC

The EC Treaty lacks a national treatment provision similar to GATT Article III:4,5 which explicitly authorizes non-discriminatory internal regulations. Consequently, also non-discriminatory national product regulations, production regulations or marketing regulations permissible under GATT Article III:4,5 may, if adopted by an EC member country, be inconsistent with the prohibition in Articles 30 and 34 of the EC Treaty of 'quantitative restrictions ... and all measures having equivalent effect' (as construed by the '*Dassonville* case-law' of the ECJ) or with secondary environmental regulations or directives of the EC.

The EC Court has, however, recently explicitly modified its case-law relating to Article 30 'in view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect was to limit their commercial freedom even where such rules were not aimed at products from other Member States'.[77]

76 Preamble to the 1994 Agreement Establishing the WTO. Article 2 of the EC Treaty refers to the task of the EC to promote 'sustainable and non-inflationary growth respecting the environment'. Article 100a:3 stipulates with regard to the approximation of laws that the 'Commission, in its proposals ... concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'.

77 Joined Cases C-267/91 and 268/91, *Keck and Mithouard*, judgment of 24 November 1993 (not yet reported); Case C-292/92, *Hünermund and Others*, judgment of 15 December 1993 (not yet reported).

According to this new case-law,

> the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements was not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), provided that these provisions applied to all affected traders operating within the national territory and provided they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[78]

As a result of this 'November revolution of the ECJ',[79] the scope of application of Article 30 of the EC Treaty seems to be limited to *product regulations*. By contrast, national *marketing regulations* are no longer covered by the prohibition of Article 30 if they meet the two conditions

- that these provisions applied to all affected traders operating within the national territory

and

- provided they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

78 Joined Cases C-267/91 and 268/91, *Keck and Mithouard*, judgment of 24 November 1993, Bulletin No 33-93, ECJ, at 4-5.

79 See Reich, 'The "November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited', 31 *CML Rev.* (1994) 459-492.

TABLE 6:

Trade and Environmental Rules: A Comparison of GATT and EC Treaty Provisions

GATT:	**general trade rules**	**EC:**	**– free movement of goods in 'non-harmonized' areas**
Art. III:1,2	= prohibition of tax discrimination	Art. 95	= prohibition of tax discrimination
Art. III:4,5	= prohibition of other internal discrimination	Arts. 9, 12 Arts. 30, 34	= prohibition of tariffs and other measures which 'directly or indirectly, actually or potentially hinder trade' (*Dassonville* case-law) subject to the
WTO/TBT-Code 1994	= non-discrimination and least trade-restrictiveness requirements = use of international standards unless they are inappropriate for the fulfilment of the legitimate objectives pursued	'rule of reason'	= that national measures may not fall under Article 30 provided they – serve mandatory public policy requirements – and are non-discriminatory, necessary and proportionate (*Cassis-de-Dijon* case-law); – or are non-discriminatory national marketing regulations (*Keck* case-law); or – are justified by EC environmental law (e.g. Article 130r: restrictions on waste trade)
Art. II	= voluntary tariff bindings	Arts. 9, 12 ff.	= elimination of tariffs
Art. XI	= prohibition of NTBs	Arts. 30, 34	= prohibition of NTBs
Art. XX	= sovereignty over national trade measures and '*inter-se*-agreements' provided they involve – no arbitrary discrimination, – no disguised restrictions on trade, and – are 'necessary' for, or 'primarily aimed' at, public policy purposes	Art. 36	= sovereignty over national trade measures for public policy purposes provided they involve – no arbitrary discrimination, – no disguised restrictions on trade, – and are necessary as well as – proportionate
Art. XXIV	= exception for customs unions and free trade areas	Arts. 9 ff., 234, 229	= customs union pursuant to GATT Article XXIV
Art. X	= transparency, rule of law, judicial review	Art. 164 ff.	= judicial protection of individual rights, 'market freedoms', non-discrimination, least-trade restrictiveness, proportionality, rule of law, democracy etc.
Art. XVI, III	= prohibition of trade-distorting subsidies	Art. 92 ff.	= prohibition of trade-distorting subsidies
			– regulatory powers in 'harmonized areas' of EC integration
			e.g. Arts. 100 ff., 99 (approximation of laws subject to national safeguard measures e.g. under Article 100a:5)
			e.g. Arts. 43, 75, 92, 130s (environmental EC regulations and directives subject to national safeguard measures e.g. under Article 130t)
			e.g. Arts. 110-115 (GATT law as 'integral part of the Community legal system')

The new case-law further suggests that national *production regulations* are also likely to fall outside the scope of application of Articles 30 and 34 of the EC Treaty provided they are applied in a non-discriminatory manner and have neither the purpose nor effect of hindering trade between EC Member States.

The judicial re-interpretation of Article 30 of the EC Treaty may be seen as a move towards greater policy autonomy of EC Member States with regard to *non-discriminatory marketing and production regulations*, which is more similar to the principle underlying GATT Article III:4 than to the previous *Cassis de Dijon* case-law of the ECJ (see below). Interestingly, the entry into force of the new WTO Agreement on 1 January 1995 will entail a new limitation of the policy autonomy of WTO member countries which they previously enjoyed under GATT Article III regarding the application of non-discriminatory internal technical regulations, standards, conformity assessment procedures, sanitary and phyto-sanitary measures. For, as a result of the application of the 1994 Agreements on TBT and SPS to all member countries of the WTO, non-discriminatory internal technical regulations, standards, conformity assessment procedures and SPS measures, even if permissible under Article III of the 'GATT 1947', may become inadmissible for WTO member countries if they are not 'necessary' in terms of the WTO Agreements on TBT and SPS.

(b) More limited Scope of the 'Public Policy Exception' in Article 36 of the EC Treaty

National trade restrictions for environmental purposes that may be permitted under the 'general exceptions' in GATT Article XX – for instance if they are 'necessary to protect human, animal or plant life of health' (Article XX(b)) or are primarily aimed at 'conservation of exhaustible resources' (Article XX(g)) – may be inconsistent with Article 36 of the EC Treaty which, even though its text was in part literally copied from the corresponding GATT Article XX, is construed by the ECJ more stringently (e.g. as permitting only 'necessary' and 'proportionate' measures for those justification grounds explicitly listed in Article 36).

(c) Approximation of Laws and a Common Environmental Policy in the EC

The EC's broad regulatory powers for the approximation of laws (e.g. under Articles 99, 100, 100a) and, since the entry into force of the Single European Act of 1986, for a common environmental policy (Articles 130r, s, t) have led to the adoption of more than 300 EC regulations, directives, decisions and

other measures for the protection of the environment.[80] This common EC economic and environmental law has no equivalent in GATT law.

Moreover, the environmental dimension must form an integral part of the process of defining and implementing all Community policies, as stipulated in Articles 2 and 130r:2 of the EC Treaty. Hence, the EC Commission has reserved itself the right to declare the EC Treaty rules on subsidies (Article 92) and restrictive business practices (Article 85 seq.) inapplicable to certain 'green state aids' and environmentally beneficial private agreements. The EC's more comprehensive approach towards trade and environment is illustrated by the EC's eco-labelling scheme in EC Regulation 880/92/EEC of 23 March 1992, which is designed to provide EC consumers with information on the environmental impact of products pursuant to the 'cradle to grave approach' (i.e. taking account of the environmental effects of the production, distribution, use and disposal of products).[81]

In 'harmonized areas' of EC integration, the lawfulness of national environmental measures by EC Member States depends on their consistency with the secondary EC regulations and EC directives rather than with the free trade rules of the EC Treaty. Even in these harmonized areas of EC integration, the EC still remains legally bound by the international GATT rules in its external trade and environmental relations with GATT member countries.

(d) More Comprehensive and More Precise EC Subsidy And Competition Rules on TREMS

In GATT discussions on trade and environment, it is often emphasized that differences among national production factors, comparative advantages, consumer preferences and environmental absorption capacities may justify different environmental standards. International harmonization of national environmental, social and other standards therefore cannot be presumed to increase economic efficiency. In the EC, however, the harmonization of diverging national PPMs or waste disposal regulations was often justified on grounds of competition policy so as to avoid unequal conditions and distortions of competition within the common market.[82] Article 130r:2 of the EC

80 For a survey of EC environmental regulations and directives up to 1990, e.g. on the protection of water, air, fauna, flora and nature conservation in general, noise emission levels, chemical and other wastes, see L. Krämer, *EEC Treaty and Environmental Protection* (1990) 1-28.

81 See P. Bristow, 'The European Community Eco-Labelling Scheme', in *Life-Cycle Management and Trade*, OECD (1994) 50-54.

82 See, e.g., EC Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ L 201, at 56), which 'lays down ... procedures for harmonizing the programmes for the reduction and eventual elimination of pollution from existing industrial establishments and is intended to improve the conditions of competition in the titanium dioxide industry' (Article 1).

Treaty requires the integration of 'environmental protection requirements ... into the definition and implementation of other Community policies'. As 'environmental externalities' are a sign of market distortions and the EC shall be based on 'a system ensuring that competition in the internal market is not distorted' (Article 3g), the integration of competition and environmental policies is a necessary condition for promoting undistorted competition.

The EC's competition rules, e.g. for environmental state aids and private anti-competitive practices, are more specific and more comprehensive than those of GATT/WTO law.[83] For instance, the successive 'Community Frameworks for Environmental State Aids' of 1974, 1980, 1986 and 1994 specify in great detail the conditions under which the EC Commission has permitted under Article 92:3 of the EC Treaty, and will continue to permit, national 'adaptation aids' for the protection of the environment (e.g. 'green state aids' up to 30% of the investment costs for certain voluntary pollution reductions and application of more stringent environmental standards, temporary exemptions from environmental taxes).[84] The EC's 1994 guidelines on environmental state aids have been criticized on the ground that they may lead to the authorization of 'green state aids' that may be found inconsistent with the subsidy rules of the 1994 WTO Agreement.[85] Another problem relates to the consistency of environmental state aids with the 'polluter-pays principle'. In a Council Recommendation of 1975, exceptions to this principle were allowed in two cases:

- where the immediate application of very stringent standards is likely to cause serious economic disruption;
- where, in the framework of other policies such as regional or agricultural policy, environmental investment is designed to resolve certain structural problems of a regional or sectoral nature, provided that the aid granted complies with the provisions of the Treaty, and in particular Articles 92 and 93.[86]

But the legal status of this Recommendation and the generous approval by the EC Commission of environmental aid schemes may be considered doubtful since the Single European Act of 1986 has elevated the 'polluter-pays principle' to a principle of primary Community law (Article 130r:2) without mention of any exceptions to the principle.

83 On the various kinds of competition rules in GATT/WTO law, see Petersmann, 'Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System', *Aussenwirtschaft (Swiss Review of International Economic Relations)* (1994) 231-277.

84 See: Community Framework for Environmental State Aids, OJ C 72/3-9 of 10 March 1994. On the Commission's decision practice under Article 92:3, see L. Hancher, T. Ottervanger, P.J. Slot, *EC State Aids* (1993) at 211 seq.

85 See Quick, 'Der Gemeinschaftsrahmen für staatliche Umweltschutzbeihilfen', *Europäische Zeitschrift für Wirtschaftsrecht* (1994) 620-624.

86 Council Recommendation 75/436 OJ 1975 L 194/1.

Under Articles 85 and 86 of the EC Treaty, the EC Commission has exempted certain private restrictive agreements and joint ventures (e.g. for the recycling of glass) if their environmental benefits outweighed the restrictions of competition.[87] In its 22nd annual report on competition policy, the EC Commission described its position in the following terms:

> Although the Commission welcomes voluntary initiatives to improve the environmental conditions in a given sector, it has to ensure that undertakings competing in that sector do not resort to agreements which go beyond what is necessary to achieve that goal, to the detriment of competition.[88]

In the *VOTOB* case, for instance, which involved an agreed price increase imposed by six undertakings so as to finance their investment costs for reducing vapour emissions from their storage tanks used by their customers, the EC Commission objected to this private 'environmental charge' as being incompatible with Article 85 of the EC Treaty.[89] In accordance with Article 85, the Commission carries out a case-by-case analysis whether an agreement or concerted practice between undertakings – if it has been found to appreciably affect trade between Member States and prevent, restrict or distort competition within the common market in violation of Article 85:1 – may qualify for an individual exemption under Article 85:3 whenever the following four cumulative requirements of Article 85:3 are met:

- the measure 'contributes to improving the production or distribution of goods or to promoting technical or economic progress';
- it allows 'consumers a fair share of the resulting benefit';
- it does not 'impose ... restrictions which are not indispensable to the attainment of these objectives'; and
- it does not 'afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

87 While it is difficult to find Commission Decisions relating to Article 85 which, based on Article 85:3, declare Article 85:1 inapplicable solely in view of the environmental benefits of the private agreements, a number of exemptions mention the environmental benefits as one of several justifications. Examples are reprinted in J. Cameron, P. Demaret, D. Geradin (eds), *Trade and the Environment: The Search for Balance*, Vol. II (1994) at 611 seq. (e.g. Commission Decision of 8 December 1983 relating to a proceeding under Article 85 of the EC Treaty involving cooperation between several undertakings in developing new coal gasification technology, in which the Commission notes, *inter alia* : 'using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal'; Commission Decision of 14 January 1992 relating to a co-reinsurance agreement for the covering of certain environmental risks, which was exempted pursuant to Article 85:3 on the ground that, *inter alia*, the measures 'also contribute to ... the protection of the environment').

88 Twenty-Second Report on Competition Policy, EC 1992, para. 75.

89 The case is discussed in the 22nd Report on Competition Policy, *supra* note 88, paras. 75-77, 177-186, as well as by Gyselen, 'The Emerging Interface between Competition Policy and Environmental Policy in the EEC', in J. Cameron, P. Demaret, D. Geradin, *supra* note 87, Vol. I, 242-260; T. Portwood, *Competition Law and the Environment* (1994) at 147 seq.

Private agreements on the protection of the environment, which are actually designed to correct market failures and improve consumer information (e.g. by means of eco-labels and internalization of environmental costs into market prices), may fulfil the first two positive requirements. But whether the additional two negative conditions are also met and whether the benefits outweigh the anti-competitive effects, has to be examined case by case. Consequently, no 'group exemption' has so far been granted by the EC Council or Commission for certain categories of 'environmentally friendly agreements'.[90] There is no basis in the EC Treaty to suggest that environmental considerations should prevail over those of competition policy. As it must be assessed in every given case whether the ecological and other benefits outweigh the anti-competitive effects, it seems unlikely that a group exemption can be used to exempt 'environmentally friendly agreements' or specified 'eco-industries' from the competition rules.

(e) 'Constitutionalization' and Supra-nationality of EC Trade and Environmental Law

The EC 'treaty constitution' establishes a supra-national organization with much more comprehensive legislative, administrative, parliamentary and judicial powers and directly applicable individual rights than the inter-governmental GATT or the new WTO. EC primary law incorporates and prescribes a number of important principles of international environmental law, which must be complied with by all Community organs and EC member countries, such as:

- promotion of 'sustainable and non-inflationary growth respecting the environment' (Article 2) and integration of 'environmental protection requirements ... into the definition and implementation of other Community policies' (Article 130r:2);
- the 'principle of subsidiarity' according to which 'the Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community' (Article 3b);
- a 'policy in the sphere of the environment' (Article 3k) which shall contribute to 'preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems' (Article 130r:1);

90 At present, Council Regulation 19/65/EEC gives authority to the Commission to grant group exemption for exclusive supply/purchase of goods for resale agreements, and agreements relating to the acquisition or use of industrial property rights. There is no authority of the Commission under this Regulation to grant a general block exemption for environmentally friendly agreements. For a discussion of these issues, see Portwood, *supra* note 89, at 158 seq.

- the obligation that the EC's environmental policy 'shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community' (Article 130r:2);
- the obligation that EC environmental policies shall be based 'on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay' (Article 130r:2).

The application of these 'constitutional principles' of 'EC primary law' has led to 'constitutional disputes' – for instance between the EC Commission and the EC Council over the appropriate legal basis of EC environmental directives and over the implications of the 'subsidiarity principle' for the delimitation of national and Community powers[91] – which have no equivalent in GATT law. The same is true for the general constitutional law principles of EC law, such as guarantees of fundamental individual rights and the requirement of the 'proportionality' of governmental restrictions of such rights.

Yet, it must not be overlooked that GATT member countries may also supplement their trade rules by international agreements on the protection of the environment. Such subsequent *inter-se*-agreements, subsequent treaty practice and 'any relevant rules of international law applicable in the relations between the parties' must be taken into account in the interpretation of GATT rules, as stipulated in the general rules of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties. At least some of the principles explicitly recognized in Article 130r of the EC Treaty – such as the 'precautionary principle', the 'rectification at source' principle and the 'polluter-pays principle' – have been universally recognized in various UN and UNCED resolutions. To the extent that these policy principles are recognized as part of international law, they may also become relevant for the interpretation and application of GATT and WTO law. The numerous MEAs concluded among GATT contracting parties may likewise be relevant for the interpretation and application of GATT/WTO law, at least among contracting parties of both the trade and environmental agreements. Such MEAs may then serve functions in the context of GATT/WTO law similar to those of secondary EC environmental law in the context of EC law.

Comparing GATT and EC rules on trade and environment, and the GATT case-law and ECJ jurisprudence on trade-related environmental measures, is not only of academic interest. Thus, the reference by the ECJ to the principles of 'rectification at source', 'proximity' and 'self-sufficiency' of waste disposal in the judicial determination of the relationship between the EC

91 See, e.g., Geradin, 'Balancing Free Trade and Environmental Protection: The Interplay between the ECJ and the Community Legislator', in J. Cameron, P. Demaret, D. Geradin, *supra* note 87, at 204-241. On the implications of the EC's subsidiarity principle on the delimitation of national and EC powers for the protection of the environment, see 'Making Sense of Subsidiarity: How Much Centralization for Europe?', Centre for Economic Policy Research (1993) at 138 ff.

Treaty's free trade rules and national restrictions on the importation of waste raises the question whether the legal arguments used by the ECJ may also be relevant for GATT/WTO disputes over environmental restrictions on the importation of waste.[92] Conversely, GATT rules and GATT dispute settlement practice are also relevant for EC law and its interpretation by the ECJ and national courts. For, according to the EC Court's long-standing 'GATT case-law', the international agreements of the EC – such as the GATT, the Tokyo Round and Uruguay Round Agreements – form an 'integral part of the Community's legal system' with legal precedence over secondary Community law.[93] Even though, according to the EC Court, GATT rules do not apply in intra-Community trade, GATT law is referred to in many EC regulations, e.g. on common rules for imports, common rules for exports, anti-dumping and other safeguard measures, and has been referred to also by the ECJ in its interpretation and application of the foreign trade law of the EC.[94]

B. Settlement of Environmental Disputes through the ECJ in 'Non-Harmonized' Areas of EC Integration

As already mentioned, there are many similarities between GATT and EC rules on trade and environment. For instance, the prohibition of tax discrimination in Article 95 of the EC Treaty was almost literally copied from Article III:1 and 2 of the GATT. Hence, national environmental charges are admissible under both GATT Article III and under Article 95 of the EC Treaty provided they are non-discriminatory (cf. Articles 9, 12, 76, 95 of the EC Treaty) and not inconsistent with EC harmonization measures (Articles 99-101). Likewise, national environmental subsidies are admissible under GATT Article XVI and under the WTO Agreement and, depending on their trade-distorting effects (cf. Articles 92, 93, 42, 77-80 of the EC Treaty), are also admissible or approvable under Article 92 of the EC Treaty. In EC practice, national environmental subsidies seem to have been authorized or tolerated generously pursuant to the various 'Community Frameworks for State Environmental Subsidies',[95] notwithstanding the 'polluter-pays principle'. For instance, certain 'adaptation aids' and tax deductions from the Danish and

92 On waste management and waste trade under EC law, see Schmidt, 'Trade in Waste under Community Law', in J. Cameron, P. Demaret, D. Geradin, *supra* note 87, 184-203.

93 For a detailed analysis of this case-law, see E. U. Petersmann, *supra* note 75, at 5740 seq.

94 See, e.g., Pescatore, 'Judicial Protection of Individual Rights by the ECJ in the Field of Foreign Trade', in M. Hilf, E.-U. Petersmann, *supra* note 20, at 203-210; Jacobs, *supra* note 74, 63-77.

95 These Commission frameworks date back to November 1974 and were amended most recently in March 1994 (see 'Community Framework for State Environmental Subsidies', in EC OJ C 72/3-9 of 10 March 1994). They include a detailed explanation of the EC Commission's practice regarding environmental subsidies.

Dutch C02 energy tax schemes were recognized as meeting the requirements of the exceptions clause in Article 92:3.

In 'non-harmonized areas' of EC integration where the national environmental regulations have not been harmonized through EC law, the consistency with EC law of national trade restrictions for environmental purposes depends mainly on the four legal issues discussed below.

1. Are the National Environmental Measures 'Quantitative Restrictions' or 'Measures Having Equivalent Effect'?

In the absence of common EC environmental rules, the consistency of national environmental regulations with EC law depends largely on their conformity with the free trade rules in Articles 9 seq., 30-36, and with the EC competition rules in Articles 85 seq., 92 seq. of the EC Treaty. In this 'non-harmonized area', the ECJ was confronted with a legal problem that did not arise in GATT law: the absence in the EC Treaty of a national treatment provision (e.g. similar to GATT Article III:4,5) specifying to what extent Member States remain competent to enact (or retain) non-discriminatory internal regulations.

In the *Dassonville* case,[96] the ECJ decided that the prohibition in Article 30 of the EC Treaty of 'quantitative restrictions on imports and all measures having equivalent effect ... between Member States' relates to 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. This prohibition also applies 'even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'.[97] The same 'Dassonville formula' was later used for the interpretation of the prohibition in Article 34 of 'quantitative restrictions on exports, and all measures having equivalent effect, ... between Member States'.[98] In contrast to GATT Articles XI and XIII on quantitative restrictions and other non-tariff trade barriers, which have been essentially limited in GATT practice to *border* measures in view of the explicit regulation of *internal* measures in GATT Article III, Articles 30 and 34 of the EC Treaty therefore extend also to *internal* trade-restrictive measures due to the absence of an EC Treaty provision equivalent to GATT Article III:4 and 5. As a consequence, non-discriminatory internal environmental measures permitted under GATT law in the external trade relations between the EC and third GATT contracting parties

96 Case 8/74, [1974] ECR 837 at 852.

97 Joined Cases 177/82 and 178/82, *Van de Haar*, [1984] ECR 1797.

98 Case 53/76, *Bouhelier*, [1977] ECR 197 for measures directed only at exports or Case 94/79, *Pieter Vriend*, [1980] ECR 327 for products governed by common market organizations; see, however, the more restrictive approach to indistinctly applicable measures e.g. in Case 155/79, *Horse Meat*, [1979] ECR 3409 at 3415 or Case 155/88, *Nightwork in Bakeries*, [1981] ECR 1993 at 2009.

may be prohibited by Articles 30, 34 in *intra*-Community trade between EC Member States.

2. Are the National Environmental Measures Justified by Article 36 or by the 'Rule of Reason' Relating to Articles 30 and 34?

According to Article 36 of the EC Treaty,

> [t]he provisions of Articles 30 and 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

As an exception, Article 36 has been construed narrowly by the ECJ[99] to the effect that

- the list of exceptions in Article 36 is exhaustive and cannot be extended by analogy; and
- the prohibition of 'arbitrary discrimination' and of a 'disguised restriction on trade' is to be construed strictly as permitting only measures that are necessary for achieving the non-economic objectives set out in Article 36 and which are not disproportionate.

The broad coverage of the 'Dassonville formula' for the interpretation of Articles 30, 34 of the EC Treaty, and the narrow interpretation of the exception in Article 36, made it subsequently necessary to limit the scope of application of Article 30 through the following 'rule of reason' first applied by the ECJ in the *Cassis de Dijon* case:

> In the absence of common rules relating to the production and marketing of ... it is for the Member States to regulate all matters relating to the production and marketing of ... on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[100]

In its subsequent *Cassis de Dijon* case-law, the ECJ also recognized protection of the environment as a 'mandatory requirement'[101] and clarified that

99 See, e.g., Case 72/83, *Campus Oil Limited*, [1984] ECR 2727 with further references to the case-law.

100 Case 120/78, *Cassis de Dijon*, [1979] ECR 649 at 662 (para. 8).

101 See, e.g., Case 302/86, *Danish Bottles*, [1988] ECR 4607 ff. The 'mandatory requirements' so far recognized by the ECJ do not seem to constitute an exhaustive list.

the national laws, in order to be covered by the rule of reason, must be *non-discriminatory* (i.e. 'applicable to domestic and imported products without distinction'), *necessary* and *proportionate* to the objective pursued; if a Member State has the choice of several means of attaining a policy objective justified under Community law, it is under an obligation to use the means which are least restrictive of *intra*-Community trade. The *Cassis de Dijon* case-law implies the principle of mutual recognition of the product and production regulations in the EC country of origin: subject to their right to protect certain public interests either under Article 36 or under the 'rule of reason' relating to Article 30 by means of non-discriminatory, necessary and proportionate measures, EC member countries must mutually recognize products that have been lawfully put into free circulation in an EC member country in conformity with the national law of that EC Member State.

In the *Danish Bottles* case, in which the EC Court had to decide on a complaint by the EC Commission that a mandatory Danish deposit-and-return system for drink containers was incompatible with Article 30, the Court inferred from these necessity- and proportionality-standards, *inter alia*, the following conclusions:

- The obligation imposed by national legislation on manufacturers and importers, as part of a system under which the marketing of beer and soft drinks is authorized only in re-usable containers, to establish a deposit-and-return system for empty containers must be regarded as necessary to achieve the objectives pursued in relation to the protection of the environment so that the resulting restrictions on the free movement of goods cannot be regarded as disproportionate.
- However, the requirement that foreign manufacturers must either use only containers approved by the national authorities, which may refuse approval even if a manufacturer is prepared to ensure that returned containers are reused, or not market annually more than a certain volume of drinks in non-approved containers is to be regarded as disproportionate and therefore unacceptable since whilst the system of returnable non-approved containers does not ensure a maximum rate of re-use, unlike the system established for approved containers, it is capable of protecting the environment, especially as the quantity of beverages likely to be imported is limited in relation to total national consumption by reason of the restrictive effect of the requirement that containers should be returnable.[102]

Comparative Legal Aspects

The *Danish Bottles* case illustrates an important difference between the GATT and EC trade and environmental rules: under GATT Article III, non-discriminatory environmental measures need not be 'necessary' or 'proportionate' in order to be GATT-consistent. By contrast, under the rule of reason for Article 30 of the EC Treaty, national environmental measures, even if non-discriminatory, must also be *necessary* and *proportionate* and

102 Case 302/86, *Danish Bottles*, [1988] ECR 4608.

satisfy *mandatory requirements recognized by Community law* in order to be consistent with the prohibition of non-tariff trade barriers in Article 30. Thus, in the *Danish Bottles* case, the Court acknowledged as 'undoubtedly true that the existing system for returning approved containers ensures a maximum rate of re-use and therefore a very considerable degree of protection of the environment since empty containers can be returned to any retailer of beverages'. However, the Court held such 'maximum protection' of the environment to be disproportionate and not allowed because 'the system for returning non-approved containers is capable of protecting the environment'.[103]

In GATT, neither GATT Articles III and XX nor the 'necessity requirement' in Article 2 of the 1979 Agreement on Technical Barriers to Trade ('that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to trade') would seem to provide a legal basis for a finding that the pursuit of 'maximum environmental protection' may be disproportionate and therefore inconsistent with GATT law. The above-mentioned differences between the worldwide GATT rules and the regional EC trade and environmental rules have, however, been reduced by the 1994 TBT and SPS Agreements and by the recent modification of the ECJ's case-law relating to Article 30 of the EC Treaty:

a) The new 1994 TBT and SPS Agreements, unlike the 1979 TBT Agreement, will be applicable to all member countries of the new 'GATT 1994' (included into Annex 1A of the WTO Agreement) and introduce a 'necessity' requirement for mandatory 'technical regulations', voluntary 'standards', 'conformity assessment procedures', 'sanitary and phytosanitary measures', which did not exist under Article III of the old 'GATT 1947'.

b) Since the *Keck* case of November 1993 and the *Hünermund* case of December 1993, the ECJ exempts non-discriminatory restrictions on certain sales methods (such as a general prohibition of resales of goods at a loss and of advertising for pharmaceutical products outside pharmacies) from the scope of application of Article 30 'in view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect was to limit their commercial freedom even where such rules were not aimed at products from other Member States'. The Court held:

> In *Cassis de Dijon* (Case 120/78, [1979] ECR 649) it was held that, in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 included obstacles to the free movement of goods where they are the

103 Yet national 'maximum environmental protection' may become admissible under Articles 100a:4 and 130t of the EC Treaty once harmonization measures pursuant to Article 100a or common environmental EC measures pursuant to Article 130s have been adopted. These environmental provisions, introduced by the Single European Act in 1987, were not yet applicable in the *Danish Bottles* case but should be taken into account in the future interpretation of Article 30.

> consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging) to goods from other Member States where they are lawfully manufactured and marketed, even if those rules applied without distinction to all products unless their application could be justified by an objective of public interest taking precedence over the free movement of goods. However, contrary to what had previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements was not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74, [1974] ECR 837), provided that those provisions applied to all affected traders operating within the national territory and provided they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Where those conditions were fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State was not by nature such as to prevent their access to the market or to impede access any more than it impeded the access of domestic products. Such rules therefore fell outside the scope of Article 30 of the Treaty.[104]

Thus, as under GATT Article III, EC Member States will in future remain free under Article 30 to apply non-discriminatory national sales and marketing restrictions also in *intra*-Community trade to products imported from other EC member countries.

3. *Are Production Regulations 'Specifically Directed at Restricting Imports or Exports'?*

The broad interpretation of the prohibition of non-tariff barriers in Article 30 has been further limited by the EC Court in cases relating to *production regulations*. As long as national production regulations do not restrict the marketing and trade of the products concerned and apply only to production activities within the country concerned, they may fall under the prohibition in Article 34 of 'quantitative restrictions on exports and all measures having equivalent effect', in the broad interpretation given to Articles 30 and 34 in the 'Dassonville formula'. By contrast, if they are also applied to products from other countries they may also amount to an import restriction prohibited under Article 30 of the EC Treaty.

A comparison of Articles 30 and 34 of the EC Treaty with the relevant GATT rules shows again an important regulatory difference: GATT Article III proceeds from the general admissibility of non-discriminatory internal production regulations and, through this generally predictable *ex ante rule*, protects national policy autonomy and reduces private transaction costs.

104 Joined Cases C-267/91 and 268/91, *Keck and Mitouard*, judgment of 24 November 1993 (not yet reported, quoted from: Bulletin No. 33-93, ECJ, at 4-5); Case C-292/92, *Hünermund*, judgment of 15 December 1993 (not yet reported).

Under Community law, by contrast, the consistency of national production regulations with the free trade rules of the EC Treaty depends on a case-by-case clarification through the *Cassis de Dijon* case-law of the ECJ and, due to this case-oriented *ex post determination*, tends to increase legal uncertainty and transaction costs.

In the *Horse Meat* case of 1979, the EC Court had to decide on a preliminary question whether a Dutch prohibition of having in stock, preparing and processing horse meat was incompatible with Article 34 of the EC Treaty. The Court decided that Article 34

> concerns national measures which have as their specific object or effect the restriction on patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.

The Court found that – as long as a specific Community regulation did not exist – a production and processing prohibition like that in question was not inconsistent with Article 34 because it

> applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export. [105]

In the *Nightwork in Bakeries* case, the EC Court had to decide whether a German prohibition on nightwork in bakeries had to be regarded as a measure having an effect equivalent to quantitative restrictions on imports or exports within the meaning of Articles 30 and 34 of the EC Treaty. In view of the fact that several other EC Member States had similar rules concerning nightwork in bakeries and that ILO Convention No. 20 prohibited nightwork in bakeries, the Court found

> that the prohibition in the bread and confectionery industry on working before 4 a.m. in itself constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty.

The Court further found that

> Articles 30 and 34 of the EC Treaty do not apply to national rules which prohibit the production of ordinary and fine baker's wares and also their transport and delivery to individual consumers and retail outlets during the night up to a certain hour.

105 Case 15/79, *Groenveld B.V. v. Produktschap voor Vee en Vlees*, [1979] ECR 3409.

The reasoning was the same as in the *Horse Meat* case:

> Article 34 concerns national measures which have as their specific objective or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question. This is clearly not the case with rules such as those in issue, which ... apply by virtue of objective criteria to all the undertakings in a particular industry ... established within the national territory, without leading to any differences in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the State in question and the export trade.[106]

The *Sunday Trading* cases related to the Sunday trading ban in the British Shops Act and to French and Belgian labour legislation prohibiting the employment of workers on Sundays. The EC Court recognized that the legislation in issue pursued aims which were justified under Community law:

> National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the member states to make those choices in compliance with the requirements of Community law, in particular the principle of proportionality.[107]

In addition to the grounds of justification exhaustively enumerated in Article 36 of the EC Treaty and the specific 'mandatory requirements' so far recognized in the Court's case-law under Article 30 (effectiveness of fiscal controls, fairness of commercial transactions, consumer protection, environmental protection), the Court seems to recognize the general admissibility of non-discriminatory national production and marketing regulations for legitimate social policy reasons.

The Court affirmed the applicability of Article 30

> to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do ... exceed the effects intrinsic to rules of that kind.[108]

While, in the *Torfaen* case, the Court left it to the national court to assess the proportionality of the rules, the EC Court had sufficiently clear and uncontested information in the *Conforama* case and the *Marchandise* case to assess itself the issue of proportionality by finding 'that the restrictive effects on trade which may stem from such rules do not seem disproportionate to the aim pursued'.[109]

106 Case 155/79, *Oebel*, [1981] ECR 1993, at 2005.
107 Case C-169/91, *B&Q*, [1992] ECR 6635, para. 11.
108 Case 145/88, *Torfaen*, [1989] ECR 3851, para. 17.
109 Case C-312/89, *Conforama*, [1991] ECR I-997, para. 12; Case C-332/89, *Marchandise*, [1991] ECR I-1027, para. 13.

The above-mentioned rulings were based, in each case, on findings that

- the national rules were not intended to govern the flow of trade between Member States;
- that they applied to imported and domestic products without distinction;
- that the marketing of products imported from other Member States was not made more difficult than the marketing of domestic products; and
- that the restrictive effects on *intra*-Community trade were not excessive in relation to the aim pursued.

The *proportionality test* focuses on whether the restrictive effects on the free movement of goods are out of proportion to the purpose of the national rules. The *necessity test*, by contrast, focuses on whether the public interest involved can be achieved by less trade-restrictive means. But the two tests are not strictly distinguished in the case-law of the Court.[110] And under both balancing tests, the Court may leave the Member State concerned a broad power of factual appraisal and policy discretion as to whether the national measure is 'necessary' and 'proportionate' for achieving the public policy objective.[111]

Since the 1993 *Keck* case, the Court has limited the scope of Article 30 with regard to non-discriminatory national marketing restrictions.[112] In contrast to its previous case-law that national marketing restrictions were capable of affecting trade even if they were indiscriminately applied to both domestic and traded goods, the Court held in the *Keck* case and in a series of subsequent judgments[113] that such non-discriminatory national marketing restric-

110 See, e.g., Case C-169/91, *B&Q*, [1992] ECR 6635, para. 15: 'Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products'.

111 See, e.g., the *Sandoz* case (Case 174/82, [1983] ECR 2445): 'In view of the uncertainties inherent in the scientific assessment of the harmfulness of vitamins, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified on principle within the meaning of Article 36 of the Treaty on grounds of the protection of human health. Nevertheless, the principle of proportionality which underlies the last sentence of Article 36 of the Treaty, requires that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the legitimate aim of protecting health... Although ... a wide discretion must be left to the Member States, they must, in order to observe the principle of proportionality, authorize marketing when the addition of vitamins to foodstuffs meets a real need, especially a technical or nutritional one'.

112 See *supra* note 104.

113 See, e.g., Case C-401/92 and C-402/92, *Tankstation 't Heukske and J.B.E. Boermans*, judgement of 2 June 1994, not yet reported, concerning closing hours of petrol stations; Case C-69/93 and C-258/93, *Punto Casa SpA versus Sindaco del Comune die Capena et al.*, judgment of 2 June 1994, not yet reported, concerning the closure of retail outlets on Sundays.

tions lie outside the scope of Article 30. Whether this judicial re-interpretation of Article 30 applies also to *production regulations* and to product-related marketing regulations which – like *environmental labelling or packaging requirements* – may be abused for segmenting national markets, remains to be seen.

4. *Articles 30 and 36 of the EC Treaty: Admissibility of Discriminatory Trade Restrictions for the Protection of the Environment?*

According to Article 36,

> [t]he provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans, animals or plants... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The EC Court construes Article 36 strictly as an exhaustive list of non-economic exceptions which cannot be extended to cases other than those explicitly laid down. Yet, since environmental measures shall – according to Article 130r – 'contribute towards protecting human health', national trade restrictions on environmental grounds may also be justifiable under Article 36.

One important difference between the 'rule of reason' relating to Article 30, on the one side, and Article 36, on the other, is that Article 36 prohibits only 'arbitrary discrimination' and may thus justify 'non-arbitrary discrimination' between member countries provided it is 'necessary' and 'proportionate' for the protection of the listed policy purposes and recourse to Article 36 has not been excluded by EC regulations or directives on the harmonization of health and environmental measures. By contrast, the 'rule of reason' limiting the scope of application of Article 30 has so far only been applied to non-discriminatory measures that are necessary and proportionate for achieving the mandatory public policy requirements.

In the *Walloon Waste* case,[114] the Court had to examine a prohibition by the Belgian region of Wallonia to deposit in Wallonia waste originating in other Member States. The Court confirmed that waste, whether recyclable or not, had to be treated as a good, the free movement of which was protected by Article 30 of the EC Treaty. But the accumulation of waste could, even before it constituted a danger to health, represent a danger to the environment, particularly in view of the limited capacity of each region to accommodate it. The Court followed from this that mandatory requirements of environmental protection could justify the disputed measures.

114 Case C-2/90, *Commission v. Belgium*, [1992] ECR 4431.

The Court did not sustain the argument by the EC Commission, which was supported in this respect also by the Advocate General, that the restrictions at issue discriminated against waste coming from other Member States and that this discrimination could not be justified by mandatory requirements of environmental protection since waste coming from other EC states was no more harmful than that produced in Wallonia. According to the Court, even though mandatory requirements could be relied on only in the case of measures which applied indiscriminately to national and imported products, it was necessary to take account of the specific nature of waste in order to determine whether or not the nature of the trade restriction was discriminatory. The principle that environmental damage should as a priority be rectified at source, as required by Article 130r:2 of the EC Treaty with regard to action by the EC relating to the environment, implied that it was up to each region, commune or other local authority to take the measures appropriate to ensure the reception, treatment and disposal of its own waste; such waste therefore had to be disposed of as close as possible to the place of its production in order to limit its transport to a minimum. The Court referred in this context to the principles of *self-sufficiency* and *proximity* set out in the Basel Convention of 1989 on the control of transboundary movements of hazardous wastes and their disposal, a convention to which the Community was a signatory. In view of the differences between waste produced in one place and that produced in another, and in view of its connection with the place where it was produced, the EC Court followed that the disputed measures could not be regarded as being discriminatory.[115] The Court therefore did not address the question whether discriminatory trade restrictions for the protection of health and the environment may be justifiable under Article 36 of the EC Treaty.

As regards the EC Commission's complaint that the prohibition of disposal of waste was inconsistent with Belgium's obligations under Council Directive 84/631/EEC, the EC Court found that this Directive introduced a system under which the national authorities concerned could raise objections and thus prohibit a specific transfrontier shipment of hazardous waste, exclusively in order to deal with problems relating to the protection of the environment and health and to public order and safety. The Directive did not authorize Member States to prohibit transfrontier movements of dangerous waste *in toto*. By imposing an absolute prohibition on the importation, storage, deposit or discharge in Wallonia of waste originating in another EC

115 This reasoning by the EC Court leaves open how the 'principles of self-sufficiency and proximity' of waste disposal are to be reconciled with the previous case-law of the Court that national restrictions, e.g. on the export of waste oils, may be inconsistent with Article 34 of the EC Treaty if the disposal of waste oils in specialized plants of another EC Member State ensures an efficient and effective protection of the environment (see, e.g., Case 172/82, *Inter-Huiles*, [1983] ECR 555 at 566). Nor does the judgment clarify under what conditions 'the specific nature of waste' may turn an import restriction into a non-discriminatory mandatory requirement in the sense of the *Cassis de Dijon* case-law.

Member State and thus refusing to apply the procedure laid down by Council Directive 84/631/EEC of 1984 on the supervision and control within the EC of the transfrontier shipment of hazardous waste, Belgium had therefore failed to fulfil its obligations under that Directive. This Court finding, and the introduction by France of restrictions on imports of waste in August 1992, prompted the EC Council to adopt a new EC Waste Regulation 259/93 in 1993 authorizing Member States to prohibit imports of dangerous waste *in toto*.[116]

The *Walloon Waste* case confirms the settled case-law of the EC Court that recourse to Articles 30 and 36 is no longer justified if Community rules provide for the necessary measures to ensure protection of the interests set out in these Articles.[117] Unlike GATT Articles III and XX, the right of Member States to adopt environmental measures under the 'rule of reason' relating to Article 30, and health protection measures under Article 36, is thus of a temporary nature pending the adoption of common protective measures by the EC. However, even in case of EC regulations and directives harmonizing national environmental rules, Articles 100a:4 and 130t of the EC Treaty reserve the national right of Member States to apply more stringent national measures for the protection of the environment.

C. Settlement of Environmental Disputes through the ECJ in 'Harmonized' Areas of EC Integration

The preceding survey has shown that the free trade rules in Articles 30-36 of the EC Treaty leave considerable scope for national measures for the protection of the environment. The general preference of both GATT law and EC law for non-discriminatory internal measures of environmental protection, rather than trade restrictions, seems consistent not only with the economic theory of optimal intervention, according to which 'production pollution' and 'consumption pollution' should be prevented through non-discriminatory corrective measures at the production or consumption level rather than at the trade level. It also appears consistent with the environmental policy principles set out in Article 130r of the EC Treaty, such as 'preventive action', 'rectification of environmental damage at source', the 'polluter-pays principle' and the requirement that 'environmental protection shall be a component of the Community's other policies'.

116 On the evolution of the EC regulations and directives relating to waste trade, and in particular EC Regulation 259/93 of 1 February 1993 on transboundary shipments of waste (OJ 1993 L 30, at 1), see Schmidt, *supra* note 92 and P. von Wilmowsky, 'Waste Disposal in the Internal Market: The State of Play after the ECJ's Ruling on the Walloon Import Ban', 30 *CML Rev.* (1993) 541-570; Sommer, 'Les déchets, de l'autosuffisance et de la libre circulation des marchandises', 377 *RMC* (1994) 246-257.

117 See, e.g., Case 72/83, *Campus Oil*, [1984] ECR 2727.

1. National TREMS in 'Harmonized Areas' of EC Law

In 'harmonized areas' of environmental regulation, the legality of national environmental measures depends on their consistency with the pertinent EC Treaty rules, EC regulations, EC directives or decisions and international agreements concluded by the EC. Even if national environmental measures remain admissible under Articles 30-36, 92 or 95 of the EC Treaty, they may become inadmissible as a result of EC environmental rules. For instance, in a case relating to importation into France of *Feline Skins from Bolivia*, the EC Court decided at the request of the EC Commission that, by issuing import permits for more than 6,000 wild cat skins originating in Bolivia, 'the French Republic failed to fulfil its obligations under Article 10(1)(b) of Council Regulation (EEC) No. 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora'.[118]

In the *Scottish Red Grouse* case,[119] the EC Court decided that a Dutch prohibition on the importation of wild birds (red grouse) was not justifiable under Article 36 of the EC Treaty or under Council Directive 79/409 on the Conservation of Wild Birds because this species of birds exists only in Scotland, is neither migratory nor endangered and may be lawfully hunted in and exported from Scotland. With regard to Article 36, the Court recalled its consistent case-law that a directive providing for full harmonization of national legislation deprives a Member State of recourse to Article 36. Since Article 14 of the directive authorized Member States to introduce stricter protective measures, the directive had regulated exhaustively the Member States' powers with regard to the conservation of wild birds. But the Court also found that

> Article 14 of Directive 79/409 on the conservation of wild birds ... applies only to migratory and endangered species, with the result that Member States are required, with regard to the other bird species covered, to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, but are not authorized to adopt stricter protective measures except as regards species occurring within their territory.

The Court gave therefore the following preliminary ruling:

> Article 36 of the Treaty, read in conjunction with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, must be interpreted as meaning that a prohibition on importation and marketing cannot be justified in respect of a species of bird which does not occur in the territory of the legislating Member State but is found in another Member State where it may lawfully be hunted under the terms of that directive and under the legislation of that other State, and which is neither migratory nor endangered within the meaning of the directive.

118 Case C-182/89, *Commission v. France*, [1990] ECR 4337 at 4362.
119 Case C-169/89, [1990] ECR 2143.

This interpretation seems to parallel the Tuna Panel's interpretation of the corresponding GATT Article XX. Neither Article may justify unilateral import restrictions designed to protect wild animals in a foreign jurisdiction which have been lawfully hunted there and are not an endangered species, unless the exporting and the importing country have agreed on protective measures or the imports affect life, health or 'production or consumption of exhaustible natural resources' (Article XX(g) GATT) in the importing country.

2. EC Harmonization of PPMs

Until the entry into force of the Single European Act in 1987, most environmental measures of the EC were based on Articles 100 and/or 235.[120] Such EC regulations or directives can have the effect that national implementing measures, including trade restrictions (e.g. on the export of waste oils) and environmental charges, can no longer be challenged under the free trade rules of the EC Treaty.[121] Since the entry into force of the Single European Act in 1987, most environmental measures of the EEC have been based on Articles 100a or 130s.

In the *Titanium Dioxide* case, the Court held that Article 100a authorizes the harmonization not only of product-related but also of production-related measures for the protection of the environment, such as Directive 89/428/EEC for the production and eventual elimination of pollution caused by waste from the titanium dioxide industry which aims at harmonizing conditions of production and competition as well as at reducing pollution.[122] The main reason given by the Court in support of this broad interpretation of Article 100a was the following:

120 See, e.g., the *Italian Sulphur* case (Case 92/79, [1980] ECR 1115), in which the Court held: 'Directives on the environment may be based upon Article 100 of the Treaty since provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is no harmonization of national provisions on the matter, competition may be appreciably distorted'.

121 In the *ADBHU* case (Case 240/83, [1985] ECR 531), the Court found that the trade restrictions prescribed in Directive 75/439/EEC on the disposal of waste oils were consistent with Articles 30 and 34 of the EEC Treaty and that the Directive provided a legal basis for national environmental charges.

122 See the *Titanium Dioxide* case (Case C-300/89, [1991] ECR I-2867 seq.). The choice between Articles 100a and 130s as a legal basis for EC environmental legislation is important in view of the procedural differences between Article 100a (e.g. cooperation procedure, majority decisions, explicit requirement to 'take as a base a high level of protection') and Article 130s (mere consultation of the European Parliament, unanimous approval). The Court inferred from these procedural differences and from the parliamentary cooperation procedure as 'a fundamental democratic principle' that simultaneous recourse to both Articles 100a and 130s was not possible and that the cooperation procedure pursuant to Article 100a should prevail in this particular case.

> Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.[123]

This reasoning appears doubtful, for instance because differences in national environmental standards and production costs may be justified by local differences (e.g. regarding environmental absorption capacities) and may thus constitute a legitimate factor of comparative advantage. Such a broad interpretation of Article 100a could lead to harmonization and centralization of national standards in many policy areas and could run counter to the 'principle of subsidiarity' laid down in Article 3b of the EC Treaty.

In Case C-155/91, *Commission v. Council*, of March 1993, the ECJ confirmed, however, that Council Directive 91/156 on waste disposal had rightly been based on Article 130s rather than on Article 100a. Even though waste, whether recyclable or not, is a product whose free circulation is protected by Article 30 of the EC Treaty, the primary objective of the Directive was to ensure that each Member State eliminated its own waste at the nearest point of disposal. The Directive's effect on the harmonization of marketing conditions in the EC was only accessory and insufficient to justify the use of Article 100a.[124]

Even if EC environmental measures based on Article 100a do not include a safeguard clause pursuant to Article 100a:5, Article 100a:4 may authorize stricter national environmental standards. Similarly, EC environmental measures based on Article 130s do not prevent more stringent national protective measures based on Article 130t, provided they are compatible with the EC Treaty (e.g. Articles 12, 30 and 95).

The ECJ has confirmed the power of the Community to adopt environmental rules in the context of other EC regulations based e.g. on the commercial policy powers and agricultural policy powers of the EC.[125] Likewise, the tax provisions of the EC Treaty can provide a legal basis for environmental taxes by the EC, such as an EC energy or CO_2 tax based, depending on its circumstances, on Articles 99, 100 or 130s.[126] Since the entry into force of the Single European Act in 1987, the various explicit and implicit EC compe-

123 *Titanium Dioxide* case, *supra* note 122, para. 23.

124 Case C-155/91, *Commission v. Council*, [1993] ECR 939.

125 See, e.g., Case C-62/88, *Hellenic Republic v. Council of the EC* , [1990] ECR 1545, where the Court decided that Article 113 of the EEC Treaty provided a sufficient legal basis for EC restrictions on importation of agricultural products radiated as a result of the nuclear accident at the Chernobyl power station. In Case 3, 4, and 6/76, *Kramer*, [1976] ECR 1279, the Court decided that Article 43 of the EEC Treaty also authorized EC regulations for the conservation of fishing resources.

126 See Düerkop, *supra* note 70 and Demaret, 'Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMS) in the External Relations of the European Community', in Maresceau, *supra* note 74, 315-399.

tences for environmental measures may exclude recourse to Article 235 as an additional legal basis for environmental measures of the EC.

3. TREMS in the EC's External Relations

In its external relations, the EC has used its treaty-making powers (e.g. in Articles 113, 130s and 238 of the EC Treaty) for concluding an increasing number of international agreements with provisions on the protection of the environment.[127] Environmental agreements proper (such as the 1989 Basel Convention on the control of transboundary movements of hazardous wastes) have been concluded by the EC as 'mixed agreements'.

In the jurisprudence of the ECJ and of national courts in EFTA countries, the trade provisions of the free trade agreements between the EC and other European countries were often construed in a less far-reaching manner than those of the EC Treaty even if the text of the respective treaty provisions was identical.[128] As a consequence, national TREMS by EC member countries – even if inconsistent with Article 30 of the EC Treaty in *intra*-Community trade – may be permissible in the external relations of the EC and consistent with the bilateral free trade area agreements of the EC (e.g. with Switzerland) to which the *Cassis de Dijon* case-law does not apply.[129] By contrast, the trade and environmental rules in the 1993 Agreement establishing the European Economic Area correspond largely to those in the EC Treaty (cf. the Preamble, Articles 8, 11-13, 73-75, Annexes II and XX, Protocol M of the EEA Agreement), with a few exceptions (e.g. no EEA provision equivalent to Article 100a:4 of the EC Treaty); the EEA Agreement is also to be construed in the light of the 'acquis communautaire' including the *Cassis de Dijon* case-law.

Unilateral trade-related measures by the EC *vis-à-vis* third countries were, until 1987, mostly based on Article 235 (e.g. the 1981 Whales Regulation and the 1982 CITES Regulation of the EC). Since 1987, Article 130s has been used for various environmental regulations of the EC *vis-à-vis* third countries.[130] In spite of certain charges of 'environmental dumping' if for-

127 See, e.g., Hession, 'The Role of the EC in Implementation of International Environmental Law', *Review of European Community and International Environmental Law* (1993) 341-347; Fernandez Sola, 'Incidence interne de la participation de la CE aux accords multilatéraux de protection de l'environnement', *RMC* (1992) 793-806.

128 See, e.g., the contributions by P. Gildsdorf and by O. Jacot-Guillarmod to O. Jacot-Guillarmod (ed.), *L'avenir du libre-échange en Europe: vers un espace économique européen?* (1990) at 277-306.

129 See, e.g., Case 125/88, *Pesticides IV*, [1989] ECR 3537.

130 See, e.g., Council Regulation (EEC) No. 2455/92 of 23 July 1992 concerning the export and import of certain dangerous chemicals (OJ L 251/13 seq.), or Council Decision of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention), OJ L 39/1 seq.

eign producers and exporters fail to integrate their environmental costs into the production costs and use these price differentials for reducing their export prices, the EC has so far not used its anti-dumping law for imposing anti-dumping duties on 'below-cost sales' of imported goods because they benefit from low environmental standards abroad.[131]

D. Comparative Aspects of GATT and EC Dispute Settlement Proceedings over TREMS

1. Need for Supplementing the Dispute Settlement Provisions in MEAs

Most MEAs provide for 'political' and 'legal' methods of dispute settlement, such as consultations, mediation, conciliation, arbitration and judicial settlement.[132] Various more recent MEAs – such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the 1992 UN Convention on Climate Change and the 1992 UN Convention on Biological Diversity – recommend the referral of disputes to the International Court of Justice, which created a special chamber procedure for international environmental disputes in 1993. But none of these dispute settlement provisions appears to have been used so far. One reason for this seems to be that 'MEAs are based on general obligations to attain broad environmental objectives and compliance with these obligations is difficult to monitor and enforce'.[133] Other reasons include the frequent scientific uncertainty relating to the environmental problems concerned, the focus on dispute avoidance (e.g. by means of information, monitoring and reporting requirements in MEAs), and the progressive development and strengthening of MEAs through successive protocols specifying and supplementing the legal obligations.

2. Frequent Use and 'Constitutional Functions' of GATT and EC Dispute Settlement Procedures

The GATT and EC dispute settlement procedures have been used more frequently for the settlement of international environmental disputes than any

131 For a detailed analysis of TREMS adopted by the EC or by individual EC member countries *vis-à-vis* third countries, see Demaret, 'Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community', in J. Cameron, P. Demaret, D. Geradin, *supra* note 87, 277-332.

132 See 'Dispute Settlement in Environmental Conventions', OECD 1994.

133 Dispute Settlement Provisions in Multilateral Environmental Agreements, GATT Doc. PC/SCTE/W/4, 1994, at 1.

other international dispute settlement system.[134] One reason for this seems to be due to the fact that both the GATT and EC dispute settlement systems are part of comprehensive trade and integration agreements with threefold functions:

- As *framework agreements* and codes of conduct for both governments and private economic agents, GATT law and EC law include precise, unconditional, justiciable and enforceable rules on TREMS.
- As trade and economic *organizations with comprehensive dispute settlement mechanisms, surveillance and enforcement systems*, GATT and the EC offer speedy and effective dispute settlement procedures for governments. Moreover, EC law – and indirectly also GATT law (e.g. by prescribing individual rights of access to domestic courts) and domestic rights to petition the initiation of GATT dispute settlement proceedings – also provide legal remedies for private exporters, importers and producers adversely affected by TREMS.
- As international *forums on periodical negotiations of new rules*, both the GATT/WTO and the EC are increasingly used for clarifying the existing and elaborating new legal disciplines on TREMS.

International cooperation in the field of international trade and environmental protection continues to be confronted with 'prisoners' dilemmas', 'free-rider dilemmas' and 'asymmetries in economic policy-making' which often make it difficult to reach agreement on effective international environmental rules and on their enforcement through (quasi)judicial dispute settlement proceedings.[135] The comprehensive scope, reciprocity principles, 'issue linkages'[136] and institutionalized monitoring and enforcement procedures in GATT and the EC set important incentives for overcoming such obstacles to international cooperation in the field of trade and environment. Because rules do not enforce themselves and all regulatory powers risk being abused due to the asymmetries in the organization and political influence of 'rent-seeking' interest groups, international dispute settlement and enforcement mechanisms – such as those of the GATT, WTO, EC and NAFTA – can serve as 'divided

134 For a survey of international dispute settlement proceedings outside GATT and the EC, which involved state responsibility for environmental damage – such as the 1941 *Trail Smelter* arbitration, the 1957 *Lake Lanoux* arbitration and the 1968 *Gut Dam* arbitration –, see Petersmann, 'International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT', *Journal of World Trade* (1993) 43-81.

135 See Petersmann, 'Why Do Governments Need the Uruguay Round Agreements, NAFTA and the EEA?', *Aussenwirtschaft (Swiss Review of International Economic Relations)* (1994) 31-55.

136 See, e.g., Article 130s:5 of the EC Treaty which provides for the possibility of financial support for the implementation of common EC environmental law: 'Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of temporary derogations, and/or financial support from the Cohesion Fund to be set up no later than 31 December 1993 pursuant to Article 130d'.

power systems' and are of decisive importance for the effectiveness and implementation of international rules.[137]

All the 7 GATT dispute settlement proceedings over TREMS (analyzed above in Chapter I.D) led to a panel finding that the discriminatory trade measures were, at least in part, inconsistent with GATT law and not 'necessary to protect human, animal or plant life or health' (Article XX(b)), or not 'primarily related' to the 'conservation of exhaustible natural resources' (Article XX(g)). But all the panel reports emphasized that the issue in dispute was not the validity of the environmental objectives pursued.[138] Moreover, the panel reports also underlined the broad policy autonomy of each GATT contracting party (e.g. under GATT Articles III and XX) and inferred therefrom that GATT law does not 'prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production'.[139] The GATT and EC case-law on TREMS demonstrates that 'green protectionism' and 'green imperialism' pose real threats to liberal trade and consumer welfare. By limiting protectionist abuses of trade and environmental regulatory powers, the liberal trade and dispute settlement rules of GATT/WTO law and EC law can serve a 'constitutional function' for protecting the 'general interest' of consumers, tax-payers and the citizens at large in economic liberty, efficient policy-making and rule of law.

3. *Commonalities of GATT and EC Dispute Settlement Proceedings on TREMS*

There are a number of similarities in the GATT and EC case-law on TREMS. For instance:

(a) National Policy Autonomy

Both GATT and EC dispute settlement rulings acknowledged that – in GATT as well as in the EC – Member States remain competent to apply non-discriminatory product standards, marketing regulations and product-related PPMs for the protection of their environment. Thus, import restrictions on environmental grounds may need no justification under GATT law at all if they are part of a 'regulation ... which applies to an imported product and to

137 Cf., e.g., Hudec, 'The Role of Judicial Review in Preserving Liberal Foreign Trade Policies', and Petersmann, 'Limited Government and Unlimited Trade Policy Powers? Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights', in M. Hilf, E.-U. Petersmann, *supra* note 20, 503 seq., 537 seq.

138 See, e.g., the 1994 Tuna II Panel Report: 'The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction' (DS 29/R, para. 5.42).

139 1992 Panel Report on US Measures affecting Alcoholic Beverages, BISD 39 S/206.

the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation' and are therefore 'to be regarded as an internal ... regulation ... subject to the provisions of Article III' (Note ad Article III in Annex I of the GATT). Both GATT law and EC law also permit trade restrictions 'to protect human, animal or plant life or health' (Articles XX(b) GATT, 36 EC Treaty) or for the protection of other environmental resources (e.g. under GATT Article XX(g) and Article 30 of the EC Treaty).

(b) Non-discrimination, Necessity and Least-Trade-Restrictiveness Standards

In both GATT and the EC dispute settlement proceedings, the 'non-discrimination principle' (e.g. under GATT Articles III and XX and Articles 30 and 36 of the EC Treaty), the 'necessity requirement' and the 'least trade restrictive standard' (e.g. under Article XX GATT, the 1979 TBT Agreement, Articles 30 and 36 of the EC Treaty) are the most important standards of review of TREMS and of their legal consistency with the liberal trade rules. The 1994 TBT Agreement will also introduce into GATT law new principles on mutual recognition of conformity assessments, which are similar to principles used in the ECJ's *Cassis de Dijon* case-law for the review and mutual recognition of national health and environmental measures.

(c) Legal Limitations on Unilateralism

Both GATT and EC dispute settlement rulings have emphasized that unilateral import restrictions may not be an appropriate policy instrument for protecting environmental resources in foreign jurisdictions and for inducing foreign countries to change their domestic PPMs (e.g. for the fishing of tuna) and environmental policies (e.g. *vis-à-vis* Scottish red grouse). Both GATT and EC practice emphasize that transnational environmental problems should be addressed through international or EC rules.

However, there are exceptions for unilateral national TREMS (e.g. under GATT Articles XI:2, XX(g) and Articles 30, 36, 100a:4 and 130t of the EC Treaty) which may also justify measures for the protection of environmental resources outside the national jurisdiction. For instance, unilateral import restrictions to protect environmental resources abroad may be justifiable under the exception in GATT Article XI:2 (c) for 'import restrictions on any agricultural or fisheries product' (e.g. turtles) if they are 'necessary to the enforcement of governmental measures which operate ... to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent ... on the imported product' (e.g. turtle soup) and 'if the domestic production of that commodity is relatively negligible'. GATT Article XX may likewise justify unilateral import restrictions to

protect environmental resources abroad, for instance if trade measures for the protection of foreign environmental resources (such as the ozone layer) are 'necessary to protect human health' of domestic citizens (Article XX(b)), or if they relate 'to the conservation of exhaustible natural resources' (e.g. endangered species abroad) and 'are made effective in conjunction with restrictions on domestic ... consumption' (Article XX(g)),[140] or if they are justified by an 'inter-governmental commodity agreement' conforming to Article XX(h).

(d) Legal Consistency with Multilateral Environmental Agreements

Neither GATT law nor EC law stand in the way of negotiating multilateral environmental agreements. In both GATT and the EC, the need for promoting the mutual consistency of international trade and environmental law and for interpreting GATT and EC law in conformity with MEAs is emphasized. For example, non-discriminatory import restrictions to protect environmental resources beyond the national jurisdiction may be justifiable under MEAs (such as the 1973 CITES Convention) in view of the sovereign right, recognized in Article 41 of the Vienna Convention on the Law of Treaties, of

> the parties to a multilateral agreement (to) conclude an agreement to modify the treaty as between themselves alone if ... the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole...

The trade and dispute settlement provisions of such MEAs may then prevail over those of GATT among the respective contracting parties in accordance with the customary law rules on 'application of successive treaties relating to the same subject-matter' set out in Article 30 of the Vienna Convention on the Law of Treaties. Thus, the Tuna I Panel Report emphasized that neither GATT's principle of unconditional most-favoured-nation treatment nor the panel's 'self-restraint' in the interpretation of Article XX prevented the GATT contracting parties from addressing international environmental problems through international agreements, which could also provide for agreed departures from the general GATT rules.[141]

140 Note that Article XX(g) specifically recognizes that the conservation of exhaustible resources might justify unilateral measures in both producer and consumer countries. This seems to imply recognition of the fact that effective protection of environmental resources can be a matter of both producer and consumer countries.

141 See BISD 39 S/155, 204, para. 6.4.

4. Differences among GATT and EC Dispute Settlement Proceedings over TREMS

The tasks of dispute settlement bodies vary depending on whether their jurisdiction extends to the harmonization of environmental standards (as in the EC and in federal states) or not (as in GATT). Unlike GATT, the EC Treaty includes not only prohibitions (e.g. in Articles 30-36, 92, 95) of trade-restrictive and trade-distortive measures of environmental policy subject to safeguard clauses for 'public policy' purposes (e.g. in the 'rule of reason' relating to Article 30 and in Article 36). It also provides explicitly (Articles 100a, 130r-t) and implicitly (e.g. in Articles 43, 75, 84, 92, 99, 100, 113, 235, 238) for comprehensive EC competences for environmental regulations, directives, decisions, recommendations, resolutions and international agreements, subject to constitutional guarantees of fundamental rights, rule of law and democracy. Several EC Treaty provisions on the protection of the environment through national measures and Community measures 'within their respective spheres of competence' (Article 130r:5) make clear that the EC Treaty's system of shared environmental competences aims at optimizing protection of the environment.[142]

For these and other reasons – such as the lack of a national treatment provision in the EC Treaty similar to GATT Article III:4,5 – the legal context for environmental measures in the EC, and the case-law of the ECJ on the mutual delimitation of trade and environmental rules, differ considerably from that of the GATT.[143] For instance, the problem of the 'optimal level' of environmental regulation, explicitly referred to in Article 3b (subsidiarity principle) of the EC Treaty, and the standards of legality of environmental measures (such as individual freedoms and general principles of law), are much more complex in the EC than in the GATT context. Furthermore, the EC dispute settlement system is much more comprehensive than the GATT dispute settlement system.

(a) The EC Dispute Settlement System is More Comprehensive

GATT law recognizes and promotes (e.g. in Article X:3 of GATT) individual access to *domestic* courts. But the *international* GATT/WTO dispute settlement procedures are open only to the contracting parties (including the

142 See, e.g., Zuleeg, 'Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiet des Umweltschutzes', *Neue Zeitschrift für Verwaltungsrecht* (1987) 280; Krämer, 'Environmental Protection and Article 30 EEC Treaty', *CML Rev.* (1993) 111 seq., 114.

143 For analyses of EEC dispute settlement proceedings in the field of trade and environmental law, see E.-U.Petersmann, *supra* note 10; Zuleeg, 'Umweltschutz in der Rechtsprechung des Europäischen Gerichtshofs', *Neue Juristische Wochenzeitschrift* (1993) 31 seq.

EC[144]) and rely essentially on the interest of exporting or importing countries to challenge foreign trade restrictions through inter-governmental dispute settlement proceedings.

EC law recognizes rights to judicial review by the ECJ not only on the part of EC Member States but also of Community organs and EC citizens. As inter-governmental 'treaty infringement proceedings' e.g. by the EC Commission against individual EC member countries pursuant to Article 169 of the EC Treaty tend to last many years, the right of EC citizens to institute judicial proceedings against national and Community measures is an important supplementary remedy and has led to a number of national and EC court proceedings over the legality of environmental measures.[145] In its Fifth Environmental Action Programme of 1992, the EC Commission has called for a 'bottom-up strategy' and additional measures to strengthen individual access to justice to enforce EC environmental rules in view of the fact that the number of complaints on environmental matters received by the EC Commission from EC citizens has risen by more than a third since 1991:

> Given their right of access to environmental information (Directive 90/313/EEC) the public must be enabled to participate as fully as possible in the decision-making processes for construction authorizations, operating permits, emisson/discharge licenses, etc.; they have a direct interest in the quality of their living environment, and in addition can provide an important spur to good performance by companies in their area [...] An accessible and efficient complaints facility should be developed at local, regional and national level to improve confidence between the public, the competent authorities and industrial or business establishments [...] Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped.[146]

Most of the EC Court cases relating to EC environmental law focused on the consistency of national measures with 'secondary' EC regulations and direc-

144 On the legal status of the EC as a GATT contracting party *sui generis,* see Petersmann, 'Constitutional Principles Governing the EEC's Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992* (1993) 21 seq., 34.

145 On the individual's right of complaint on environmental matters in EC law, and on EC Directive 90/313 on the Freedom of Access to Information on the Environment, see L. Krämer, *Focus on European Environmental Law* (1992) at 229 seq. and 290 seq. On the still limited number of national court cases with references to EC environmental directives, see Ward, 'The Right to an Effective Remedy in European Community Law and Environmental Protection: A Case Study of United Kingdom Judicial Decisions Concerning the Environmental Assessment Directive', *Journal of Environmental Law* (1993) 221-244.

146 See 'Towards Sustainability. A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development', EC (1993) at 117. The report also notes: 'Up to the present, environmental protection in the Community has mainly been based on a legislative approach ('top-down'). The new strategy advanced in this programme implies the involvement of all economic and social partners ('bottom-up')' (at 43).

tives. In the 'non-harmonized areas' of EC integration, there have been only few EC Court cases on the consistency of national environmental measures e.g. with the free trade rules in 'primary' EC law, such as Article 30 of the EC Treaty. In addition to 'inter-governmental' disputes, there have been also 'constitutional disputes', e.g. between the EC Commission and the EC Council over the proper legal basis of EC environmental regulations,[147] or between EC citizens and national government organs over whether e.g. an EC directive on the disposal of waste oils was in conformity with the principles of freedom of competition and 'freedom of trade as a fundamental right', as guaranteed by Community law.[148]

(b) The Applicable Law in EC Dispute Settlement Proceedings is More Comprehensive

Article 130r of the EC Treaty explicitly stipulates that

> action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.

EC disputes over TREMS may, accordingly, be decided by the ECJ on the basis of principles of EC environmental law as well as international environmental law, such as the 'principles of autarky' or 'self-sufficiency' of waste disposal prescribed in the 1989 Basel Convention on Transboundary Movements of Hazardous Waste[149] and referred to by the ECJ in its *Walloon Waste* case of 1992.[150]

GATT/WTO law does not explicitly recognize these or other principles of environmental law and policy. GATT dispute settlement panels have so far

147 See, e.g., the *Titanium Dioxide* case, *supra* note 122, in which the EC Court held that Council Directive No. 89/428/EEC of 21 June 1989 on the reduction of pollution arising from titanium dioxide produced in the EC had to be adopted on the basis of Art. 100a rather than of Art. 130s.

148 See the *ADBHU* case, *supra* note 121, in which the ECJ held, *inter alia*, that 'the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance' (at 548). But 'the principle of freedom of trade is ... subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired' ... 'such measures ... must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest' (at 549). EC Directive No. 75/439 of 1975 on the disposal of waste oils, which requires Member States to prohibit any form of waste oil disposal which might harm the environment and to set up an effective system of prior approval and subsequent inspections of undertakings that are permitted to process or dispose of waste oils in special plants, was found to be consistent with Community law.

149 See ILM (1989) 657.

150 See Case C-2/90, [1992] ECR 4431.

construed their terms of reference narrowly and refused to apply principles of international environmental law and policy.[151] The new Dispute Settlement Understanding of the WTO Agreement, however, explicitly imposes the requirement 'to clarify the existing provisions of those (covered) agreements in accordance with customary rules of interpretation of public international law'.[152] It remains to be seen whether future WTO dispute settlement panels will take into account universally agreed environmental principles as 'relevant rules of international law applicable in the relations between the parties' (Article 31:3(c) Vienna Convention on the Law of Treaties). One problem remains that – notwithstanding the reference to the customary rules of international treaty interpretation – the standard terms of reference of WTO panels are limited to WTO law and do not include environmental law as 'applicable law' for the settlement of the dispute. Another difficulty relates to the determination of whether e.g. the universally endorsed UNCED principles – such as the principles of 'polluter-pays', 'preventive action' and 'rectification of environmental damage at source' – can already be considered as part of international environmental law, rather than as 'soft law rules' and 'policy principles'.

(c) The Proportionality Principle Plays an Important Role in EC Case-law

The principle of proportionality has long since been recognized as a general principle of Community law and plays an important role in the ECJ's case-law on whether EC restrictions or national restrictions of individual 'market

151 See, e.g., the 1987 Panel Report on US Taxes on Petroleum, BISD 34 S/136 at 162, para. 5.2.6: 'The mandate of the Panel is to examine the case before it in the light of the relevant GATT provisions'... 'The Panel therefore did not examine the consistency of the revenue provisions in the Superfund Act with the environmental objectives of that Act or with the polluter-pays principle. The Panel notes that the *Contracting Parties* established in 1972 a Group on Environmental Measures and International Trade... The EEC would thus have a forum available in the GATT in which to pursue the environmental issues which the Panel, because of its limited mandate, could not address'. The 1994 Tuna II Panel Report, in applying the general rules of international treaty interpretation codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties, found that various bilateral and plurilateral environmental agreements, on which the parties had based some of their arguments, 'were not concluded among the contracting parties to the General Agreement, and ... did not apply to the interpretation of the General Agreement or the application of its provisions ... the Panel noted that practice under the bilateral and plurilateral treaties cited could not be taken as practice under the General Agreement and therefore could not affect the interpretation of it. The Panel therefore found that under the general rule contained in Article 31 of the Vienna Convention, these treaties were not relevant as a primary means of interpretation of the text of the General Agreement' (DS 29/R, para. 5.19). The Panel, however, did not explicitly examine the requirement (spelled out in Article 31:3(c) of the Vienna Convention) that 'there shall be taken into account together with the context ... any relevant rules of international law applicable in the relations between the parties'. But the Panel observed 'that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory' (para. 5.17).

152 Article 3 of the DSU in Annex 2 to the 1994 Agreement Establishing the WTO.

freedoms' are 'disproportionate' and therefore illegal. Thus, in the 1988 *Danish Bottles* case, the Court held a Danish prohibition of using returnable, non-approved containers to be 'disproportionate' and hence illegal on the ground that

> whilst the system of returnable non-approved containers does not ensure a maximum rate of re-use, unlike the system established for approved containers, it is capable of protecting the environment, especially as the quantity of beverages likely to be imported is limited in relation to total national consumption by reason of the restrictive effect of the requirement that containers should be returnable.[153]

In contrast to the transparency, non-discrimination and 'necessity' requirements of GATT law and EC law, whose application in GATT and EC dispute settlement practice reveals many parallels, GATT law and WTO law do not include a proportionality requirement. A negotiating proposal to include a 'proportionality' standard into the WTO Agreement on Technical Barriers to Trade was opposed by many countries and not incorporated into the final text of the Agreement. Unlike the ECJ, a GATT/WTO dispute settlement panel cannot therefore declare a national trade restriction illegal on the ground that, even if it is found 'necessary' to ensure a 'maximum level' of environmental protection, such 'maximum protection' of the environment is a 'disproportionate' restraint on freedom of trade.

(d) GATT's Border Adjustment Rules are Construed Differently from those of EC Law

GATT's 'border adjustment rules' (Articles II:2, III, VI:4) permit each contracting party to apply its domestic product taxes and other internal product regulations to imported products, and to exempt domestic products from such taxes and product regulations upon their exportation. The recourse to these provisions is optional and may therefore lead to four different forms of treatment of products exported from one country into another:[154]

- Application of the *destination principle*: The product could be exempted from domestic taxes and regulations in the exporting country and could be taxed and regulated in the importing country.
- Application of the *origin principle*: The product could be taxed and regulated in the exporting country and could be exempted from taxes and regulations in the importing country.
- *Double taxation and regulation*: The product could be taxed and regulated in both the exporting and the importing country.
- *Tax and regulatory exemption*: The product could be exempted from taxes and regulations in both the exporting and the importing country.

153 See *supra* note 102.

154 See Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration', to be published in 1995 in a book edited by J. Bhagwati and R.E. Hudec.

GATT's border adjustment rules also apply to environmental product taxes and product regulations, such as labelling, packaging, product standards and product-related PPMs. Subject to the GATT requirements of national treatment (Article III) and unconditional most-favoured-nation treatment (Article I:1), each GATT member retains a large number of policy options including sub-optimal environmental policies, for instance when the exported goods are subject to double-taxation or exempted from pollution taxes in a manner inconsistent with the polluter-pays principle. Thus, the 1987 *GATT Panel Report on US Taxes on Petroleum* noted the complaint by the EC that

> a substance containing the chemical exported from the EEC to the United States would have to bear the costs of environmental protection twice: once in the exporting country in accordance with the Polluter-Pays Principle and upon importation into the United States under the Superfund Act. What the United States was in fact doing under the label of border tax adjustments was to ask foreign producers to help defray the costs of cleaning up the environment for the United States industries.[155]

The United States replied

> that the Polluter-Pays Principle had not been adopted by the CONTRACTING PARTIES and it was on the GATT provisions and not on OECD recommendations that the Panel had to base its conclusions. It was therefore irrelevant whether that principle had been observed ... the United States considered that it would be inappropriate for the Panel to determine the consistency of the tax on certain imported substances with the General Agreement on the basis of the Polluter-Pays Principle. Environmental policy principles related to trade could conceivably be incorporated into the GATT legal system, but such a far-reaching step required the cooperation of all contracting parties and could be taken only after considerable study and discussion. A reinterpretation of the existing GATT rules on border tax adjustments would not be the proper vehicle to introduce such principles.[156]

The Panel found

> that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served. The Panel therefore did not examine whether the tax on chemicals served environmental purposes and, if so, whether a border tax adjustment would be consistent with these purposes.

155 See BISD 34 S/136, 148, para. 3.2.8.

156 BISD 34 S/136, 148, para. 3.2.9. The USA further stated: 'If the objective of the Polluter-Pays Principle was to internalize *all* negative externalities caused by polluting activities, environmental taxes had to take into account not only the pollution caused in the production process but also the costs of disposal. When a toxic chemical was exported, the cost of its disposal was exported as well. It could then be quite appropriate to tax not only domestic but also imported products' (para. 3.2.10).

The Panel noted, however, that the

> General Agreement's rules on tax adjustment ... give the contracting party ... the possibility to follow the polluter-pays principle, but they do not oblige it to do so.[157]

GATT's objective to promote multilateral trade liberalization without domestic policy harmonization differs fundamentally from the more comprehensive EC Treaty objective of a 'single market' with 'approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market' (Article 100 EC Treaty). As GATT/WTO law does not provide for 'a system ensuring that competition in the internal market is not distorted' (Article 3(g) EC Treaty), the 'regulatory competition' among GATT contracting parties must be supplemented by more flexible border adjustment rules and by more comprehensive safeguard provisions permitting the unilateral protection of import-competing industries e.g. against dumped, subsidized or other 'injurious' imports (Articles VI, XIX).

In the EC, the national policy autonomy of Member States has been much more limited by EC harmonization of laws and by corresponding limitations on the right of member countries to resort to unilateral border adjustment and safeguard measures. Hence, even though the EC Treaty provisions on border tax adjustments (Articles 95, 96, 98) were largely based on those of the GATT and permit border tax adjustments only for taxes on products (indirect taxes) but not for taxes on producers (direct taxes), the pertinent case-law of the ECJ differs considerably from that of GATT dispute settlement panels.[158] There are also cases where the ECJ has allowed product and tax differentiations based on criteria (such as production process employed) that were unrelated to the final product itself and would be inconsistent with GATT Article III. In *Commission v. Italy (recycled oil products),* for instance, the ECJ held that Italy could grant tax advantages to oil products produced with recycled used oil notwithstanding the impossibility of distinguishing between the final products produced either with or without used oil, provided that the same tax advantages were accorded to imported products produced with used oil.[159]

157 BISD 34 S/136, 161.

158 See Demaret, Stewardson, 'Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes', *Journal of World Trade* (1994) 5-65, who note that 'the distinction between direct and indirect taxes has not been rigidly applied in EC law' (at 42). Regarding the EC's application of the border tax adjustment rules also to 'direct taxes that are sufficiently closely related to the product concerned', the authors note that 'this category is perhaps too undefined and subjective to be practicable in the GATT context, as it requires the presence of a strong decisional body' (at 43). Under EC law, 'specific environmental taxes on inputs or processes are not currently eligible for adjustment' (at 61).

159 Case 21/79, *Commission v. Italy*, [1980] ECR 1.

In view of the abolishment, since 1 January 1993, of internal customs frontiers and border controls within the EC, the declared longer term goal of the EC is to replace tax adjustments within the EC by the application of the origin principle to all indirect taxes so that goods will be taxed in the country of origin at the tax rate of the country of origin. The resulting 'regulatory competition' may then induce EC member countries to either harmonize their tax rates or lower them in order to increase sales.

(e) The EC's Case-law Concerning Competition Rules on TREMS has no Equivalent in GATT Dispute Settlement Practice

Competition policy aspects have played an important role in the elaboration of EC environmental law and in the ECJ's interpretation of it. As 'environmental protection requirements shall be a component of the Community's other policies' (Article 130r:2), a large number of environment-related EC regulations and directives were based on Articles 100 or 100a of the EC Treaty on the ground that they pursue the twofold aim of environmental protection and improvement of the conditions of competition and 'directly affect the establishment or functioning of the common market' (Article 100:1) by promoting greater uniformity of conditions of competition. The ECJ has confirmed that

> provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is no harmonization of national provisions on the matter, competition may be appreciably distorted. It follows that action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100a, a provision which is particularly appropriate to the attainment of the internal market.[160]

Until now, there have been no GATT dispute settlement proceedings or EC Court cases on environmental subsidies.[161] As regards the EC competition rules in Articles 85 seq., the Court has inferred from Articles 3(g) and 5 in conjunction with Article 85 an obligation also on the part of EC member countries to abstain from any action which favours, facilitates or allows private anti-competitive behaviour.[162] Private cooperation agreements between undertakings, e.g. on environment-related common research programmes, the

160 Case C-300/89, *Commission v. Council*, [1991] ECR I 2867 seq., para. 23.

161 Quick, 'Der Gemeinschaftsrahmen für staatliche Umweltschutzbeihilfen', *Europäische Zeitschrift für Wirtschaftsrecht* (1994) 620-624, draws the attention to potential conflicts between EC law, where certain environmental state aids may be approved under Article 92:3, and GATT/WTO law, where the same state aids may be found to be inconsistent with the WTO Subsidy Agreement.

162 See, e.g., Case 231/83, *Cullet v. Centre Leclerc*, [1985] ECR 305, para. 17; Case 136/86, *BNIC v. Aubert*, [1987] ECR 4789.

voluntary limitation of environmentally dangerous PPMs and the common recycling of packaging waste, as well as voluntary agreements between national authorities and undertakings for the protection of the environment, have been promoted by the EC Commission provided the environmental benefits outweighed the restrictions on competition.[163] But the recent complaint against the exclusive character of a recycling system of standardized refillable glass bottles, organized by a group of German mineral water producers,[164] and the EC Commission's refusal to grant an exemption from Article 85 for privately agreed 'environmental charges' designed to cover the investment costs for reducing harmful environmental emissions from tank storage facilities,[165] also illustrate the risks of 'green protectionism' and of 'green restraints of competition'.

The EC's more comprehensive set of both 'competition rules for governments' (e.g. Articles 30, 37, 92) and 'competition rules for private anti-competitive practices' (e.g. Articles 85 seq.) enable the EC to deal much more effectively with the problem, so far unresolved in GATT/WTO law, that the liberalization of *governmental* market access barriers and distortions may be replaced by *private* market access barriers and distortions. As the various EC Treaty provisions (e.g. Articles 30, 85:3, 92:3) provide for similar legal tests of proportionality, it should be possible under EC law to promote their overall consistency and coherent application.

Outlook: What Can We Learn from Comparing International and European Trade and Environmental Law?

The comparative analysis of international and European trade and environmental law, and of the pertinent GATT and EC dispute settlement practice (e.g. regarding tax discrimination and unilateral TREMS), has revealed a large number of commonalities between the worldwide GATT/WTO law and the regional EC integration law. There are also interdependences between the worldwide and regional rules, for instance when GATT law and MEAs are applied by the ECJ as an 'integral part of the Community's legal system', or when both GATT and EC law are construed in conformity with subsequently concluded environmental agreements.

But there are also important differences between GATT/WTO law and EC law. For example, while international trade and environmental agree-

163 See above Chapter II.A.2.d.

164 See Procedure SPA Monopole/GDB, in: Twenty-Third Report on Competition Policy, EC 1993, paras. 158-159.

165 On this *VOTOB* case, see *supra* note 89.

ments continue to be negotiated and implemented in relative isolation from one another on the worldwide level, EC law has enabled an integration of trade, economic and environmental law to a degree so far not possible in other international organizations. And in contrast to GATT's inter-governmental 'top-down approach', the EC's rights-based 'bottom-up approach' and guarantees of judicial review have enabled a much more effective enforcement system in the field of trade and environmental law. The comparison between GATT and EC dispute settlement practice showed astonishing differences even in respect of almost identically worded provisions such as the 'public policy exceptions' in Article XX of GATT and Article 36 of the EC Treaty: the prohibition of a 'disguised restriction on trade' in Article 36 of the EC Treaty was construed by the ECJ as prohibiting 'unnecessary' or 'disproportionate' restrictions on trade. By contrast, the same prohibition of a 'disguised restriction on international trade' in Article XX of GATT has so far hardly ever been invoked in GATT dispute settlement practice and, in one GATT panel report, was construed only as a transparency requirement.

One of the major lessons from the comparative analysis is that the different legal and institutional contexts of GATT law and EC law have a strong bearing on the interpretation and mutual delimitation of their respective trade and environmental rules. Thus, the 'applicable law' in GATT dispute settlement proceedings over TREMS has so far been exclusively international trade law.[166] By contrast, the ECJ decides disputes over TREMS on a much broader legal basis including trade, economic, competition and environmental law. The fact that the almost identically worded prohibitions of tax discrimination in GATT law (Article III) and EC law (Article 95) are construed by the ECJ – in contrast to GATT dispute settlement panels – as allowing national tax differentiation even between identical products depending on their PPMs, has been attributed, *inter alia*, to the independence and stronger legal authority of the ECJ.

Policy recommendations e.g. on 'green reforms' of border adjustment rules must take into account the fact that – due to the absence of systematic harmonization of national economic, environmental, social and other internal regulations in GATT – the worldwide border adjustment rules of GATT must remain more flexible than those of EC law. Whereas GATT's border adjustment rules were designed primarily to avoid competitive distortions and protectionist abuses, Article 130r of the EC Treaty requires that environmental protection requirements are also taken into account in the interpretation and application of the EC's border adjustment rules. Due to the EC's 'single mar-

166 It is only very rarely that GATT panel reports have also referred to general international law and then not as a *ratio decidendi*. A recent example is the 1994 Tuna II panel report (DS 29/R): 'The panel further observed that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory'... (para. 5.17).

ket' objective and approximation of laws including tax laws, the EC's border adjustment rules pursue a broader range of policy objectives than those of GATT law. Yet, GATT's border tax adjustment rules seem to include more stringent limitations on the national right to differentiate between 'like products', even for valid environmental reasons, so as to prevent GATT contracting parties from undermining their product-related tariff bindings. GATT's 1994 *Automobile Taxes* case and the treatment, in the WTO Agreement on Subsidies, of energy, fuel and oil used in the production process of a product as 'inputs physically incorporated', indicate that the interpretation of the GATT/WTO border adjustment rules may continue to evolve.

The universally agreed 'UNCED principles' on trade and environment, and the increasing efforts in GATT and the WTO to ensure the mutual consistency of worldwide trade and environmental rules, suggest that the GATT/WTO should follow the EC's approach of integrating trade and environmental rules if the latter have been accepted by all GATT/WTO member countries. GATT's principle of 'separation of policy instruments', and GATT's legal ranking of trade policy instruments according to their economic efficiency, have helped governments in their 'public choice' of welfare-increasing policy instruments and in resisting protectionist pressures. But – given their complementary economic and legal policy objectives – the separation of trade and environmental rules is no longer justified if it leads to mutually inconsistent interpretations and practices in international trade and environmental law. The explicit incorporation of universally agreed UNCED principles on TREMS into WTO law, for instance by means of an Understanding of the WTO Committee on Trade and Environment, could avoid such legal and political inconsistencies and, like the international environmental law principles in Article 130r of the EC Treaty, could strengthen the overall consistency of trade and environmental rules.

In other areas, such as approximation of national tax laws and environmental PPMs, EC law does not seem to offer an appropriate model for the future evolution of the worldwide GATT/WTO law. The past success of the GATT world trade and legal system rested on the subtle combination of reciprocal trade liberalization, domestic policy autonomy, rule of law and third party (quasi-)adjudication of trade disputes. GATT's requirements of unconditional most-favoured-nation treatment (Article I:1) and national treatment (Article III) were therefore construed in a manner protecting non-discriminatory market access, yet without limiting the right of exporting and importing countries to tax and regulate traded products and PPMs for purposes unrelated to 'protection to domestic production' (Article III:1). Research to date has confirmed that

> environmental measures have not been the source of significant cost differentials among the major competitors and have had minimal effects on overall trade between OECD and non-OECD countries.[167]

One reason for this seems to be that environmental laws can enhance industrial competitiveness by spurring more efficient technologies, fewer inputs, waste minimization, recycling and competitive advantages in 'eco-products' and 'eco-industries'.[168]

GATT/WTO law promotes the harmonization of technical regulations, standards and conformity assessment procedures because e.g. harmonization of national eco-labelling, eco-packaging and recycling programmes will reduce transaction costs and ease trade problems caused by such market differentiation. The complaints about trade-distorting effects of Germany's Ordinance on the Avoidance of Packaging Waste of 1991, which sets re-use and recycling quotas for 'primary or sales packaging' and requires producers to take back 'secondary packaging' from distributors as well as the 'tertiary transport packaging', are illustrative of the gains which might be reaped from a coordinated introduction of the various kinds of eco-packaging schemes (such as deposit-refund requirements, re-use and recycling requirements, bans on packaging or packaging materials, packaging charges, packaging standards). The obligations under the 1994 TBT and SPS Agreements for the preparation, adoption and application of technical regulations and standards, and for the mutual recognition of conformity assessments, are likely to enhance both economic welfare and protection of the environment because they do not impede the right of countries to apply higher national standards.

The Uruguay Round Agreement on TRIPS remains the only 'multilateral trade agreement' (in the sense of Article II:2 of the WTO Agreement) up to now which has introduced comprehensive worldwide obligations for the protection of private property rights by requiring substantive minimum standards for the availability, scope, use and protection of intellectual property rights. The linkage of the TRIPS Agreement to the outcome of the other Uruguay Round Agreements enabled a 'package deal' based on 'global reciprocity', which was never achievable in separate sectoral negotiations e.g. on reforms of intellectual property rights in the context of the World Intellectual Property Organization. The success of this 'issue linkage' has already triggered proposals to also use the WTO as a negotiating forum and

167 Stevens, 'Environmental Policies and Industrial Competitiveness', *Environmental Policies and Industrial Competitiveness*, OECD (1993) at 7. For a summary of studies on the impact of environmental costs on international trade see Dean, 'Trade and the Environment: A Survey of the Literature', *World Bank* (1992).

168 See Stevens, *supra* note 167, at 9: 'Reduced input costs, technological innovation, greater efficiency in production, reduced clean-up costs, and increased production of environmental goods and services may have counter-balanced environmental compliance costs for industry as a whole'. On the trade implication of eco-labelling, eco-packaging and recycling see *Life-Cycle Management and Trade*, OECD (1994).

legal enforcement system for other domestic policy issues, such as competition rules, TREMS, or worker rights so as 'to ensure that trade liberalization – with the increased opportunities and the necessary adjustments that go with it – goes hand in hand with social progress' to be measured in terms of compliance with internationally recognized conventions concluded in the context of the International Labour Organization.[169]

The proposed worldwide harmonization, in the framework of the WTO, of e.g. competition, environmental and social laws would lead the WTO further away from the old '1947 GATT system', based on international market integration and 'competition among non-discriminatory internal rules', towards international policy coordination. The experience with the EC's successful market integration suggests that a stronger linkage between e.g. trade rules, competition rules and environmental rules on TREMS could strengthen the WTO's objective of 'expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development' (WTO Preamble). But the EC's difficulties with 'social policy integration', and the frequent protectionist abuses of the EC's discretionary regulatory powers (e.g. in the field of the common agricultural, transport and commercial policies), are also a warning that attempts at 'policy integration' may be neither economically desirable nor politically acceptable or legally enforceable in the worldwide context of the WTO. In the field of environmental law as well, the needed establishment of a global environmental organization with 'GATT-like' multilateral rules and enforcement mechanisms must take place outside the WTO.[170]

169 The quotation is from a report submitted in November 1994 by the International Labour Office to the 'Working Party on the Social Dimensions of the Liberalization of International Trade': The Social Dimension of the Liberalization of World Trade, Doc. GB.261/WP/SLD/1, at para. 67.

170 See, e.g., Esty, 'The Case for a Global Environmental Organization', in P.B. Kenen (ed.), *Managing the World Economy. Fifty Years after Bretton Woods* (1994) 287-309.

The Cultural Dimension of Community Law

by

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Biography

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Law graduate of the University of Leuven in 1978, Diplôme d'études européennes at the College of Europe (Bruges) in 1979, Ph.D. in Law at the European University Institute (Florence) in 1985.

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Principal Publications

– 'Building Europe's Image and Identity', in A. Rijksbaron, W.H. Roobol, M. Weisglas (eds), *Europe from a Cultural Perspective* (1987) 132-139.

– 'The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice', in R. Bieber, G. Ress (eds), *Die Dynamik des europäischen Gemeinschaftsrechts* (1987) 261-281.

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– 'The European Dimension of Legal Education', in P. Birks (ed.), *Reviewing Legal Education* (1994) 68-76.

Introduction: Economic Integration and Cultural Diversity in Historical Perspective

Cultural assimilation was one of the main ingredients of the transformation of 'Peasants into Frenchmen', the process which took place in the nineteenth century and is described by Eugen Weber in his book with the same name.[1] At the end of this process of social upheaval and national integration, all French citizens spoke French whereas a majority of the French population was unable to do so one century before. Economic transformation and cultural standardization went hand in hand, like in many other European countries. In his influential book *Nations and Nationalism*, Ernest Gellner offers an explanation of this phenomenon.[2] He argues that cultural and linguistic nationalism in the nineteenth century ('one state, one nation, one language') has to be explained in terms of the social and economic evolution of that time. The structural change taking place in the economies of the Western European countries, more particularly the shift to an industrial economy, led to a new division of labour and hitherto unknown occupational mobility. The capacity to move between diverse jobs, and to communicate and cooperate with numerous individuals in other social positions required

> that members of such a society be able to communicate in speech and writing, in a formal, precise, context-free manner – in other words they must be educated, literate and capable of orderly, standardized presentation of messages.[3]

One may contrast the French peasants of the nineteenth century with, say, the citizens of Luxembourg today. The latter, apparently, can be transformed into Europeans without any such linguistic assimilation. Their economy is part and parcel of the wider European economy. A very high percentage of the country's working population consists of citizens of other European Community countries (mainly Portuguese immigrants and *fonctionnaires* of the EC institutions). Apart from the steel industry, which tries to find its way through recession under the guidance of the Commission of the EC, the country's major economic activities are in the services sector. In both banking and television, Luxembourg firms have conducted an active export policy within the framework of the common market, which has enabled them to conquer large chunks of that market. Yet, at the very same time at which its economy has become linked with a thousand threads to the wider European market, Luxembourg has elevated the local dialect (Luxemburgian or

1 E. Weber, *Peasants into Frenchmen. The Modernization of Rural France 1870-1914* (1979), Chapter Six: 'A Wealth of Tongues'.

2 E. Gellner, *Nations and Nationalism* (1983). A summary of those views can be found in Gellner, 'Nationalism and the Two Forms of Cohesion in Complex Societies', in *id., Culture, Identity and Politics* (1987) 6.

3 Ibid., at 15.

'Letzebuergesch') to the status of an official language protected by the Constitution, and has promoted its use in a range of activities. Recently, the Luxembourg parliament agreed to extend electoral rights at local elections to EC citizens (as required by the Maastricht Treaty on European Union), but only on condition that they are able to speak Luxemburgian.[4] It would seem that the Luxemburgians try (deliberately or not) to erect communication barriers in order to preserve their national identity in the midst of the growing economic and political integration of Europe.

How can one explain the difference between what happened to the cultural identity of the peasants of Lozère, Finistère and other places in the nineteenth and early twentieth centuries, and what happens in Luxembourg today? Why does the new enlargement of economic scale taking place in the second half of this century under the flag of European integration fail to produce the same detrimental effect on cultural and linguistic diversity as the earlier one arguably did?

The obvious answer is the different role of the State in both situations. The French State (and other European States in the same period) was able to use its power resources and the cultural institutions which it controlled (principally the schools) in order to bring about cultural assimilation. Today, cultural patterns are still deeply affected by decisions of governments: the latter control educational institutions and media organizations, they are able to impose the use of a particular language in particular contexts: in the media, in public administration, sometimes even in private business. But the citizens of Luxembourg and those of other European nations have maintained control over those instruments for the cultural reproduction of society; they have not become the subjects of a European nation-State but have preserved their cultural sovereignty.

In other words: the institutional conditions now are very different from what they were in the nineteenth century. Unlike then, the creation of a larger economic space has not been accompanied by the location of cultural policy-making at the higher level of government. Many State powers may have been transferred to the European Community, but the regulation of culture was not among them.

When, in the 1950s, economic integration was undertaken, it aimed of course at increasing the economic welfare of the participant States, but also, undoubtedly, at achieving *political* objectives, like the preservation of peace and the encapsulation of Germany and an 'ever closer union among the peoples of Europe'.[5] But closer union did not imply, in the minds of the founding fathers, *cultural* assimilation. There was no obviously dominant national

4 *Le Monde*, 4 July 1992.

5 The Preambles of both the ECSC Treaty and the EEC Treaty were quite outspoken about the broader political objectives of the founding fathers.

culture and none of the founding States harboured thoughts of cultural expansionism by means of economic integration. One may even go further and say that the Community system, as it was established, is marked by a clear but unexpressed resolution to separate the economic and the cultural spheres, and to launch a process of economic unification which would not affect national cultural identities.

In this respect, as in many others, European integration can be seen as a highly original political process involving a break with earlier traditions in the sense that political or economic unification were no longer thought to require simultaneous cultural homogenization. The guiding image of Europe was – and still is for most of its citizens – that of a (con)federation respecting existing cultural patterns rather than that of a new nation-State following the nineteenth century model.

The same point can be expressed in legal terms. The European Community was created by an international treaty containing specific rules binding the contracting States and attributing specific powers to the Community institutions. Apart from those enumerated rules and powers, the Member States have retained their sovereignty. As the EEC Treaty did not formulate a Community cultural policy (as it did not provide the Community institutions with explicit powers to adopt rules in this area), the logical conclusion would seem to be that Community rules simply could not affect the cultural policies of the Member States.

Yet, this simple picture was never entirely true and it needs serious qualification today. The economic integration of the Member States into a common market has proved to have an indirect impact on their established cultural patterns (Part II). As a result, culture is no longer an excluded sector of Community activity and has indeed emerged in recent years as a significant dimension of EC policy (Part III). In the Treaty on European Union, the Member States have formally recognized this evolution by including specific provisions on culture and attempting to strike the balance between the needs of economic and political integration and that of preserving cultural diversity (Part IV). These general considerations on the cultural dimension of Community law will be preceded by the analysis of a case-study (the trade in works of art) which will serve to highlight some of the central legal and policy issues which will be encountered in the remainder of this course (Part I).

I. Community Law and the Trade in Works of Art

Florence, the city where the present course was held, had what is probably one of the earliest examples of legislation trying to prevent the removal of works of art outside a country: the deliberation of 24 October 1602 by which

the Grand Duke of Tuscany prohibited the 'extraction from Florence and from the State of good paintings'.[6] A licence had to be obtained for the export from Tuscany of paintings by dead artists, and there was an absolute prohibition to export works painted by eighteen named artists, including Michelangelo, Raphael, Andrea del Sarto, Leonardo da Vinci, Titian, Correggio, Parmigianino, and some others who are less famous now. The most recent piece of European Community legislation in the field of culture covers the same ground. It also aims at preventing the extraction of works such as those of Raphael and Michelangelo from their cultural setting. This legislation has two parts: a Regulation of 9 December 1992 on the export of cultural goods (instituting a Community system of export licences)[7] and a Directive of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.[8] Between 1602 and 1993 there is continuity in the purpose of the legislation (protecting the cultural heritage) and in the objects protected (the works of the old Italian masters are within the scope of the European legislation along with many other objects), but there is discontinuity in the level at which legislation is enacted: from Tuscany, a small State of the *ancien régime*, to the more encompassing regime of the European Community. Why is there European regulation of this matter, and, to put it in legal terms, why is the Community competent to deal with such an eminently cultural subject matter, despite the fact that culture was not mentioned in the Treaty of Rome?

The key for explaining the adoption of those Community acts is the terms *cultural goods* and *cultural objects* which are used in the respective titles of the Regulation and the Directive. They indicate that the works of art covered by those Community acts are the expression of cultural activity, and often even of a specific national culture. At the same time, those works are 'goods' or 'objects', which means that they come within the scope of the free movement of goods, one of the central economic principles and objectives of the EC Treaty.[9]

The Janus-like concept of cultural goods (or objects) echoes the first case in which the European Court of Justice was called to address the relationship between culture and Community law, namely the *Italian Art Treasures* case.[10] In 1968, the European Commission brought infringement proceedings against Italy, arguing that the Italian export tax on works of art, insofar

6 See M. Frigo, *La protezione dei beni culturali nel diritto internazionale* (1986) at 9.
7 Council Regulation 3911/92, OJ 1992 L 395/1.
8 Council Directive 93/7, OJ 1993 L 74/74.
9 In the following, the term 'EC Treaty' will be used for general statements about Community law, which extend to both the past and the present, as well as for statements referring specifically to the EC Treaty as it is now, since the entry into force by the Treaty on European Union. The term 'EEC Treaty' will only be used for specific references to the text of the Treaty as it was before 1 November 1993.
10 Case 7/68, *Commission v. Italy*, [1968] ECR 423.

as it applied to export to Community countries, was prohibited by Article 16 of the EEC Treaty. This Article is part of the chapter on the free movement of goods and prohibits charges whose effect is equivalent to that of a customs duty.

The Italian Government argued, in defence of the legitimacy of its law before the European Court of Justice, that the tax applied to objects of a very special nature, namely works of art, that could not be assimilated to goods for ordinary use or consumption and therefore were not covered by the Treaty rules on the free movement of goods.[11] The argument had a strong basis in Italian law, which indeed considers cultural goods to be different from ordinary goods. Italian legal doctrine has developed a theory of 'cultural goods' according to which such goods have a dual nature. They can be the object of private appropriation but are not at the full disposal of their proprietor; rather, the national community has a separate right in their preservation and retention because of their cultural value.[12]

Yet, the Court of Justice rejected the Italian argument and tersely held that all products forming the object of a commercial transaction come under the rules on free movement of goods whatever their other qualities.[13] As works of art are sold and purchased, they were to be considered as goods in the sense of the EEC Treaty. One did not, in fact, need a court judgment to arrive at this conclusion. The EEC Treaty itself already pointed in that direction by allowing, in Article 36, for national restrictions to free trade justified on grounds of 'protection of national treasures possessing artistic, historic or archaeological value'. There would have been no need for a provision excepting a *limited* category of cultural goods if the principle of free movement did not apply to *all* cultural goods in the first place.

The limited nature of Article 36 results, first of all, from the fact that it constitutes an exception only to the rules of the Articles 30 and 34 EC Treaty which deal with *quantitative* restrictions to trade. Therefore, as the Court of Justice stated in the *Italian Art Treasures* judgment, it cannot justify *financial* restrictions to trade such as the Italian export tax which formed the object of litigation in that case. This means that a State is allowed to prohibit completely the export of certain valuable items, but is not allowed to impose the less severe restriction of an export tax on those same items. This paradox

11 Ibid., at 428.

12 The classical formulation of this doctrine is by Giannini, 'I beni culturali', *Rivista trimestrale di diritto pubblico* (1976) 3. See also Rolla, 'Beni culturali e funzione sociale', *Le Regioni* (1987) 53. The doctrine was recognized and confirmed in the Italian Act of 19 April 1990, No. 84, on the inventory and cataloguing of cultural goods. Its Article 1.C(3) states the following: '*I beni culturali, in quanto elementi costitutivi dell'identità culturale della Nazione, per quanto riguarda il regime della circolazione, non sono assimilabili a merci*' ('Cultural goods, being constitutive elements of the Nation's cultural identity, cannot, with regard to their movement, be assimilated to (ordinary) goods').

13 Case 7/68, *supra* note 10, at 428-429.

can be justified by the consideration that if retention of the cultural patrimony is the policy aim, then an export prohibition might be an adequate instrument, whereas an export tax, which cannot ultimately prevent exportation, is not. Moreover, an export tax is only laid on those works that may be exported, that is, works for which retention is not considered necessary anyway.

The scope of Article 36 is thus limited to non-financial restrictions of trade. A further limitation is that the exception does not necessarily justify restrictions for *all* the objects which the Member States have brought within the scope of their art trade legislation. On this point, there is a discrepancy between the various linguistic versions of the Treaty. Whereas the substantive term *treasures*, used to identify the objects covered by the exception in the English version of the Treaty, corresponds to the French term *trésors*, it is more narrow than the expressions used in some of the other language versions of the Treaty, such as the Italian (*patrimonio*), Dutch (*bezit*) or German (*Kulturgüter*).

How to deal with this terminological diversity? On the one hand, all linguistic versions of the Community Treaties are equally authentic and carry the same weight for the purposes of interpretation.[14] On the other hand, it might be tempting to privilege the more narrow concept of artistic 'treasures' on the basis of the well-known rule of interpretation that exceptions to the common market freedoms should be narrowly interpreted. Yet, the Court of Justice has never advocated such a narrow reading for this particular exception of Article 36, and one might rather think that the protection of cultural identity could be treated like the protection of public morality, an exception ground in Article 36 for which the Court has left a wide discretion to the Member States.[15]

In the absence of a European Court ruling on this matter, there is still uncertainty about the extent to which national art trade legislations are compatible with the Community principle of free movement of goods. Almost all European States regulate the flow of works of art from their territory. Some countries merely restrict the export of a limited number of listed objects. In other countries, particularly in Southern Europe, an export licence is required

14 D. Lasok and J.W. Bridge, *Law & Institutions of the European Communities* (1991) at 97 et seq.

15 A Member State can define the needs of public morality 'in accordance with its own scale of values and in the form selected by it' (Case 34/79, *Henn and Darby*, [1979] ECR 3795); see discussion of this point in De Witte, 'The Freedom of Movement of Goods and Services', in K. Waaldijk and A. Clapham, *Homosexuality: A European Community Issue* (1993) 317, at 325 et seq. On the problems of interpretation of the 'artistic treasures' exception of Article 36, see Pescatore, 'Le commerce de l'art et le Marché commun', *RTDE* (1985) 451, at 456-457; and Mattera, 'La libre circulation des œuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique', 2 *Revue du marché unique européen* (1993) 9, at 21-25.

for vast categories of cultural objects defined by reference to their age and artistic or historical value.[16] In the latter countries, not all of those goods can be qualified as 'treasures' yet they do form part, arguably, of the country's 'patrimony'.

Despite the remaining uncertainty, it is clear that a consistent category of goods are excluded from the free trade regime instituted within the Community. This anomaly appeared in a cruder light when the Member States decided, by adopting the Single European Act in 1986, that all remaining barriers to trade had to be removed before the end of 1992 so as to create an area without frontiers.[17] Yet, the drafters of the Single European Act realized the possible contradiction between this aim of uninhibited free trade and their own restrictive art trade regulations. They appended to the Single Act a Declaration to the effect that 'nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purpose of controlling ... illegal trading in works of art and antiques'.

As part of its endeavours to favour completion of the internal market, the Commission issued on 22 November 1989 a policy document entitled 'Communication to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992'.[18] The Council reacted one year later by adopting 'Conclusions'[19] which, despite their lack of binding force, are important because they contain the main ingredients of the political compromise which formed the basis of the later legislation. First, it was agreed that Member States may continue to rely on Article 36 of the Treaty and maintain their restrictive art trade legislation even after 1992. No total harmonization of art trade regimes was envisaged as part of the process of completion of the internal market. Second, it was agreed that the opening of the internal borders did require, as the Commission had argued, the removal of customs controls. As those controls are a traditional means for the enforcement of national export restrictions, their abolition by the end of 1992 could lead to an increase in illegal art trafficking across the intra-Community borders. In order to avoid this, a *Community regime* was needed to buttress national art trade laws and curb illicit export of works of art. This was to be accomplished by a two-pronged legislative scheme: on the one hand, the institution

16 For a comparative survey of national legislations on the export of works of art, see P. Lalive (ed.), *International Sales of Works of Art* (1988); Q. Byrne-Sutton, *Le trafic international des biens culturels sous l'angle de leur revendication par l'Etat d'origine* (1988); L. Prott and P. O'Keefe, *Handbook of National Regulations Concerning the Export of Cultural Property* (1988).

17 Article 8A of the EEC Treaty as amended by the Single European Act (now Article 7A of the EC Treaty).

18 COM(89) 594.

19 The Conclusions were adopted on 19 November 1990. A French version of this text can be found in *RMC* (1991) 65.

of common controls at the external borders of the EC so as to mitigate the effect of abolition of customs controls at the internal borders; on the other hand, but with the same purpose, the creation of a procedure for the restitution, inside the Community, of illegally exported works of art.

When the Commission finally published a draft Regulation and a draft Directive on 28 February 1992, most of the political groundwork had been laid. This allowed a relatively smooth progress of these proposals through the Community decision-making system and they were adopted around the prescribed deadline of 1 January 1993, the target date for completion of the internal market. In December 1992, the Council adopted the Regulation and approved a common position on the Directive. After the second reading by the European Parliament, the Directive was finally adopted on 15 March 1993.[20]

Both acts are relatively complex pieces of legislation, with reverberations on central questions of national private law and administrative and judicial procedure. The focus, in this course, will be on their role in the development of the cultural dimension of Community law.[21]

The aim of the *Regulation on the export of cultural goods*[22] is to install uniform controls at the Community's external borders so as to avoid a situation in which cultural property would first be exported from a Member State with strict export regulations (say, Italy) to a Member State with a liberal export regime (say, the United Kingdom) from where it could leave unhindered the territory of the Community. The harmonization of national export

20 There was no need for a second reading of the Regulation because it was based on Article 113 of the EEC Treaty which enables the Council to decide measures of common commercial policy without even consulting the European Parliament (although such consultation is routinely undertaken). The Directive was based on Article 100A of the EEC Treaty and was therefore adopted according to the cooperation procedure which involves a second reading in Parliament and Council. One may note that future amendments of the Directive will have to be adopted according to the codecision procedure of Article 189B EC Treaty, which, since the entry into force of the Treaty on European Union, has replaced cooperation as the appropriate mechanism for the adoption of acts based on Article 100A. For a comparative view of the various legislative procedures, see Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union', *EL Rev.* (1994) 343.

21 For a fuller treatment of the substance of the Regulation and Directive, see Voudouri, 'Circulation et protection des biens culturels dans l'Europe sans frontières', *Revue du droit public* (1994) 479; De Ceuster, 'Les règles communautaires en matière de restitution de biens culturels ayant quitté illicitement le territoire d'un Etat membre', 2 *Revue du marché unique européen* (1993) 33; Margue, 'L'exportation des biens culturels dans le cadre du grand marché', *id.*, 89; M.P. Chiti (a cura di), *Beni culturali e Comunità Europea* (1994); Schwarze, 'Der Schutz nationalen Kulturguts im europäischen Binnenmarkt', *Juristen Zeitung* (1994) 111; Rigaux, 'Le commerce des œuvres d'art dans le Marché Commun', *Etudes de droit international en l'honneur de Pierre Lalive* (1993) 733; Seidl-Hohenveldern, 'Patrimoine culturel mobilier et Marché intérieur de la Communauté européenne', *id.*, 753; Siehr, 'International Protection of Cultural Property in the European Community', *id.*, 763.

22 Council Regulation 3911/92, OJ 1992 L 395/1.

regimes has a limited scope. The export regime instituted by the Regulation applies to particular categories of cultural goods listed in an Annex to the Regulation (and defined on the basis of their age and economic value) which may be broader or narrower than the categories of goods that are considered as 'national treasures' under national law.[23] By defining, in the Annex, the categories of 'cultural goods' for the purpose of the Regulation, the Community has made a cultural policy choice which the Member States will have to respect.

Persons wishing to export from the Community one of the cultural goods as defined by the Annex of the Regulation will have to present an export licence (Article 2) delivered by the authorities of the country in which the good was 'lawfully located'. The criterion of lawful location implies that if an art collector illegally exports a painting by, say, Botticelli from Italy into England and wants to ship it from there to the United States, the British authorities will not provide him with an export licence; he will need an Italian export licence which he will obviously not be able to present, and therefore the object will remain within the territory of the Community.

One can say therefore that the Regulation imposes on the Member States the duty to recognize each other's art trade legislation whenever 'cultural goods' are involved. As a compensation for the fact that controls at the internal borders are removed, countries like Italy, Spain and Greece find extraterritorial recognition of their strict art trade legislation; their legislation 'follows' the good as long as it is on the territory of the European Community.

The *Directive on the return of cultural objects*[24] complements the Regulation by ensuring protection for the national cultural heritage through an obligation for the Member States to return objects which were unlawfully removed from their Community country of origin. Restitution of an art object to the country of origin normally depends on the operation of the rules of private international law of the country where the object is located. The Directive harmonizes the laws of the Member States by requiring them to return cultural objects to the Community country from which they were illegally exported, if certain conditions are fulfilled. 'Unlawful removal', in the sense of the Directive, includes both the case in which the good was stolen and the case in which it was transferred with the consent of its owner but in contravention of national export restrictions.

Like the Regulation, the Directive entails the mutual recognition of protective national rules across the Community, but the effect of this recognition is more far-reaching. For instance, Britain will have to recognize the extra-

23 In practice, the biggest change occurs for countries that had export restrictions for *listed* objects and that henceforth will have to apply export controls for complete *categories*.

24 Council Directive 93/7, OJ 1993 L 74/74.

territorial operation of Italian legislation by returning objects which were unlawfully removed from Italy, even though the exportation from Britain of a similar object would be free. Again, the recognition is not complete, because the duty to return is limited to 'cultural objects'. The term 'cultural objects' is used instead of the term 'cultural goods' used in the Regulation. The choice of a different term is to be explained by the fact that, whereas 'cultural goods' form a purely Community category, 'cultural objects' are a mixed category: they must fall within one of the categories of objects listed in the Annex to the Directive (which is virtually identical to that of the Regulation), *and* they must be part of the 'national treasures' of the country of origin (within the limits allowed by Article 36 EC Treaty).

The obligation to return such objects is subject to judicial proceedings being brought by the requesting State before the competent court of the requested State against the possessor of the object. That court must then, if the conditions set by the Directive are fulfilled, order the return of the object to the country of origin. The *bona fide* holder of the object is entitled to an indemnity to be paid by the requesting State. The Directive also attributes to the administrative authorities of the requested States the role of acting as an intermediary in the process of recovery; they have a number of duties of cooperation but do not possess decision-making powers.

Finally, one should note that the Directive only applies to cultural objects 'unlawfully removed from the territory of a Member State after 1 January 1993' (Article 13): it does not apply, for instance, to the famous Elgin Marbles, which were removed from the Parthenon in the nineteenth century and are now kept in the British Museum and which Greece would like to have returned to their place of origin.[25]

The Regulation and the Directive are a recent and rather spectacular example of Community involvement in the cultural sphere and may serve to highlight some more general characteristics of that involvement which recur in other areas of cultural policy to be examined further on in this course.

First, Community law on trade of cultural property is a good illustration of the two modes of operation of Community law in the domain of culture, which will be examined in Parts II and III of this course. On the one hand, there is *market integration* (sometimes called 'negative integration'). National rules that are contrary to the common market freedoms (such as the Italian export tax in Case 7/68) must be abolished or modified so as to remove the incompatibility; yet, as Article 36 shows, cultural goods (or at least some of them) have a special status which exempts them partially from market integration. On the other hand, there is *policy integration* (also called 'positive integration') because European rules are adopted to replace or

25 For a legal analysis of this controversy, see Merryman, 'Thinking About the Elgin Marbles', 83 *Mich. L. Rev.* (1985) 1881.

complement national rules to the extent required by the functioning of the common market.[26]

A second characteristic is that the *absence of explicit competences* in the Treaty has apparently not been an obstacle for the development of policy integration in the field of culture. The legal bases for Community action were, at face value, purely economic policy provisions: in the case of the Regulation, Article 113 of the E(E)C Treaty attributing to the Community institutions the power to regulate trade with third countries; in the case of the Directive, Article 100A of the E(E)C Treaty which gives the Community the power to adopt measures for the harmonization of national law when needed for the establishment and functioning of the common market. Because of the intertwining of the economy and culture, those economic competences allow for measures which may have a direct impact on national cultural policies.[27]

A third noticeable element is that the Community institutions can, and must, take into account the cultural policy implications of acts adopted under economic policy headings. The European Community could, in pursuing the '1992' open borders objective, have limited itself to abolishing border controls without dealing with the ensuing difficulties for the continued enforcement of cultural retention policies. Therefore, the recent legislation was not strictly necessary for the completion of the internal market; it may even face the criticism that it has created new impediments to the trade in works of art! The acts were adopted because the Commission, the European Parliament and the Council all agreed that the negative implications of '1992' for national cultural policies had to be counterbalanced by appropriate European legislation. One may disagree with the actual choices of cultural policy made by the Community legislator,[28] but the fact that legislation of this nature *does* imply cultural policy choices is undeniable.

26 One of the first legal analyses of European integration based on the contrast between 'market integration' and 'policy integration' is that by Kapteyn, 'Outgrowing the Treaty of Rome: From Market Integration to Policy Integration', *Mélanges Dehousse* (1979), Vol. 2, 45. For an application of the terms 'negative integration' and 'positive integration' in the context of cultural policy, see A. Loman, K. Mortelmans, H. Post and S. Watson, *Culture and Community Law – Before and After Maastricht* (1992) at 14 et seq.

27 The legitimacy of using Article 100A as the legal basis for an Act which, in substance, deals with cultural matters is sharply disputed by Eberl, 'Probleme und Auswirkungen der EG-Vorschriften zum Kulturgüterschutz', 13 *Neue Zeitschrift für Verwaltungsrecht* (1994) 729. The same sort of criticism is made for the Directive on Transfrontier Television (cf. *infra*, Part III) and for other internal market measures impinging upon cultural matters.

28 For a criticism of the new EC regime inspired by the doctrine of 'cultural internationalism', see Note, 'Cultural Policy in the European Community: A Case Against Extensive National Retention', 28 *Texas International Law Journal* (1993) 191. This doctrine is formulated most prominently by Professor Merryman in a number of articles: 'International Art Law: From Cultural Nationalism to a Common Cultural Heritage', *New York University Journal of International Law and Politics* (1982/83) 757; 'Thinking About the Elgin Marbles', 83 *Mich. L. Rev.* (1985) 1881; 'Two Ways of Thinking About Cultural Property', 80 *AJIL* (1986) 831.

It is submitted that those three characteristics apply beyond the sector of trade in works of art, and may help to explain more generally the relationship between the European Community law and culture. They will guide the examination, in the following two Parts, of the role of market integration and of policy integration as the two sides of the cultural dimension of European Community law.

II. A Common Market for Culture? Regulation of Culture and Market Integration

A. Culture as an Object of State Regulation and Market Integration

A general examination of the cultural dimension of European Community law requires, first of all, an exploration of the boundary lines of the terms 'culture' and 'cultural policy'.

Cultural policy and the corresponding expressions in other languages (*politique culturelle, Kulturpolitik, politica culturale*, etc.) are quite commonly used on the European continent. Under this general heading are grouped a variety of specific governmental policies dealing with books and literature, with theatre and the fine arts, with the mass media. Those policies are often institutionally linked by the fact that the responsibility for conducting such policies lies with a distinct member of the government and a distinct ministerial department, often called the Minister and the Ministry of Culture. The most accomplished example of this institutional model is France. Other countries offer many variations. In Italy, the responsibility for the mass media belongs for historical reasons to the Ministry of Postal Affairs, whereas the Minister of Culture only deals with the protection of the cultural heritage. In Germany, cultural policy is within the jurisdiction of the *Länder* in each of which there is a *Kultusminister*, whose responsibility extends over a whole range of subjects including the arts, culture, but also education, science and religion. In Britain, there is a policy on the 'arts' and on the 'heritage', but the term 'cultural policy' as an overall description of a set of government policies has come into timid usage only recently, perhaps under European influence.

The broad continental meaning of culture and cultural policy has been adopted in the terminology of international law and international relations. In UNESCO's official designation, culture is one of the catchwords alongside education and science and covers a large variety of activities. The same has happened at the level of bilateral international relations. Agreements have been signed on quite a number of different cultural subjects. Yet, a practice has developed among States to conclude, alongside any such specific agreements, a treaty which covers the exchange of culture as a whole and which is

simply called *cultural agreement* or *cultural cooperation agreement*. At the regional European level, culture has emerged as a similarly global denominator and convenient shorthand for a whole sector of inter-State cooperation within the Council of Europe. Finally, the word has officially entered the vocabulary of European Community law because of the insertion, by the Treaty of Maastricht, of a new Article 128 in the EC Treaty under the heading 'Culture'. In the text of that article, the adjectival form of the same word is used to describe the types of action that come within the scope of EC competence.[29]

Since the entry into force of the Treaty on European Union, the term 'culture' has therefore become one with legal significance for all the Member States of the EU. But already before that date, the term was used to identify a specific portion of Community law, as is shown by the titles of some monographs devoted to the subject. The authors of those books have taken a pragmatic approach to the question of defining and delimiting culture. Without venturing into abstract definitions of culture, they purport to deal with those 'measures and actions which the Member States commonly take in pursuit of their objectives of cultural policy',[30] including matters such as film and audiovisual products, visual arts, heritage, literature, dance and ballet, music, architecture and drama.[31]

Yet, the objects and processes brought under the heading 'culture' may have some intrinsic common characteristics beyond the pragmatic consideration that they happen to be considered together in relevant fora of national policy or international cooperation. The search for this unified concept of culture is a traditional puzzle for social scientists. Under the influence of anthropology, the social sciences adopt a much broader view of culture than the range of activities mentioned above. This broader view is evoked by the following phrase in a Report written for the European Commission: 'Culture is not an abstract concept, but a set of rich and varied practices which manifest themselves in all aspects of everyday life. Culture is about our lifestyles, our traditions and our ideals, about dialects and songs, about how we declare our love and how we bury our dead'.[32] Culture was defined by Raymond Williams, in more abstract terms, as 'the signifying system through which

29 Article 128 refers to the 'cultural heritage', to 'cultural exchanges', and more generally to the 'cultural aspects' of Community action. For the significance of this new provision of the EC Treaty, cf. *infra*, Part IV.

30 A. Loman *et al.*, *supra* note 26, at 3; a similar pragmatic view is taken by J. Sparr, *Kulturhoheit und EWG-Vertrag* (1991) at 15-17, and by M. Niedobitek, *Kultur und Europäisches Gemeinschaftsrecht* (1992) at 21-23.

31 A consequence of this pragmatic approach is that the substantive scope of those books is not identical. Whereas media and broadcasting are only marginally dealt with by Loman *et al.*, they occupy pride of place in Sparr. Niedobitek deals thoroughly with educational policy, which is not considered by Sparr and by Loman *et al*.

32 *Culture and the European Citizen in the Year 2000*, Report to the Commission of the EC by the Committee of Cultural Consultants, November 1989, at 7.

necessarily ... a social order is communicated, reproduced, experienced and explored'.[33]

The legal system itself is part of culture taken in this broad sense,[34] and therefore the Community legal system as well. Yet, it is possible to identify within this large cluster a number of social institutions, whose specific role is to represent and reproduce the value system characterizing that particular society, and which may be characterized as *cultural institutions* in the narrow sense. Whereas economic institutions are specialized in the production of material goods, cultural institutions have as their specific function the production of symbolic values,[35] the representation and reproduction of society, the creation of meaning in human society. Among those cultural institutions are the educational system, the mass media, the arts and language, which all play a distinctive role in the integration of societies.[36]

Yet, one should not adhere too rigidly to this functionalist approach. In fact, cultural institutions often serve a variety of functions, and the exact nature of their cultural function at any particular time may not be evident. It is usually said that cultural institutions help perpetuating social norm and values,[37] but cultural institutions also produce new values and norms. One can also frequently find the view that the function of cultural institutions is to counterbalance excessive social differentiation by producing a collective *identity* overarching the functional roles in society and guaranteeing the cohesion of the nation or country as a whole. But in modern society, cultural institutions appear to be much less preoccupied with the integration of society and also act, deliberately or not, towards increasing mobility and individual differentiation.[38]

Precisely because the effects of their action are not predictable, cultural institutions are not granted full autonomy by the political system. They are affected by the action of the political institutions. Governments intervene and

33 R. Williams, *Culture* (1981) at 13. For a set of contrasting theoretical approaches to the subject, see R. Münch and N.J. Smelser (eds), *Theory of Culture* (1992).

34 On this theme, see, e.g., Coing, 'Das Recht als Element der europäischen Kultur', 238 *Historische Zeitschrift* (1984) 1.

35 The contrast between the functions of economic and cultural institutions is of special interest for the study of European Community law, whose role has often been that of applying rules of economic law to cultural activities. As will be illustrated further on in this course, political and scholarly controversies in this field have often originated from the feeling that there was insufficient attention to the specific function of cultural institutions in the European integration process.

36 See the general analysis proposed by Schudson, 'Culture and the Integration of National Societies', *International Social Science Journal* (1994) 63.

37 There is strong insistence on this perpetuation function in the influential work of the French sociologist Bourdieu. See, among other works, Bourdieu, 'La production de la croyance. Contribution à une économie des biens symboliques', 13 *Actes de la recherche en sciences sociales* (1977) 3; and P. Bourdieu and A. Passeron, *Reproduction in Education, Society and Culture* (1977).

38 See, e.g., Touraine, 'Les deux faces de l'identité', *Quaderni di Sociologia* (1979) 407.

develop cultural policies. Those policies comprise a large variety of interventions: State organizations may take direct responsibility for cultural activities (public education, public service broadcasting); the State may give direct and indirect financial support to private activities (theatre, press, book production), and the State may regulate private cultural behaviour (the regulation of language use, regulation of commercial television or of private schools).

Those cultural policies have acquired an international dimension, which is due to the increase, in recent decades, of transnational flows of culture. Among the various forms of cultural expression, music and pictures travel more easily across cultural (and therefore also national) borders than language. It is not surprising, therefore, to find a largely international market for records, for films and for especially modern art while the market in the publishing sector is much more compartmentalized along national or linguistic lines. The quantitative dimension of transnational cultural interaction is difficult to assess, and it is therefore extremely hazardous to venture into an analysis of the effects of this interaction. Yet, many informed and less-informed interpretations have been offered on this subject; and much of the formal regulation of culture, enacted by governments or even European institutions, are largely based on such assumptions.

In Europe today, there are more intensive cultural contacts than ever before. People move across national and cultural barriers more frequently, and images, ideas and objects also cross cultural boundaries. As a consequence, established cultural models are challenged and may converge, and individuals have increased opportunities for creating their own lifestyles and their own 'cultural mix'. Yet, as a reaction, one also observes in a number of European countries the development by governments of policies for the preservation of the cultural identity of the nation (or the region) against perceived threats of foreign cultural hegemony.

In formulating such policies, governments run counter to one of the objectives of the European Community, which is to guarantee the *free flow of culture* across intra-Community borders. The rule formulated by the European Court in the *Italian Art Treasures* case that the free movement of goods applies to works of art as to any other category of goods that form the object of a commercial transaction[39] can be applied, *mutatis mutandis*, to all other cultural goods and activities. Economy and culture are not two watertight compartments, but closely interrelated social spheres; the economic categories and legal rules of the EC Treaty include cultural activities whenever these present a transnational economic dimension. All tangible objects that lend themselves to a commercial transaction are goods in the sense of the EC Treaty; in addition to paintings and sculptures, books, records and videotapes are also covered by the *free movement of goods*. Invisible transactions (like

39 See Part I, *supra*.

the transmission of a television programme) are covered by the *freedom to provide services*. All persons exercising a professional activity, whether they are self-employed or salaried workers, come within the scope of the *free movement of persons*, including the whole variety of cultural actors such as painters, film producers, dancers, or art teachers.[40] The cultural dimension of Community law is therefore, first of all, about the consequences of the common market freedoms for all those cultural sectors and activities.[41]

From a global view of those common market freedoms, one can formulate the following legal rule: national measures which restrict the free flow of cultural goods, services or actors between countries of the European Community are generally prohibited. It does not matter whether those measures are to be found in legislation or in informal administrative practice, whether they have been enacted by the central State or by a region or a local government. Thereby, the EC Treaty protects the free flow of culture and the mobility of cultural actors against State interference. The underlying economic objective is wealth maximization through trade and factor mobility. Yet, liberating cultural exchanges inside the European Community may also have distinct, albeit perhaps unintended, benefits for cultural development as well.

However, many of the interferences are not just blunt forms of protectionism but may themselves be justified by plausible reasons, including reasons of national cultural policy. The legal solution to such conflicts is straightforward: the process of constitutionalization of the European Community Treaties[42] has led to the general acceptance of the supremacy and direct

40 The same idea is expressed in more concrete terms in *Le Monde* of 18 September 1992, at 7: '*un tableau de Van Gogh ou un film d'Almodovar sont des marchandises au même titre qu'un paquet de nouilles; un spectacle mis en scène par Chéreau ou un concert dirigé par Abbado sont des opérations commerciales de même nature que la vente des sardines à la criée*'.

41 I will not deal, in this course, with *education*. Although education is undoubtedly a cultural institution in the sociological definition, it is usually not considered as part of 'cultural policy' in the political-institutional definition of that term. There is often a separate Department of Education with its own minister (the exception being Germany). More importantly, the same distinction is made in the EC Treaty: whereas 'culture' is dealt with in Article 128, education is governed by separate rules formulated in Article 126. There is also a longer history of Community involvement in the field of education, particularly higher education, which was rendered possible above all by the generous reading, by the Court of Justice, of the 'old' Article 128 EEC Treaty. This provision ostensibly dealt merely with general principles of vocational training, but had become the legal basis of a Community policy on higher education, highlighted e.g. by the Erasmus programme. The impact of European Community law on the educational policies of the Member States is therefore a rather different story, which has been analysed elsewhere: B. De Witte (ed.), *European Community Law of Education* (1989); Lonbay, 'Education and Law: The Community Context', *EL Rev.* (1989) 363; De Witte, 'The Influence of European Community Law on National Systems of Higher Education', in J. Pertek (ed.), *General Recognition of Diplomas and Free Movement of Professionals* (1992) 73; Lenaerts, 'Education in European Community Law After "Maastricht"', 31 *CML Rev.* (1994) 7.

42 Mancini, 'The Making of a Constitution for Europe', 26 *CML Rev.* (1989) 595; Weiler, 'The Transformation of Europe', 100 *The Yale Law Journal* (1991) 2403, at 2413 et seq.

operation of EC law also by national courts. This prevalence can be enforced on the initiative either of interested parties or of the Commission using the enforcement procedure of Article 169 EC Treaty against recalcitrant States (as in the *Art Treasures* case against Italy).

Since the late 1980s, a number of European Court judgments that happened to deal with culture, together with the renewed insistence on market integration with the completion of the '1992' internal market programme, brought greater awareness about the cultural implications of the common market freedoms and a perception of the need to change some long-established practices of cultural autarchy. This awareness was accompanied by the emergence of culture as a distinct theme in the literature on Community law. From the mid-1980s onwards, there was a rapid growth of legal literature on the subject. The issue was identified in a few general articles,[43] and a session of the 1988 FIDE-congress on European law was devoted to the 'Legal Aspects of Community Action in the Field of Culture';[44] governments, disquieted by the impending '1992' deadline, commissioned studies by legal experts about the possibly disruptive consequences of the completion of the internal market for established cultural policies.[45] Although the textbooks on Community law continue to devote little attention to culture,[46] there are now some excellent monographs exploring the subject of the Community dimension of culture in greater depth.[47]

There is no need to repeat here the systematic examination of the various Court cases, nor to give an exhaustive account of the cultural implications of each of the common market freedoms, and of competition law.[48] I will limit myself to some general considerations on the practice of the European Court of Justice and the European Commission on the central issues of the justifiability of restrictions to free trade and mobility of culture (B), and of the pos-

43 De Witte, 'The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice', in R. Bieber and G. Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts/The Dynamics of EC Law* (1987) 261; De Witte, 'Cultural Policy: The Complementarity of Negative and Positive Integration', in J. Schwarze and H.G. Schermers (eds), *Structure and Dimensions of European Community Policy* (1988) 195; Roth, 'Grundfreiheiten des Gemeinsamen Marktes für kulturschaffende Tätigkeiten und kulturelle Leistungsträger', *Zeitschrift für Urheber- und Medienrecht* (1989) 204.

44 FIDE Reports of the 13th Congress, *Legal Aspects of Community Action in the Field of Culture* (1988); Professor Tomuschat wrote the general report, 'Rechtliche Aspekte des Gemeinschaftshandelns auf dem Gebiet der Kultur'.

45 The report by J. Loman, K. Mortelmans and H. Post, *De Europese Gemeenschappen en cultuurbeleid* (1989) was commissioned by the Dutch Ministry of Culture. The report by G. Ress, *Kultur und Europäischer Binnenmarkt* (1991) was commissioned by the German Ministry of the Interior.

46 German textbooks form an exception: Schneider, 'Bildungs- und Kulturpolitik', in A. Bleckmann, *Europarecht* (5th ed., 1990) 783; T. Oppermann, *Europarecht* (1991) 732 et seq.

47 A. Loman *et al.*, *supra* note 26; J. Sparr, *supra* note 30; M. Niedobitek, *supra* note 30.

48 This has been very competently done by A. Loman *et al.*, *supra* note 26, at 23-139.

sibility for Member States to invoke cultural policy interests as justifications for exceptions to the common market principles (C).

B. The Abolition of Barriers to Cultural Trade and Mobility

If the *common market of culture* has a potentially very broad scope, it was not established at once and is not entirely effectuated as yet. The degree to which it has been realized varies from one sector to the other, and depends to a large extent on the priorities set by the European Commission in its policy of enforcing the common market freedoms and the rules on competition, and on the accidental emergence of disputes brought to the Court of Justice by means of preliminary references from the national courts.

The degree to which this common market has been realized also depends on the nature of the obstacles which have to be removed. On the one hand, there were, and still are, national restrictions of a discriminatory or protectionist character. They have to a large extent been removed directly on the basis of the Treaty as enforced by the Commission and the Court of Justice (through its generous granting of direct effect to the common market freedoms)[49] or by early liberalization directives adopted by the Council.[50]

Yet, the case-law of the European Court keeps exposing examples of clearly discriminatory practices, even after many decades of operation of the common market. Some have a rather anecdotic character and reach the Court of Justice due to the activism of the Community citizens who bring an action before the competent national court. A good example is the case of Mr Steinhauser, the German painter who was denied the use of exhibition premises belonging to the town of Biarritz because he was not a French citizen. The Court held that the freedom of establishment of artists involved the prohibition of any discrimination which they may suffer from the hands of the national authorities in their country of establishment, even if the restriction is imposed by *local* authorities and even if it does not directly prevent the continued exercise of the artists' professional activity.[51]

Cases of cultural protectionism are still to be found in the nooks and crannies of the Member States' legislative systems, as was shown by the *Fedicine* case decided by the European Court in 1993.[52] The Court held in

49 See for instance the *Italian Art Treasures* case discussed in Part I, *supra*.

50 For instance, the Council Directives abolishing restrictions on the establishment of foreign firms in cinema production and distribution (Directive 65/264, OJ 1964-65, English Special Edition, 62; Directive 68/369, OJ 1968, English Special Edition, 520; Directive 70/451, OJ 1970, English Special Edition, 620). See A. Loman *et al.*, *supra* note 26, at 151-153.

51 Case 197/84, *Steinhauser*, [1985] ECR 1819.

52 Case C-17/92, *Federación de Distribuidores Cinematográficos v. Estado Español*, judgment of 4 May 1993, not yet published.

this case that a Spanish law for the promotion of the distribution of Spanish films was contrary to the freedom to provide services. Spanish law required official permission for dubbing a foreign language film in view of its distribution in Spain. Such a licence is granted on the condition that the distributor applying for the licence undertakes to distribute one or more Spanish films as well. When Spain joined the European Community in 1986, the licence requirement was modified so as to be applicable only to non-EC productions (nearly all of them produced in the United States), while films produced in EC countries could freely be distributed in Spain without the need for a licence. Despite the absence of direct restrictions against productions from other Member States, the latter remained disadvantaged by this scheme, according to the European Court of Justice: the condition under which dubbing licences were granted to non-EC films gave an extra-outlet to *Spanish* films, and not to films from other Community countries. Therefore, the Court found there was discrimination and a *prima facie* violation of the freedom to provide services.

Apart from the discriminatory restrictions against goods, persons or services coming from other Member States, such as those described above, there are also *disparities*, that is, obstacles to trade and mobility resulting from the application of national rules that do not distinguish between national and foreign goods, persons or services. The latter category of restrictions, often also called in EC parlance '*indistinctly applicable measures*', is more difficult to identify and to remove. As a rule, they are also prohibited by the EC Treaty, precisely because of their restrictive effects on trade. This was first affirmed by the European Court in the context of the free movement of goods, but more recently there has been a convergence in the European Court's interpretation of the various common market freedoms,[53] and this affirmation is now equally valid for the free movement of services[54] and possibly also for the free movement of persons.[55]

The distinction between discriminations and indistinctly applicable measures is important for deciding on the justifiability of those restrictions. The European Court will only insist on a narrow reading of possible exceptions when discriminations are involved, whereas indistinctly applicable measures will be accepted whenever they are justified by imperative reasons relating to

53 See Behrens, 'Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht', *Europarecht* (1992) 145.

54 In *Säger,* the Court held that Article 59 of the EC Treaty requires 'the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services' (Case C-76/90, *Säger,* [1991] ECR I-4421, Rec. 12; see also Case C-275/92, *Schindler,* [1994] ECR I-1039, Rec. 43).

55 Wouters, 'European Citizenship and the Case-Law of the Court of Justice of the European Communities on the Free Movement of Persons', in E.A. Marias (ed.), *European Citizenship* (1994) 25, at 35ff.

the public interest. Here again, the judge-made category of imperative reasons, originally coined for the purpose of the free movement of goods (in *Cassis de Dijon*) has since been extended to the field of the free movement of services and persons. A double standard has thus emerged for deciding whether restrictions to common market freedoms are acceptable. The decisive criterion in adopting the stricter or the more lenient standard is not primarily related to the importance of the value which national law seeks to protect, but to the nature of the restriction. When the measure is deemed to be protectionist, or has a discriminatory element, the European Court (and the national courts, that have to follow its guidance) will resort to a strict and almost fatal standard: only those derogations are accepted that are listed in the Treaty, and they are to be interpreted narrowly. As will be explained below, there are no cultural policy derogations among those listed in the Treaty, apart from the provision on art treasures in Article 36,[56] which means that cultural 'protectionism' will invariably be struck down by the Court of Justice. On the other hand, a more lenient scrutiny is applied to measures that apply indiscriminately. They can be justified in the name of a wide notion of the public interest, that includes also the cultural policy priorities of the Member States.

The double standard approach is straightforward and therefore perhaps attractive. Yet, it raises some problems, because it is not always easy to distinguish between a discriminatory and a non-discriminatory measure, and because some discriminatory measures are not really an expression of protectionism but rather the only effective way of protecting a legitimate national interest.

The first of those two problems can be illustrated by the following example. The Italian Media Act of 1990 states that fifty percent of the broadcasting time devoted to European productions should be reserved for Italian productions. This is a discrimination on grounds of nationality, and therefore not compatible with EC law.[57] But what should one think of a comparable provision in a Dutch Media Regulation of 1991[58] stating that the 'television programme of commercial broadcasters ... should consist of at least forty percent Dutch- or Frisian-language elements'? Is the language criterion a prohibited form of indirect discrimination or simply an indistinctly applicable measure which may or may not be contrary to the free movement of services?

The second problem can be illustrated by the question of access to cable distribution. In some countries of Europe, cable distribution has replaced antennae as the normal means by which TV programmes are brought to the

56 See Part I of this course.

57 Strozzi and Mastroianni, 'La disciplina comunitaria delle trasmissioni televisive e la recente legislazione italiana', *Il Foro Italiano* (1993) IV 142, at 157.

58 *Mediabesluit* of 22 June 1992 (*Staatsblad* (1992) 334), Article 52 l.

viewer. For technical reasons, the number of programmes that can be distributed by some cable networks is limited to about twenty or twenty-five, whereas satellites make up to one hundred television programmes available for cable distribution. In establishing a priority list among the many programmes on offer, the operators of a cable network, whether public bodies or private firms, are usually constrained by 'must carry' rules according to which national programmes *must* be distributed, whereas foreign programmes *may* be distributed within the limits of the remaining capacity of the cable network. The Commission has expressed the view that such rules are discriminatory to the extent that they give priority to national programmes over those from other EC countries and they are unlawful restrictions of the freedom to provide services.[59] This view would probably be upheld by the European Court of Justice because such rules make a clear distinction based on the national origin of the programme for which there is no express justification in the text of the Treaty; yet, it would seem somehow unreasonable to deny the Member States the right to give formal priority, in a situation of scarcity, to the diffusion of domestic television programmes.[60]

C. Recognition of Cultural Policy as a Legitimate Public Interest

The Member States' cultural policies may act as a hindrance for the trade in cultural goods and services, or the mobility of cultural actors. They can also affect more generally the functioning of the common market and distort competition between firms on that market. Thus, linguistic requirements about the labelling of consumer goods do not cause a restriction of the flow of culture, but of the flow of consumer goods in general. Therefore, the question to be addressed in this section is to what extent Member States may restrict the free flow (of cultural *and* other products and activities) for reasons of cultural policy.

There is no obvious answer to this question in the EC Treaty. None of the common market freedoms is phrased in absolute terms. Yet, among the exceptions and derogations listed in the Treaty, only the protection of national treasures is selected, in Article 36, as a cultural interest worthy of protection. But what about all the other cultural policy values and priorities of the Member States that are not mentioned in the Treaty? To what extent can they be invoked to limit the exercise of one of the common market freedoms?

59 Commission Communication, *Television Without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, COM(84) 300, at 120.

60 See D. Waelbroeck, 'La libre transmission des messages audiovisuels et la protection des intérêts culturels', in G. Vandersanden (sous la dir. de), *L'espace audiovisuel européen* (1991) 137, at 144 et seq.

Due to the lacunose nature of the Treaty, the task of drawing the line between permissible and impermissible forms of cultural protection has been performed mainly by the Court of Justice, as part of its global role to strike the balance between the effective enforcement of the Community treaties and the need to preserve the policy autonomy of the Member States. The first landmark in the European Court's case-law was its *Leclerc* judgment of 1985.[61] The specific question submitted to the Court, by means of a preliminary reference, was whether the French legislation on book prices (the so-called 'Loi Lang') was compatible with the free movement of goods.[62] The French statute imposed a system of resale price maintenance for books, with prices to be decided by the publisher (for French books) or by the first distributor (for imported books). This meant that the Leclerc supermarkets and other non-traditional outlets could not purchase their own books from 'parallel' importers and set their own, lower, prices.

The French Government, intervening in the case, admitted that the scheme might cause some restriction of the trade in goods, but tried to justify this by invoking the need to protect the consumer and by reasons of cultural policy: a fixed price for books, they argued, protects the existence of specialist booksellers and ultimately the diversity and quality of publishing.[63]

The European Court did not question the existence of such cultural policy reasons, but refused to examine their merit. It rejected their relevance in the context of the case with the following words:

> Since it derogates from a fundamental rule of the Treaty, Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Neither the safeguarding of consumers' interests nor the protection of creativity and cultural diversity in the realm of publishing is mentioned in Article 36. It follows that the justification put forward by the French government cannot be accepted.[64]

The situation resulting from *Leclerc* might seem rather unfair: on the one hand, the Court did not find difficulties in broadly interpreting the economic freedoms so as to cover cultural products and activities as well (*despite the fact* that they are not explicitly mentioned by the Treaty); on the other hand, it refuses to accept cultural policy justifications for derogating from those freedoms, *because* such exceptions are not expressly listed in the Treaty. Those contrasting approaches are probably to be explained by one overarching concern of the Court of Justice, that of maximizing the scope and effectiveness of market integration.

61 Case 229/83, *Leclerc v. Au Blé Vert,* [1985] ECR 1. See the comments by A. Loman *et al., supra* note 26, at 44 et seq.

62 There was also a question as to the possible breach, by France, of the Treaty's competition rules, but that question does not concern us here.

63 *Leclerc* judgment, Rec. 16.

64 *Leclerc* judgment, Rec. 30.

The *Leclerc* holding, which relates to the movement of goods, is also applicable to the interpretation of the other common market freedoms. In the field of the free movement of *persons* and *services*, cultural exceptions are entirely absent from the text of the Treaty. Discriminatory restrictions to the provision of services are compatible with Community law only if they can be brought within the scope of an express derogation such as the public policy clause of Article 56 of the Treaty (which is applicable to services by means of the reference in Article 66). Cultural policy is *not* expressly mentioned in Article 56, and this has prompted the Court to reject the possibility of justifying discriminatory restrictions to trade and mobility by cultural policy reasons. It did so in the *Fedicine* case, where it rejected the argument of the Spanish Government that the distribution scheme pursued a cultural aim, namely to foster Spanish film production, as irrelevant because that aim is not among those mentioned in Article 56.[65] Yet, the Court has failed to explain why cultural policy could not be encompassed within a broadly defined concept of 'public policy'.[66]

When, on the other hand, a cultural policy restriction is not discriminatory but applies evenhandedly to domestic products or services and to those from other EC countries, a more lenient scrutiny is applied. As already stated before, such measures can be justified in the name of a wide notion of the public interest that includes also the cultural policy priorities of the Member States.

In deciding whether cultural policy objectives of the Member States constitute a legitimate ground for limiting the full effect of market integration, the European Court takes a number of steps. First, the Court examines whether there is a restriction of one of the common market freedoms. Second, whether the restriction is inspired by a sufficiently important public interest. And third, whether the restriction is proportionate, that is, whether there is a close connection between the (legitimate) aim and the means to attain it. Recent case-law indicates that the Court is easily satisfied on the second point: it readily accepts the existence of a weighty public interest in the field of cultural policy. But the ultimate hurdle, the proportionality test, is rather severe and national rules often stumble on it.

Cultural policy gradually emerged as a legitimate public interest in the Court's case-law on the common market freedoms. The development started with a judgment of 1985 about the free movement of goods. In this *Cinéthèque* judgment, the Court avoided stating a general principle about

65 The same point was made by the European Court in Case C-211/91, *Commission v. Belgium,* [ECR] 1992, I-6757, Rec. 10 of the judgment.

66 One reason for the Court's reluctance might be that, whereas the term 'public policy' may sound broad enough as to include cultural policy, the equivalent expressions in the other language versions of the EC Treaty are much narrower. For instance, the French equivalent of 'public policy' is 'ordre public'.

cultural policy justifications but recognized more narrowly that the 'encouragement of creation of cinematographic work' justified the barrier to intra-Community trade of videocassettes which resulted from the French Act restraining the early exploitation on video of newly released films.[67] The approach was confirmed in the 1991 *Tourist Guides* judgments dealing with the freedom to provide services,[68] and finally formulated in more general terms in the Dutch media cases which will be examined below.

In addition to media policy, special attention will go, in the following pages, to two other areas of cultural policy in which there is a tension between Member State actions and the principles of free trade, mobility and competition, namely language policies and financial support for the arts. Those two sectors offer a view of market integration which is complementary to media policy, because they highlight the role played by the *political* (as opposed to the judicial) institutions of the Community in formulating the limits of acceptability of national cultural policies within a common market. In the area of language policies, the *Council* has adopted rules about the legitimate limits to the free movement of goods and persons which were clarified and interpreted by the European Court in a few highly symbolic cases. Financial support for the arts is subject to the rules and practice on State aids formulated by the *Commission* without intervention, so far, by the Court of Justice.

1. National Media Policies Before the Court of Justice

Since the 1970s, with the advent of cable and satellite technology, there has been a gradual internationalization of broadcasting activities.[69] The tradi-

67 Joined Cases 60 and 61/84, *Cinéthèque v. Fédération Nationale des Cinémas Français*, [1985] ECR 2605. See the analysis of this judgment in A. Loman *et al., supra* note 26, at 47-49.

68 In the *Tourist Guides* cases, the Commission brought an enforcement action against three countries (France, Italy and Greece) which required tourist guides to possess a licence which could be obtained through examination. This made it legally impossible for tourist groups from other countries to be accompanied by their own guides, and formed therefore a restriction of the freedom to provide services. The governments argued that this requirement, which was indistinctly applicable to nationals and foreigners alike, guaranteed the quality of the information provided to tourists, and could therefore be justified on grounds related to the general interest, in particular the protection of the consumer and the proper exploitation of the national artistic and archaeological heritage. The European Court, in its judgments of 26 February 1991, accepted that the latter cultural policy argument could justify limitations to the exercise of the freedom to provide services, but that in this case the requirement to possess a licence went much beyond what is reasonably necessary for the protection of that interest and therefore failed to meet the proportionality test. Case C-154/89, *Commission v. France*, [1991] ECR I-659; Case C-180/89, *Commission v. Italy*, [1991] ECR I-709; Case C-198/89, *Commission v. Greece*, [1991] ECR I-727.

69 Negrine and Papathanassopoulos, 'The Internationalization of Television', 6 *European Journal of Communication* (1991) 9.

tional broadcasting structures, marked in most European countries by a public service monopoly, became gradually exposed to competition from across the borders. In 1974, the European Court of Justice held in *Sacchi*[70] that the transmission of television (or radio) signals across an intra-Community border should be regarded as the provision of services in the sense of the EEC Treaty. This statement was not decisive for the case at hand, but it was to be the prelude for a fastly developing body of Community case-law and (later on) legislation dealing with the broadcasting media. In 1979, the European Court held that impediments to the cross-border transmission of television services could be justified by the 'general interest' if they applied evenhandedly to domestic and foreign services. Such was the case when copyright exclusivity on a film was used in order to prevent the cable relay of the broadcasting of that film from another EC country (*Coditel* case);[71] and such was the case with Belgian legislation which (at that time) imposed a total ban on advertising on television, which applied to domestic and foreign stations alike (*Debauve* case;[72] this could mean that advertising which was lawful according to the country of origin's rules had to be removed from the programme upon its cable relay in Belgium). Such impediments to the trade in television services, the Court held, must be accepted in the absence of Community rules of harmonization.

Yet, the Court of Justice had been lenient in *Debauve* only because Belgium excluded any form of advertisement on television, a systematic policy choice which did not show protectionist leanings. In a series of later cases, Dutch and (again) Belgian media legislation failed to pass the Treaty test because of their allegedly protectionist character. The Dutch cases will be considered in somewhat more detail, as they offer a good insight in the Court's reasoning about restrictions to the free movement of services, and in its hesitations when dealing with cultural policy arguments.[73]

In the Netherlands a very dense network of cable distribution has existed since the early 1980s. Almost all owners of a television set have access to cable distribution, which allows them to see a large number (up to twenty or more) of programmes, most of them from abroad. The Dutch broadcasting system, although never a State monopoly in the strict sense, traditionally operated as a public service system along non-commercial lines.[74] Advertising was allowed on television, but it was controlled and operated by a sepa-

70 Case 155/73, *Sacchi*, [1974] ECR 409.
71 Case 62/79, *Coditel v. Ciné Vog Films*, [1980] ECR 881.
72 Case 52/79, *Procureur du Roi v. Marc Debauve*, [1980] ECR 833.
73 The 'Belgian' case related to media legislation of the Flemish Community which had a clearly protectionist character and which the Belgian Government did not insist on justifying (Case C-211/92, *Commission v. Belgium*, [1992] ECR I-6757).
74 The peculiar development of the Dutch media system is outlined by Nieuwenhuis, 'Media Policy in the Netherlands: Beyond the Market?', 7 *European Journal of Communication* (1992) 195.

rate organization (called *STER*) and its proceeds used for helping to finance the non-commercial broadcasting organizations. Even advertising revenue therefore directly served the purposes of the State's media policy.

In 1984, the Dutch Minister of Culture issued very strict rules on the cable distribution of foreign TV programmes, for fear that a foreign commercial broadcaster could freely 'enter' into the Dutch market and threaten the financial stability of the system by tapping part of the advertising revenue which normally accrued to the public service broadcasters. The rules adopted in 1984 held that Dutch cable operators were not allowed to transmit foreign television programmes containing advertisements directed at the Dutch consumer. Advertisements were considered to belong to this prohibited category if the Dutch language was used in the programme before, during or after the commercial. Advertising agencies sued the Dutch State before the administrative court, claiming that the prohibition of cable distribution of such programmes was a breach of Community law. The Dutch court referred the case for a preliminary ruling and the European Court, after an unusually long period of two-and-a-half years, answered by confirming that the Dutch regulations did constitute a measure which discriminated against cross-frontier provision of television services from other Community countries and was therefore contrary to the EEC Treaty provisions on services.[75] The Dutch Government had argued, in defence of its views, that the restrictions were necessary in order to preserve the pluralist and non-commercial nature of the Dutch broadcasting system. Indeed, the revenue from advertising allowed the Dutch broadcasters to continue their operation on a non-commercial basis.

The European Court held that the real objective of the Dutch Government was *economic* protection. The distinction made here by the European Court may not be entirely convincing. While it is true that the immediate objective of the Dutch Government was undoubtedly economic (protecting the advertising income of the Dutch broadcasters), its ultimate aim was of a cultural policy kind (preserving public service broadcasting), and the two objectives cannot really be considered in separation as the Court did.[76] Besides, the distinction between an 'economic' and a 'cultural' sphere is contrary to the Court's own basic view that market integration principles should be applicable to cultural activities, and that economy and culture should not be considered as distinct spheres of activity and public policy.

In the meantime, the Cable Decrees of 1984 had been repealed and replaced, from January 1988 onwards, by Article 66 of the new Dutch Media Act, which, though differently worded, pursued the same policy goal of preventing external attacks against the established public service television

75 Case 352/85, *Bond van Adverteerders v. Netherlands*, [1988] ECR 2085.

76 See the critical remarks by Dumont, 'Les compétences culturelles de la Communauté', in J. Lenoble and N. Dewandre, *L'Europe au soir du siècle. Identité et démocratie* (1992) 189, at 196-200.

system. According to Article 66, distribution of foreign cable programmes containing advertisements directed at the Netherlands was no longer prohibited, provided that the advertisements took place according to the Dutch *STER* model: they should be transmitted on behalf of an organization which is separate from the broadcasting stations, and the advertisements themselves must be clearly separated from the other programmes, may not cover more than five per cent of programming time and may not be transmitted on Sundays, and, finally, the advertising revenue should not be used for programming purposes. Although the new rules no longer contained a formal discrimination, they effectively protected the broadcasting system against commercial 'pirates' transmitting from abroad by requiring them to copy the Dutch model of advertising on television, which is sharply different from the usual way in which advertising is regulated elsewhere in Europe.[77] Despite the apparent equal treatment, advertising directed at the Dutch public was, like before, made very difficult for foreign broadcasters.

The new provision was again challenged before the Dutch Council of State, which referred once more the question of a possible incompatibility with Community law to the European Court in Luxembourg. The Commission, from its side, had started infringement proceedings against the Netherlands, arguing that the Media Act breached Community law on this and other points. The preliminary reference action and the infringement action were decided by the Court of Justice on the same day, and using similar dicta.[78] The Court of Justice no longer treated the Dutch rules as being discriminatory but implicitly considered them to be indistinctly applicable to national and foreign broadcasters. It also accepted *in theory* that national laws which aim at preserving a pluralist and non-commercial public service television system were a form of 'cultural policy' which may 'constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services'.[79] But the Court added that the provisions of Dutch law *in fact* pursued the economic goal of protecting the advertising revenue of STER and therefore could not benefit from a cultural policy justification;[80] the end result therefore was, like in the earlier *Bond van Adverteerders* case, that the Dutch Media Act was held to be incompatible with the freedom to provide services. The 1991 judgments, like the earlier one, have to face the criticism of failing to recognize the close connection existing between cultural policy goals and the financial means for attaining them, and thereby making it exceedingly difficult for the Member States to

77 For a comparative survey of the regulation of advertising on radio and TV, see E. Barendt, *Broadcasting Law – A Comparative Study* (1993) at 198 et seq.

78 Case C-288/89, *Collectieve Antennevoorziening Gouda,* [1991] ECR I-4007; Case C-353/89, *Commission v. Netherlands,* [1991] ECR I-4069.

79 *Collectieve Antennevoorziening Gouda* judgment, *supra* note 78, Rec. 23.

80 Ibid., Rec. 29.

preserve a non-commercial public service broadcasting system against attacks by commercial stations operating from across the State border.[81]

A further challenge to Dutch media law was made a few years later in the *Veronica* case.[82] Veronica, one of the (non-commercial) organizations forming part of the Dutch public service system had been sanctioned by the independent authority for the media (the *Commissariaat voor de Media*) for allegedly having contributed to setting up RTL-4, the Dutch-language commercial television station which had started operating from Luxembourg territory in 1989.[83] In the legal action which it brought against the *Commissariaat*, Veronica argued that the sanction constituted a breach of the free movement of services (as regards the management assistance provided by Veronica for setting-up the new channel in Luxembourg) and of the free movement of capital (as regards the investment allegedly made by Veronica in the new commercial station). Applying its earlier case-law on the 'U-turn' provision of services,[84] the European Court held that the sanction was compatible with EC law: the Dutch authorities had aimed at preventing the national broadcasting organizations from using the freedoms guaranteed by the Treaty in order to circumvent the obligations arising from national legislation as regards the pluralist and non-commercial character of their programmes.[85] Thus, for the first time, a restriction of trade resulting from Dutch media legislation was accepted by the Court of Justice. One might interpret this recent judgment as auguring a more favourable attitude to cultural policy considerations, were it not that the facts of the case are rather peculiar. The national measures did not, in this case, cause a direct hindrance to the transfrontier flow of television programmes, but merely involved restrictions to the 'export' of business services by national broadcasters which do not directly affect the functioning of the common market for broadcasting.[86]

2. *Linguistic Barriers to Trade and Mobility in Community Legislation and Case-Law*

The effect of linguistic diversity is to make communication across national boundaries more difficult. Language differences act as an obstacle to the movement of persons and ideas, but the diffusion of linguistically neutral

81 One commentator even held that the Court of Justice took an 'extremist' view in the Dutch media cases of 1991: Mastroianni, 'Il ruolo del principio di sussidiarietà nella definizione delle competenze statali e comunitarie in materia di politiche culturali', *Rivista italiana di diritto pubblico comunitario* (1994) 63, at 73.

82 Case C-148/91, *Vereniging Veronica Omroeporganisatie v. Commissariaat voor de Media*, [1993] ECR I-487.

83 For more details on this case and the background of Dutch media policy, see the annotation by Hins in 31 *CML Rev.* (1994) 901.

84 Case 33/74, *Van Binsbergen*, [1974] ECR 1299, Rec. 13.

85 *Veronica* judgment, Rec. 13.

86 Hins, *supra* note 83, at 911.

images and objects is also hampered by linguistic diversity, if only because they are accompanied by linguistic messages (as with text accompanying films and television programmes). This phenomenon can be put in economic terms: linguistic diversity creates additional transaction costs which would not arise within a linguistically homogeneous area.

Those economic and social costs of linguistic diversity are further increased by political and legal costs, because governments develop forms of 'language planning'. Language policies stem from the fact that language, apart from being a means of communication, also serves other social functions, such as providing a marker of group identity and an instrument of social integration. In order to further those aims, governments promote or impose the use of a particular language (or languages). By doing so, governments distort the linguistic patterns that would spontaneously result from the informal interaction between persons and thereby contravene the core principle and image of economic integration: that of the (common) market.

The EC Treaty aims at guaranteeing free and unhindered economic activity across intra-Community borders. Because language is the medium of practically all economic activity, the EC Treaty indirectly acts as a source of linguistic rights for the participants in transnational economic activities. The Treaty, without saying so expressly, establishes the principle of *free language use in transnational economic activity*. Linguistic policies pursued by national or regional governments may constitute a hindrance for both the free movement of persons and for the free movement of products (goods or services). Those two categories will be considered separately. For each of them, there has been an emblematic European Court judgment, but those judgments offer a contrasting attitude to cultural policy values. The *Groener* judgment on the free movement of persons is highly respectful of national linguistic values, whereas the *Piageme* judgment on the free movement of goods is rather insensitive to those values.

(a) Free Movement of Persons and Language Requirements

An ever-growing proportion of jobs requires extensive cultural and linguistic skills. Linguistic job requirements constitute an invisible barrier for individual European citizens considering migration to another country of the European Union, and thereby limit the exercise of the free movement of persons. This was acknowledged already in Council Regulation 1612/68 which implemented the principle of equal treatment of workers originating from other Community countries.[87] In addition to direct discriminations against citizens of other Member States, Article 3 of that Regulation also prohibits *indirect* discrimination, that is, measures having as their exclusive or principal aim or

87 Council Regulation 1612/68, OJ 1968 L 257/2.

effect to keep nationals of other Member States away from the employment offered. But to this principle the Council added the qualifying statement that the prohibition does 'not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.

In other words, when a Member State makes access to employment dependent on linguistic proficiency, there is a presumption of an indirect discrimination against foreign workers, unless it can be shown that such proficiency is needed for that particular job. This is theoretically a far-reaching limit on the Member States' linguistic policies, but its practical scope may have seemed limited at the time of adoption, in 1968. Outside the scope of Community law remained, or so it seemed, linguistic requirements in public service employment. Indeed, the EEC Treaty has an exception clause, Article 48(4), which states that the free movement of workers does not apply to 'employment in the public service', for which nationality conditions, and *a fortiori* linguistic conditions seemed perfectly legitimate to the drafters of the EEC Treaty.

On this last point, a major change has taken place since 1968, through a series of judgments of the European Court of Justice drastically limiting the exception clause of Article 48(4). The present legal situation is that workers from other Community countries can only be excluded from public sector jobs related to the exercise of State authority (justice, police, central ministerial departments) but not from the (more numerous) jobs in other public service sectors such as health care, education or transport.[88] In the latter category of services, the principle of free movement fully applies, including the language provision of Regulation 1612/68.

The role of this provision becomes then much more important, because linguistic requirements are very often made for access to public sector jobs. One can even say that, as a rule, all plurilingual countries have more or less formal rules of this kind, which have been enacted in the form of national legislation (as in Belgium) or in the form of regional legislation limited to part of the country (as in some parts of Spain and Italy).

The question of whether such requirements are compatible with EC law was squarely raised in the *Groener* case decided by the European Court of Justice in 1989.[89] Anita Groener was a Dutch national acting as a part-time teacher of painting at the College of Marketing and Design in Dublin. In order to be appointed on a permanent basis, she had to show an adequate knowledge of the Irish language. For that purpose, she took a two-week crash course, but failed in the subsequent examination. This was not a formal dis-

88 For an analysis of the case-law of the Court on this question, see Handoll, 'Article 48(4) EEC and Non-National Access to Public Employment', *EL Rev.* (1988) 223. See also the Communication of the Commission published in OJ 1988 C 72/2.

89 Case 379/87, *Anita Groener v. The Minister for Education and the City of Dublin Vocational Education Committee,* [1989] ECR 3967.

crimination against foreigners as Irish citizens must demonstrate an equivalent knowledge of Irish for access to teaching functions. Article 8 of the Irish Constitution proclaims Irish to be the first national language, as well as the official language of the country, together with English. This meant, according to constitutional law, that the government was entitled to take measures in order to promote the use of Irish and, among other things, to impose on all teachers in the public education system a duty of proficiency in Irish. Yet, Anita Groener argued, with some plausibility, that the requirement of Irish did not serve any practical purpose in her case (she would never be required actually to use Irish in her job) and, instead, was a measure resulting in the exclusion of foreigners and therefore a form of indirect discrimination prohibited by Article 3 of Regulation 1612/68. Through a preliminary reference by the Irish court, the European Court of Justice found itself confronted with a dispute which was deliberately presented by the Irish Government as a value conflict between the principles of the common market and Irish national identity.

The Court of Justice upheld the position of the Irish Government with the following words:

> The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language... The importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language.[90]

Thus, the European Court gave to the words 'required by reason of the nature of the post to be filled', used in Article 3 of Regulation 1612/68, an interpretation which may seem rather timid from the perspective of the free movement of persons, but is certainly more respectful of the cultural values protected by Irish law. Yet, the Court did not grant full discretion to the Member States in the definition of their linguistic policies. The Court rather confirmed its well-established doctrine that any national policy standing in the way of one of the common market freedoms is to be carefully scrutinized, even if it is a policy area (like culture or language) in which a role for the European Community is not expressly recognized by the Treaty. The Court reserved to itself the power to decide in future cases whether national language regulations have a disproportionate impact on the rights of Community nationals.

90 *Groener* judgment, Rec. 19 and 20.

(b) Free Movement of Products and Labelling Requirements

There exist many official rules on language use that may constitute barriers to the trade of goods. One very common example is that of requirements concerning the language to be used in the labelling of products or in documentation accompanying those products. If those requirements are different from one country to another (and they are bound to be), there are extra costs for those producers who want to market their goods in several countries and have to comply with the different linguistic requirements of each of those countries. Therefore, such linguistic rules may be analyzed as disparities restricting trade. Those rules may, however, be justified by the need to provide adequate information to the consumer of the product. The Community has recognized the need to balance the values of free movement and consumer protection and has enacted a Directive harmonizing the national rules relating to the labelling of foodstuffs.[91] Article 14 of the Directive states that the Member States may (and must) prescribe that labelling should be in a language which the consumer can easily understand, unless the consumer is sufficiently informed otherwise about the nature of the product.

Some countries traditionally have much stricter rules, and often prescribe the use of the national language in all cases and for all products. The compatibility of such rules with the Directive and, beyond, with Article 30 of the EEC Treaty, was raised in 1991 before the European Court of Justice in the case of *Piageme v. Peeters*. Bottles of French and German mineral water had been sold in the Flemish region of Belgium with their original labels in German and French. This was contrary to Belgian rules imposing the labelling of products in the language of the linguistic area in which they are sold, which meant that, in this case, Dutch language labelling was required. The Belgian rule could, just as much as the Irish rule in *Groener,* be seen as a specific consequence of a constitutionally mandated policy choice protecting the use of the various national languages within their own traditional territory. Yet, unlike in *Groener*, neither the European Court nor the Advocate-General nor, apparently, any of the parties to the dispute raised this cultural policy issue, and the case was decided along the narrow lines of a 'technical' interpretation of the EEC Directive. The European Court held that national rules requiring the exclusive use of a particular language for the labelling of consumer products, without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other means, were contrary to Directive 79/112 and, more

91 Council Directive 79/112, OJ 1979 L 33/1. For a general study of EC labelling law, with a case-study of the compatibility of Catalan regional legislation, see Baro i Ballbé, 'L'etiquetatge en Català: un problema en relació amb la CEE?', 14 *Revista de Llengua i Dret* (1990) 137.

generally, to Article 30 EEC Treaty.[92] Rather than imposing absolute language requirements, as Belgian law did, national authorities have to decide case by case, under the supervision of the national and European courts, whether the labelling of a particular product is easily understandable for consumers in a given area.

The *Piageme v. Peeters* judgment provoked strong reactions in Flemish and Dutch public opinion, the general tone of which was that the Court of Justice had trampled on cultural identity in the name of market integration, and that the ruling led to discrimination of the smaller language communities in Europe.[93] But the judgment did not provoke immediate changes in Belgian law. In fact, less than a month after the judgment, the Belgian parliament confirmed the earlier rule when adopting a new Trade Practices Act of 14 July 1991.[94]

It remains to be seen whether the vivid reactions will prompt a change in the position of the Community institutions. The Commission issued an interpretative Communication in which it firmly adhered to the *Piageme* line.[95] The Council adopted, in 1992, a new EC Directive on labelling of medicinal products containing stricter rules than the earlier Directive; it states that labelling particulars and package leaflets must appear 'in the official language or languages of the Member States where the product is placed on the market'.[96] This could be seen either as an overruling of the earlier view and a vindication of the Belgian position, or as the recognition of the special case of medicinal product labellings, for which the slightest misunderstanding may have detrimental consequences for the consumer.

92 Case C-369/89, *Piageme v. Peeters*, [1991] ECR I-2971, Rec. 16 and 17. See the case notes by Van Bunnen in *Journal des Tribunaux* (1991) 764; and by Van Nuffel (who draws the parallel with the *Groener* judgment) in *SEW* (1992) 395. See also Wytinck, 'The Application of Community Law in Belgium (1986-1992)', 30 *CML Rev.* (1993) 981, at 999. On the compatibility of similarly worded German consumer legislation with the Directive, see Streinz, Hohmann, 'Die Rechtsprechung des EuGH im Bereich des Lebensmittelrechts 1990-1992', *Juristen Zeitung* (1993) 712, at 719.

93 The disquiet was reflected e.g. in a number of Written Questions by members of the European Parliament: OJ 1992 C 159/60; OJ 1993 C 95/6 and C 95/7. See also Kuypers, 'De consument en taaletiketteringsvoorschriften', *Tijdschrift voor consumentenrecht* (1992) 137, at 146.

94 Article 13 of the Trade Practices Act of 14 July 1991, *Moniteur belge* 29 August 1991; see Evrard, 'Les pratiques du commerce, l'information et la protection du consommateur (loi du 14 juillet 1991)', *Journal des Tribunaux* (1992) 681, at 683.

95 *Interpretative Communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case*, 10 November 1993, COM(93) 532; on the same day, the Commission issued the more global *Communication from the Commission to the Council and the European Parliament concerning language use in the information of consumers in the Community*, 10 November 1993, COM(93) 456.

96 Council Directive 92/27 of 31 March 1992, OJ 1992 L 113/8, Article 4(2) and Article 8.

3. *Financial Support for the Arts as State Aids: The Practice of the Commission*

The rules of Articles 92 and following of the EEC Treaty organize the control by the Commission of *State aid* to enterprises. States can, by subsidising their own business companies, improve those firms' position on the market to the detriment of foreign competitors, thereby distorting competition within the common market. In order to avoid this, all forms of State aid (both direct subsidies and indirect advantages such as fiscal rebates) are subject to the preventive control of the Commission which accepts them on specified conditions.

In principle, this control system also applies to State subsidies inspired by cultural policy objectives. In the same way as for the application of the common market freedoms, the absence in the EEC Treaty of any specific reference to the cultural sector meant that the general rules of the Articles 92 and 93 apply to the cultural sector as to any other economic sector.

The potential consequences of this are quite important, because public financing of the arts and culture is very widespread throughout Europe.[97] Financial aid is given for the preservation of the cultural heritage, for the production of cultural goods and services (including direct subsidies to creative artists) and for their diffusion (including direct subsidies to performers). In addition to central governments, regional and local governments also play a major role in this respect. A few examples will serve to illustrate the many forms of financial intervention by public authorities in this sector.

France has an active policy of subsidising many forms of cultural expression.[98] There are financial aid schemes for film productions and for theatre, for the translation of French publications into foreign languages and the distribution abroad of French publications; French world radio and satellite television as well as the *chanson française* receive official financial support. This French policy of financial aid to the cultural sector is not fundamentally different from that pursued by most other European States, even if it may be more lavish and systematic. Similar schemes can also be found at the sub-State level. For instance, the Autonomous Communities of Catalonia, Euskadi, and Galicia have instituted ambitious policies of 'language normalization' which attempt to restore the current and normal use of the Catalan, Basque and Galician languages.[99] In order to promote the use of these languages in all areas of social life, all three regional governments have instituted selective subsidy schemes for cultural activities in which the regional

97 A comparative survey is provided by F. Rouet and X. Dupin, *Le soutien aux industries culturelles en Europe* (1991).

98 See the survey by A.-H. Mesnard, *Droit et politique de la culture* (1990) at 361 et seq.

99 For the concept of 'language normalization' and a short description of it, see Cobarrubias, 'The Protection of Linguistic Minorities in the Autonomous Communities of Spain', in P. Pupier and J. Woehrling (eds), *Language and Law* (1989) 399.

language is used in speech or writing: publishing (both books and periodicals), theatre, film production.

In order to evaluate the compatibility of those and similar schemes with Community law, it must first be ascertained whether they are 'State aid' in the sense of Article 92; and if so, it must be decided to what extent they can be held to be compatible with the common market on the basis of the criteria mentioned in Article 92 and further elaborated by the Commission.[100]

State aid is commonly defined, in Community law, as a financial advantage for specific enterprises paid by the State or from State resources which distorts competition and affects trade within the common market. The term 'financial advantage' indicates that the concept of *aid* is larger than that of *subsidies* and also includes indirect financial advantages such as tax rebates or preferential lending rates. These financial advantages come within the purview of Article 92 only if they benefit *specific enterprises*. Subsidies to *individual* artists or writers would seem to be outside the reach of the EC Treaty. A further condition for the application of Article 92 is that the aid should be granted by the State or from State resources. Therefore, private sponsorship of the arts is not a form of State aid, but subsidies granted by private associations funded by the State are.

A further criterion for the application of the Treaty regime is that the aid should distort competition and trade within the common market. This is not the case with most forms of support for *public services in the cultural sector*, such as funding of public libraries or theatre groups. Aid to *cultural industries* will more often affect intra-Community trade and competition, but, there, the Commission decided a self-imposed limit on its control activity by formulating a *de minimis* clause. It declared that, 'in the interests of administrative simplification', aid below a certain ceiling is no longer subject to prior notification.[101] Many forms of aid in the cultural sector are below this threshold and therefore no longer subject to the procedure of control by the Commission.

The fact that aid affects the functioning of the common market does not necessarily mean that it is incompatible with the Treaty, because Article 92(3) indicates a number of reasons which may justify State aids. Cultural policy was not listed among those reasons in the original version of the EEC Treaty, yet the Commission has adopted a rather favourable attitude to State aid inspired by cultural policy reasons.

100 In the book by A. Loman *et al., supra* note 26, at 123 et seq., one finds both a general outline of the EC rules on State aids, and more specific information on their application to culture. See also G. Ress, *Kultur und Europäischer Binnenmarkt, supra* note 45, at 123 et seq.

101 Community Guidelines on State Aid for Small and Medium-Sized Enterprises, OJ 1992 C 213/2.

There is no general statement of the Commission about its policy on cultural aid schemes, nor is there any European Court case dealing with State aid of this type. But a few decisions and comments made by the Commission in relation to national schemes of aid to the *film industry* show that it is prepared to recognize the *specificity of culture*.

In a Decision of 1989 concerning the Greek film subsidy regime, the Commission held that 'aid to the film industry should, in view of its combined economic and cultural function, qualify for exemption under Article 92(3)(c) of the EEC Treaty provided, however, that it satisfies all the requirements of the Treaty, notably those concerning the free movement of persons and the freedom to provide services'.[102]

Thus, the Commission is prepared to give an exemption for cultural policy reasons, provided that the scheme does not contain discriminations against nationals of other EC States such as the condition that the director, or (part of) the actors and the technical members should be nationals of the country. Accordingly, Denmark, France, Italy and Germany accepted, under pressure from the Commission, to amend their film support schemes so as to remove conditions of nationality.[103]

One may wonder whether the frequently used criterion that the film should be made in the language of the country should be considered as indirect discrimination of citizens of other Member States. In the Greek film case, the Commission considered that 'the obligation to make the original version of a film in the Greek language ... constitutes a legitimate concern to preserve a national language'. It added, however, that 'it should be made possible, notably by means of dubbing techniques, for all nationals not knowing Greek to take part in the making of a film. Should this possibility not be recognized, the obligation to make a film in Greek would constitute further hidden discrimination contrary to the EEC Treaty'. One may wonder whether the Commission has not pushed the concept of indirect discrimination on grounds of nationality too far in this case, particularly if compared with the liberal approach adopted by the European Court of Justice in *Groener* concerning requirements of linguistic proficiency.

The uncertainty as to the legality of cultural subsidies was not removed by the Commission's hesitant policy on film support schemes and led to the demand of some States to insert a special clause in the Treaty about cultural subsidies. This was done on the occasion of the Maastricht Treaty.[104]

102 Commission Decision 89/441 on aid granted by the Greek Government to the film industry for the production of Greek films, OJ 1989 L 208/38.

103 Buffet-Tchakaloff, 'La réglementation communautaire de la communication audiovisuelle', *Droit et pratique du commerce international* (1990) 353, at 377-378. The 'negotiations' between the Commission and Germany are recorded in Commission of the EC, 22nd Report on Competition Policy 1992, at 247-248.

104 Cf. *infra,* Part IV.

III. The Development of Community Cultural Policy

A. Community 'Action' and Community Powers in the Field of Culture

The growing involvement of the European Community with culture is often illustrated in the literature by reference to the various action plans submitted at regular intervals by the Commission and to the activities of the Ministers of Culture meeting within the Council.[105]

The *Commission action plans* take the form of Communications addressed to the Council, and their titles indicate a voluntaristic attitude which goes *crescendo*: 'Community action in the cultural sector' (1977);[106] 'Stronger Community action in the cultural sector' (1982);[107] 'A fresh boost for culture in the European Community' (1987);[108] 'New prospects for Community cultural action' (1992).[109] Those action plans describe a multitude of activities but are not based on a coherent design. The Commissioner for Cultural Affairs himself called them '*une politique sans gouvernement*'.[110]

The political follow-up of those Communications takes place within an intergovernmental Committee on Cultural Affairs,[111] which itself prepares the half-yearly meetings of the ministers in charge of Cultural Affairs of the Member States. The output of those meetings usually takes the legal form of Resolutions and Conclusions, that is, acts lacking binding force and dealing often with symbolic policies like the procedure for designation of European Cities of Culture, the European Literary Price, etc. A special institutional feature is that those acts are sometimes specified to be acts adopted by the *Council*, in other occasions as acts adopted by the *Ministers responsible for Cultural Affairs meeting within the Council*, and in other occasions still as 'mixed' acts adopted by the *Council and the Ministers responsible for Cultural Affairs*.[112]

105 Forrest, 'La dimension culturelle de la Communauté européenne', *RMC* (1987) 326; Margue, 'L'action culturelle de la Communauté européenne – Bilan et perspectives', 2 *Revue du marché unique européen* (1993) 171.

106 COM(77) 560.

107 COM(82) 590.

108 COM(87) 603.

109 COM(92) 149.

110 Those were the words used by Mr Dondelinger, at that time the member of the Commission in charge of cultural action (Dondelinger, '1992: les relations de la Communauté et de la culture', *RMC* (1990) 77).

111 This Committee was established by a Resolution of the Council and the Ministers of Culture of 27 May 1988, OJ 1988 C 197/1. It is not integrated in the Coreper structure, which prepares the normal work of the Council, but it functions along similar lines; see J.W. de Zwaan, *Het Comité van Permanente Vertegenwoordigers* (1993) at 183-184.

112 The distinction was related to the subject-matter, which was considered by the governments to fall either squarely within Community competence, or clearly outside Community competence, or to straddle the borderline between Community and Member State

Although Commission Communications and Resolutions by the Council or the European Parliament may provide a sufficient basis for Community expenditure on 'pilot actions' in the cultural sector,[113] they are not, contrary to appearances, at the core of the Community's cultural policy. *Explicit* cultural actions are arguably a minor part of the cultural dimension of Community law and policy. In fact, it may happen that while the Ministers of Culture adopt their non-binding resolutions, their colleagues participating in other Council meetings adopt binding rules with rather more important cultural policy implications. For instance, on 12 November 1992, the Ministers of Culture adopted wide-ranging but rather vacuous Conclusions on 'guidelines for Community cultural action';[114] around the same time, their colleagues reached a political agreement on the art trade package, which would soon after be formalized by the adoption of the Regulation on export of cultural goods and the Directive on the return of cultural objects.

The recent Community legislation on art trade is not unique. There are several other examples of *binding acts of Community law which, though not based on explicit cultural competences, have a direct impact on cultural activities*. In view of the principle of enumerated powers enshrined in Article 4 of the Treaty, the obvious question, then, is which provision(s) of the Treaty could form, or have formed, the *legal basis* for the adoption of those binding acts.

The fact that no explicit competence had been attributed to the Community in the field of culture proved to be no obstacle for Community legislation impinging upon cultural activities because of the characteristic nature of Community powers. The Community institutions possess a number of sectoral powers, i.e. competences defined in sectoral terms like the power to develop common policies on agriculture, on transport, on coal and steel, on research and technology, on vocational training. Apart from those, the Community institutions also had (and still have) important *functional powers*, that is, competences defined in terms of an objective that must be achieved, rather than in terms of a specific sector of activity. The central objective to be achieved was the establishment of the common market, for which the Community institutions were given both specific powers, related to the various freedoms such as the free movement of persons and services, and general powers related to the establishment of the common market as a whole.

competence, in which case the act was adopted under the 'mixed' formula. For further discussion of this issue, see De Witte, 'The Scope of Community Powers', *supra* note 43, at 273 et seq.; and M. Niedobitek, *supra* note 30, at 261 et seq. Since the entry into force of the Treaty on European Union, this formal distinction will probably disappear because the scope of the new Article 128 EC Treaty is so wide as to justify the adoption of any (non-binding) act by the Council. There will normally be no need to recur to the intergovernmental or mixed formula (on the scope of Article 128, see Part IV, *infra*).

113 See *infra*, the section dealing with Community support for the arts.

114 OJ 1992 C 336/1.

Inevitably, in pursuing those objectives, the Community intruded upon many State policies for which competences had not been expressly transferred to the Community. This phenomenon was revealed and justified by the European Court of Justice in its *Casagrande* judgment of 1974. Regulation 1612/68 on the free movement of workers has (among many other things) a provision granting the right of equal access for Community migrants (and their children) to the educational institutions of the host State.[115] This is clearly a measure of educational policy; it could not be justified by reference to an express power for the Community to develop a common educational policy (there was no such power), but by its contribution to achieving a genuine freedom of movement for Community migrants. In the preliminary reference brought to the European Court in *Casagrande,* this provision was challenged by one of the intervening parties as being *ultra vires*. The Court seized the opportunity and formulated the following principle about the division of powers between the Community and the States: 'Although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training'.[116]

With this rather cumbersome phrase, the Court made the important statement that if an act fits within the functional powers of the Community, it may legitimately be adopted even if it deals with policy areas, such as education, that are not enumerated among the sectoral Community competences in the Treaty.[117] As there is no 'constitutionally protected nucleus of sovereignty for the Member States',[118] the same reasoning may also be applied to the field of culture.[119] The European Court has never had the occasion to confirm this explicitly, but this is because the validity of Community acts in this field was never openly challenged. One may therefore conclude that the EC Treaty allows for measures of cultural policy if they serve the establishment and functioning of the common market or (since 1987) the internal market. In other words, the substantive scope of policy integration corresponds at least to the scope of market integration as delineated in Part II of this course.

115 See De Witte, 'Educational Equality for Community Workers and their Families', in B. de Witte (ed.), *supra* note 41, at 71.

116 Case 9/74, *Donato Casagrande v. Landeshauptstadt München,* [1974] ECR 773, at 779. The *Casagrande* formula was repeated in later judgments on educational matters: Case 152/82, *Forchieri,* [1983] ECR 2323, and Case 293/83, *Gravier,* [1985] ECR 594.

117 The general importance of the *Casagrande* formula for understanding the mutation of EC jurisdiction and competences in the 1970s is emphasized by Weiler, *supra* note 42, at 2438 et seq.

118 Lenaerts, 'Constitutionalism and the Many Faces of Federalism', *AJCL* (1990) 205, at 220.

119 For elaboration, see M. Niedobitek, *supra* note 30, at 191-198.

The *Casagrande* example also suggests that Community action is not limited to the *formal establishment* of the internal market, but may also aim at facilitating the *effective exercise* of the common market freedoms, and at ensuring the *adequate functioning* of the common market once it is established.[120] Often, those various functions are performed within a single act of harmonization. Justifications available to the Member States under the Treaty for maintaining restrictive national provisions can only be removed by the Community institutions if they enact harmonized rules which adequately protect the public interests which justified the restriction.[121] Such harmonization measures contribute at the same time to market integration and to policy integration, and the exact mix of the two elements is a matter for the discretionary appreciation of the Community legislator.[122] This double-purpose design of internal market measures can be seen at work in the Directive 'Television without Frontiers', which combines mutual recognition of broadcasting standards with harmonization of some basic aspects of broadcasting regulation.

Though a connection with the functioning of the market is a precondition for Community intervention, this does not mean that that intervention may only be inspired by economic policy concerns. Just as the European Court accepted, in *Titanium Dioxide*, that internal market measures may also aim at the protection of the environment, those measures may similarly be inspired by cultural policy objectives.[123] Those objectives may consist, on the one hand, in facilitating the effective exercise of the free movement of goods, services and persons in the cultural field (already in the 1960s, a number of Council Directives were adopted with the purpose of facilitating the establishment of film production and distribution firms), and on the other hand, in preserving through common action the shared cultural policy interests of the Member States (here, the Regulation and Directive on the trade in works of art provide a good example).

The growing entanglement of the European Community with culture by means of its common market competences provides an excellent illustration

120 Article 100A hints at this by allowing the Council to adopt measures 'which have as their object the *establishment and functioning* of the internal market' (emphasis added.). The Court of Justice has spelled out more clearly the second object by holding, in the *Titanium Dioxide* case, that the instrument of harmonization may be used for the purpose of eliminating distortions of competition (Case C-300/89, *Commission v. Council*, [1991] ECR 2867, Rec. 23). For a discussion of the objectives of Community harmonization, see also Pipkorn, 'Le rapprochement des législations dans la Communauté à la lumière de l'Acte unique européen', *AEL*, Vol. I, Book I (1990) at 209ff. Pipkorn distinguishes between the objective of permitting 'l'exercice effectif des libertés fondamentales' and that of ensuring 'l'encadrement de l'économie communautaire'.

121 D. Wyatt and A. Dashwood, *European Community Law* (1993) at 356.

122 Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation', *CML Rev.* (1993) 85, at 101.

123 See, on this point, M. Niedobitek, *supra* note 30, at 208 et seq.

of 'spillover' and possibly a partial vindication of functionalist theories of integration.[124] Spillover into the cultural sphere takes place, roughly speaking, as follows. A functional linkage is made by the actors of the Community system between the original task of achieving economic integration and a new side-task of developing cultural policy initiatives in order to ensure an appropriate overall balance. It appears that the economic rules of market integration lead to severe restrictions on the formulation of national cultural policies. This limitation of their powers leads national governments to the perception that their failure to recognize law-making competences to the Community would have negative repercussions on national policy itself: the only means through which they can continue to pursue some of their objectives is through joint action within the EC framework.

Yet, there is not necessarily a perfect equilibrium between the 'negative' and 'positive' dimensions of integration, and there may instead be major deficits at the policy integration side. Indeed, once market integration has occurred in a given area, it is difficult to counterbalance it with subsequent policy integration.[125] This phenomenon, which is by no means specific to the field of culture, has been called the *regulatory gap,* the cause of which is a deregulatory bias in the institutional structure of the Community.[126]

B. Particular Sectors of Community Policy

The general considerations made above may be illustrated, first of all, by looking at the recent Regulation and Directive on the trade of works of art, which was done in Part I of this course. Further illustrations will be given in this Part, by looking at the same three sectors and forms of cultural policy for which the impact of market integration has been assessed in Part II, namely

124 For general considerations on spillover theory and its explanatory value in the European Community context, see Keohane and Hoffmann, 'Conclusions: Community Politics and Institutional Change', in W. Wallace (ed.), *The Dynamics of European Integration* (1990) 276 at 282 et seq.

125 See, for example, what happened in the field of resale price maintenance for books. Commission Decisions and Court judgments had led to a degree of market integration, but the subsequent efforts of the Commission to adopt Community rules on resale price maintenance led to nothing; see De Witte, 'Cultural Policy', *supra* note 43, at 201-202.

126 Abolition of restrictive national measures is easier than the adoption of common rules, because of the 'lourdeur' of the Community decision-making process. Therefore, the overall effect of Community intervention tends to be deregulatory. The 'regulatory gap' thesis was advanced in 1987, within the context of consumer protection, by Bourgoignie and Trubek, 'Consumer Law, Common Markets and Federalism', in M. Cappelletti, M. Seccombe, J.H.H. Weiler (gen. eds), *Integration Through Law. European and the American Federal Experience,* Vol. 3 (1987) at 2-4, and 111 et seq. Many of their conclusions can be extended to cultural policy as, indeed, to other areas of Community policy. For a synthetic discussion of the regulatory gap thesis in the changed climate of 1992 (with a more effective decision-making process in the Community), see Dehousse, 'Integration v. Regulation? On the Dynamics of Regulation in the European Community', 30 *JCMS* (1992) 383, at 393 et seq.

television, language use and financial support for the arts. This selection may provide a representative cross-section of Community cultural policy, despite its leaving aside of other relevant cultural policy sectors and dimensions such as the book trade[127] and the protection of copyright.[128]

1. Media Policy

(a) The Directive 'Television Without Frontiers'

Although the European Court's case-law on television services had swept away some restrictive national measures in the course of the years, the Court's attitude in cases like *Debauve* and *Coditel* meant that there were still 'frontiers' in the Community market for television programmes. The Court had held that the Treaty allowed Member States to maintain certain restrictive rules if they were indistinctly applicable and served the general interest but only 'in the absence of any harmonization of the relevant rules'.[129] Taking the hint from those words, and in order to complete the internal market in this sector of growing economic importance, the Commission proposed to harmonize what it considered to be the 'relevant rules' of broadcasting law. After protracted and conflictual negotiations,[130] the Council adopted on 3 October 1989 the Directive 'Television Without Frontiers'[131] and Member States were to comply with its terms by the year 1991.[132]

127 On the publishing sector, see Commission Communication of 3 August 1989, *Books and Reading: A Cultural Challenge for Europe*, COM 989(258); EP Res. A3-0159/92 of 21 January 1993, OJ 1993 C 42/182; a survey is given in A. Loman *et al., supra* note 26, at 168-170.

128 There is a growing number of Community acts harmonizing national copyright rules. Special mention may be made of Council Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ 1992 L 346/61; and Council Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993 L 248/15. See Cook, 'Copyright in the European Community', 2 *Legal Issues of European Integration* (1992) 67; Franzone, 'Droit d'auteur et droits voisins: bilan et perspectives de l'action communautaire', 2 *Revue du marché unique européen* (1993) 143.

129 Case 52/79, *Procureur du Roi v. Marc Debauve*, *supra* note 72, Rec. 15.

130 See Delwit, Gobin, 'Etude du cheminement de la directive "télévision sans frontières": synthèse des prises de positions des institutions communautaires', in G. Vandersanden, *supra* note 60, at 55.

131 This is not the official name of the Directive. Officially it is called the Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23. Among the publications discussing the content of this Directive, see Hordies, Jongen, 'La directive "télévision sans frontières" – analyse juridique', in G. Vandersanden, *supra* note 60, at 75; Tizzano, 'La direttiva comunitaria sulla televisione senza frontiere', *Il Foro Italiano* (1990) IV 92; Wallace, Goldberg, 'The EEC Directive on Television Broadcasting', *YEL* (1989) 177; Buffet-Tchakaloff, *supra* note 103.

132 The implementation of this Directive is unsatisfactory and the Commission started infringement proceedings against several States for failure to comply with it by not implementing some of its provisions, or by not implementing them correctly. See

The Directive can be considered as an expression of the 'new approach' adopted by the Community in its programme for the establishment of the internal market: priority is given to the principle of *mutual recognition* of national rules, accompanied by *harmonization* of national rules to the extent necessary for achieving the goal of mutual recognition. The principle of mutual recognition is laid down in Article 2(2): Member States shall not restrict transmission and reception of television programmes from other Member States for reasons falling within the fields coordinated by the directive; that is, the reception of TV programmes lawfully transmitted in their State of origin should not be hindered by the authorities of the countries of reception.[133] This, of course, was the principal objective which the Commission had sought to achieve when proposing the Directive. Yet, the price to be paid for convincing a (qualified) majority of Member States to agree with this liberalization of the rules on cross-border television, was the simultaneous adoption, within the Directive, of a minimum standard of harmonization[134] in a limited number of fields:[135] mainly that of advertising and sponsorship, but 'European' rules were also adopted on the protection of minors, the right of reply and, most controversially, the promotion of distribution and production of European audiovisual works.

The provisions on the latter subject, usually described somewhat inappropriately as the 'quota rules', are the clearest evidence of the fact that the Directive on Television Without Frontiers is an instrument of media regulation and of cultural policy. Their *raison d'être* was the will, from the side of some Member States (particularly France) and the Commission, to curb the massive dominance of American media multinationals and American audiovisual productions on the European market. Most European countries import more programmes from the United States than from all other European countries put together. After a long and heated debate, the Directive's final text is an uneasy compromise between, on the one hand, the am-

Eleventh Annual Report of the Commission to the European Parliament on monitoring the application of Community law, OJ 1994 C 154/1, at 17.

133 In formulating this rule, the Directive does not address the problem of the possible circumvention of the broadcasting rules of the country of reception by broadcasters transmitting from abroad, which was at the heart of the *Veronica* case, discussed *supra* in Part II.

134 The Directive allows States to impose *stricter* rules on their *own* national broadcasting organizations. The Directive wants to ensure that foreign broadcasts will no longer be banned; if those foreign programmes are subject to stricter standards in their country of origin, that does not matter so much from the internal market perspective.

135 The harmonization of media law by this Directive did not cover *copyright*, despite the original intention of the Commission. Copyright is not one of the 'fields coordinated by the directive'; therefore, obstacles to transfrontier television based on the exercise of copyright remained legitimate within the limits of Article 59 of the EEC Treaty, as interpreted by the European Court of Justice in *Coditel*. This gap in the internal market programme was filled only later by the adoption of Council Directive 93/83 'on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission', OJ 1993 L 248/15.

bitious aims held by the Commission (at least originally), the European Parliament and above all the French Government, who all wanted binding quotas, and on the other hand, the strong misgivings of the television multinationals and some other governments like those of the United Kingdom and Germany.

Instead of binding quotas, Article 4 contains a broad policy objective (broadcasters should reserve for European works a majority proportion of their transmission time) accompanied by very 'soft' language as to the means for reaching that objective (the Article uses terms such as 'where practicable', 'by appropriate means', 'having regard to', 'progressively', and 'on the basis of suitable criteria'). It is clear that the authors of the text did not intend it to be binding; this does not only appear from the wording (which contrasts with the much stronger wording originally proposed by the Commission) but also from a declaration by the ministers, made at the time of adoption, that the quota provisions merely constitute a *political* obligation. Such a declaration cannot, by itself, modify the legal nature of a directive which, according to Article 189 EC Treaty, is binding upon the Member States. On the other hand, the Commission agreed with the declaration and thereby committed itself (or so it would seem) not to initiate Article 169 proceedings against a Member State for failure to comply with the quantitative standards contained in the Directive.

The dubitative mode in which the obligations of Article 4 are formulated has led some authors to criticize the provision for being an example of symbolic legislation devoid of practical effects and incapable of achieving its stated objective of promoting the development of the European audiovisual industry.[136] Yet, most authors have criticized the 'quota' provision for opposite reasons, and regard it as an example of ill-conceived protectionism towards the outside world and/or undue interference with national cultural policies. This debate was not merely conducted on the basis of political arguments; many legal arguments were also invoked for challenging the legality of this part of the Directive. Apart from the argument that the quota provisions might be an infringement of the freedom of expression of the broadcasting stations,[137] the main misgivings relate to the alleged lack of

136 Delwit, Gobin, 'Les mesures de promotion culturelle de la Communauté européenne', in G. Vandersanden, *supra* note 60, 121, at 128.

137 Von Bogdandy, 'Europäischer Protektionismus im Medienbereich', *Europäische Zeitschrift für Wirtschaftsrecht* (1992) 9, at 15. Beyond the case of Article 4 of the TV Directive, there is a more general rule that acts adopted by the Community institutions may not infringe fundamental rights; this rule cannot be read in the EC Treaty but is an unwritten general principle of Community law. See, e.g., A. Clapham, *Human Rights and the European Community. A Critical Overview* (1991); and, with specific reference to the consequences for Community cultural policy, De Witte and Post, 'Educational and Cultural Rights', in A. Cassese, A. Clapham, J.H.H. Weiler (eds), *Human Rights and the European Community: The Substantive Law* (1991) 123.

Community competence in this matter, and to the breach of international law obligations.

On the issue of *competence*, the argument goes that the Directive is an instrument of cultural policy, that the EC does not have the necessary powers to conduct its own cultural policy, and that the Directive is therefore *ultra vires*.[138] The argument can be rebutted by reference to the *Casagrande* formula: if the Directive fits within the EC's functional power to facilitate the free movement of services, then it is legitimate even if considerations or measures of cultural policy are part of the Directive's aims. One could perhaps argue that the quota provisions do not really *facilitate* transfrontier services, as they merely impose a supplementary condition for the proper provision of such services. Yet, it can also be argued that the Directive, by eliminating impediments to the intra-Community provision of services, offers improved possibilities for the distribution of audiovisual production (including that of American origin) throughout Europe. The creation of an 'area without frontiers' by the Directive will lead to a Europe-wide market for television programmes which is much more attractive to the powerful outside (read: US) exporters or investors than the earlier fragmented market. In this manner, a specific move of market integration (abolishing restrictions to the provision of TV programmes) gives rise to an *additional* regulatory need (protecting European production within that wider market). When seen in this perspective, the quota measures may appear to be closely related to the need of ensuring the fair operation of the internal market and of eliminating distortions of competition.

An entirely different issue is whether the quota provisions are compatible with the *international obligations* of the Community, as laid down in the GATT Agreements. According to the US Government, and to American commentators, Article 4 of the Directive constitutes a violation of the national treatment clause in Article III of the GATT Agreement and of the most favoured nation clause in Article IV(b) of the same Treaty. The main line of defence of the Community was that the audiovisual quotas may possibly be restrictions of the trade in services, but not of the trade in goods, and that therefore the GATT Agreement did not apply to them at all.[139] This line of argument came under strain when, during the Uruguay Round negotiations, a consensus emerged for the adoption of rules on free trade in services within the framework of the new World Trade Organization. Interest groups

138 Pechstein, 'Subsidiarität der EG-Medienpolitik?', *Die Öffentliche Verwaltung* (1991) 535, at 540; M. Niedobitek, *supra* note 30, at 168, thinks only Article 235 of the Treaty could have provided the necessary basis for the quota provision.

139 The compatibility of the European quotas with GATT obligations is examined by several authors among whom: Salvatore, 'Quotas on TV Programmes and EC Law', 29 *CML Rev.* (1992) 967, at 987ff.; by von Bogdandy, *supra* note 137, at 15ff.; Filipek, 'Culture Quotas: The Trade Controversy over the European Community's Broadcasting Directive', *Stanford Journal of International Law* (1992) 323.

from the European audiovisual sector,[140] strongly backed by the French Government[141] and by the European Parliament,[142] objected to making audiovisual services part of the Uruguay Round accord. The position of the EC during the negotiations was that audiovisual services, if not entirely excluded, should at least be the object of a specific regime. In the General Agreement on Trade in Services (GATS)[143] as signed in Marrakech on 15 April 1994, audiovisual services are covered in principle, but the European Community failed to undertake any specific commitments for the reduction of trade barriers in the audiovisual sector, and lodged an exemption from the principle of the most favoured nation (Article II of GATS) so as to be able to preserve the privileged treatment of non-EC European States within the framework of the quota regime. The dispute between the Community and the United States about alleged European protectionism in the audiovisual sector remains therefore on the agenda of future bilateral and possibly multilateral negotiations and dispute settlement procedures.

(b) Regulating the Audiovisual Market

The Directive 'Television Without Frontiers' is certainly the most spectacular element of the Community's media policy,[144] but other measures need to be mentioned as well. Their common feature is that they aim at regulating the audiovisual market which Article 59 of the EC Treaty and the TV Directive have helped to establish, and to complement the harmonization of laws effected by the Directive.

The first set of measures is the support scheme for the European audiovisual industry known as the MEDIA[145] Programme. It is a funding programme for the economic support of the European television and cinema industries, particularly for cross-border initiatives and might be seen as the 'positive' counterpart of the protective 'quota' rules of the Directive. The Council Decision of 1990[146] which formally set up the programme provided for 200 million ECU of Community funding over a period of five years for various actions related to the pre-production and distribution stages of audio-

140 See, e.g., a full-page advertisement by French associations of authors and copyright societies in *Le Monde* of 18 September 1993, at 14: '*Un Gatt raisonnable pour une culture européenne*'.

141 See the concurring views expressed by the French President, Prime Minister and Minister of Culture in speeches held on the same day, but in different places; *Le Monde* 23 September 1993.

142 EP Resolution on the cultural aspects of Gatt, OJ 1993 C 255/182.

143 Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, General Agreement on Trade in Services, 33 ILM (1994) 44.

144 '*Peu de directives ont fait couler autant d'encre et suscité autant de commentaires*' (Hordies and Jongen, *supra* note 131, at 75).

145 MEDIA is an acronym for 'Mesures pour encourager le développement de l'industrie audiovisuelle'.

146 Council Decision 90/685, OJ 1990 L 380/37.

visual material: cinema distribution (through a European Film Distribution Office), video distribution, financial assistance for dubbing or sub-titling into other languages, development of the market for independent productions, improvement of production conditions (European Script Fund).[147] Special attention is paid, in some of those projects, to 'countries with smaller audio-visual capacity and/or with a limited geographical and linguistic area'.

Of growing importance is another form of Community intervention in the broadcasting market, namely the application of *competition law* to the activities of press and television organizations. The principle that cultural activities are covered by the economic categories of the EC Treaty applies not only to the common market freedoms but equally to the competition rules contained in Article 85 and following of the Treaty. Organizations operating in the cultural sector can be treated as 'undertakings' in the sense of the Articles 85 and 86. In *Sacchi*, both the German and Italian Governments suggested to the European Court 'that since television undertakings fulfil a task which concerns the public and is of a cultural and informative nature, they are not 'undertakings' within the meaning of the provisions of the Treaty'. The Court, however, assumed that they were undertakings without even taking care to reject expressly the governments' arguments.[148] As a consequence, the prohibition of restrictive agreements between firms (Article 85 EC Treaty) also applies to agreements between media organizations even if they are public service broadcasters,[149] and the prohibition to abuse a dominant position (Article 86 EC Treaty) also applies to the activities of public or private broadcasting organizations.[150] Public broadcasters may, however, escape the full rigour of the competition rules to the extent that exemptions are necessary for the performance of their public service tasks (Article 90, paragraph 2 EC Treaty).[151]

The new issue arising vigorously in recent years is that of controlling the rise of private media conglomerates that might threaten the plurality of

147 For a description of the various projects within the MEDIA programme, see D.B. Winn, *European Community and International Media Law* (1994) at 373-393.

148 Case 155/73, *Sacchi*, *supra* note 70, Rec. 13 of the judgment.

149 The Commission has adopted several Decisions concerning agreements in which public service broadcasters were directly involved, e.g. Commission Decision 89/536 of 15 September 1989, *Film Purchases by German Television Stations*, OJ 1989 L 284/36; Commission Decision of 19 February 1991, *Screensport v. EBU Members*, OJ 1991 L 63/32.

150 The *Magill* case involved a collective abuse of their dominant position by Irish and British broadcasters, the latter including both public and private organizations: Commission Decision 89/205, *Magill TV Guide v. ITP, BBC and RTE*, OJ 1989 L 78/43. The Decision was upheld by the Court of First Instance in Case T-69/89, *Radio Telefis Eireann v. Commission*, [1991] II-485, and two other cases decided on the same day.

151 A survey of the application of Articles 85 and 86 EC Treaty to the cultural sector can be found in A. Loman *et al.*, *supra* note 26, at 95-121. See also V. Salvatore, *Concorrenza televisiva e diritto comunitario* (1993); and Defalque, 'L'audiovisuel et la politique de la concurrence', in G. Vandersanden, *supra* note 60, at 17.

opinions in society. Every European country has its own, very idiosyncratic, rules on the subject of media ownership.[152] The European Parliament repeatedly called for a Community legislative framework for media ownership and concentration.[153] In answer to those calls, the Commission published in 1992 a Green Paper in which it broached the question whether there might be a need for the EC to adopt specific rules on the concentration of media ownership, in addition to the existing general competition rules.[154] Again, it is clear that the formal legitimacy for the Commission to propose a directive or regulation on this matter could derive from the interference of national media ownership rules with the functioning of the internal market (differences between national rules may distort competition) but that fact should not prevent the Community from paying heed also to other regulatory needs in such a text, notably the need to preserve pluralism in the media which was defined by the Court of Justice in the Dutch Media cases as being a form of cultural policy.[155]

2. The Regulation of Language Use

Apart from the legal rules dealing with language use by the European institutions themselves, which need not concern us here,[156] the European Community had adopted a number of legal rules on the use of languages for certain matters. The Community provisions on language use which were at issue in the *Groener* and *Piageme* cases examined above (Part II) are incidental arrangements covering specific conflicts between the principles of market integration and national language policies within a broader regulatory framework. There are, however, a few examples of Community acts which have language as their principal object, although their underlying objective is, again, more closely related to the general aims of market integration than to language policy *per se*.

(a) The Directive on Language Education of Migrant Children

An early and rather uncontroversial inroad in language matters was made by the European Community in 1977, when the Council adopted a Directive on

152 E. Barendt, *supra* note 77, at 121 et seq.

153 EP Resolution of 15 February 1990, OJ 1990 C 68/137; EP Resolution of 16 September 1992, OJ 1992 C 284/44.

154 European Commission Green Paper, *Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action*, COM(92) 480, 23 December 1992. For an analysis of the Green Paper, and a survey of the responses to it, see Hitchens, 'Media Ownership and Control: A European Approach', 57 *MLR* (1994) 585.

155 Case C-288/89, *supra* note 78, Rec. 22 and 23.

156 See the survey by Coulmas, 'European Integration and the Idea of the National Language', in F. Coulmas (ed.), *A Language Policy for the European Community – Prospects and Quandaries* (1991) 1.

the education of children of migrant workers.[157] The Directive imposes on the Member States a duty to organize special language education for the children of migrant workers from other Community countries (not, it should be emphasized, for the more numerous children who are nationals of third States). In order to promote the mobility of Community workers, it was felt that 'appropriate measures' had to be taken in order to facilitate the integration of those children by teaching the official language (or one of the official languages) of the host State. Article 3 of the same Directive adds that the States should also promote teaching of the language and culture of the country of origin. This would seem to be a recognition of the idea that movement of people should not go to the detriment of linguistic diversity. In fact, the underlying view might have been rather different; as the Preamble of the Directive candidly admits, migrant children were granted the benefit of mother tongue education 'with a view principally to facilitating their possible reintegration into the Member States of origin'. Therefore, both the provision about the host country's language and that about the mother tongue pursued, originally at least, the same aim of improving the linguistic skills of migrant children in order to facilitate the intra-Community mobility of their parents. This reasoning justified the choice of the legal basis for this Directive, namely Article 49 of the EEC Treaty, which allows the Community to take 'measures required to bring about ... freedom of movement for workers'. The functional powers of the Community thus served, in the spirit of the *Casagrande* doctrine of the European Court, as a vehicle for legislation dealing with matters (educational and linguistic policy) which one would have thought to be within the residual jurisdiction of the Member States.

The Directive, unlike other acts effectuating the free movement of persons, does not simply order the extension of existing benefits to a new category of beneficiaries, namely EC nationals; it rather imposes on national authorities a duty to set up new programmes specifically addressed to the needs of the migrants' children, irrespective of how the education of the country's own minority groups is organized. Due perhaps to this innovative content, the Directive has met with considerable difficulties at the implementation stage. Moreover, some of the obligations are couched in such vague terms that it is difficult to imagine their enforcement through court actions by individuals. One can, therefore, hardly describe this Directive as granting a genuine 'right' to language education. It constitutes nevertheless a good example of EC internal market legislation with a clear cultural policy dimension.

157 Council Directive 77/486, OJ 1977 L 199/32.

(b) The *Lingua* Programme

The same link between the improvement of linguistic skills and labour mobility is present, though in a more attenuated form, in the *Lingua* programme adopted by a Council Decision of 1989.[158] This is a multiannual scheme of Community funding for the promotion of the teaching and learning of Community languages. It involves mobility grants for students and teachers of languages on the model of the well-known *Erasmus* programme, but also grants for in-service training of language teachers and for the improvement of language skills in economic life. The link between this initiative and the basic Community objective of market integration is clearly indicated in the Preamble of the Decision: 'the establishment of the Internal Market would be facilitated by the quantitative improvement of foreign language training within the Community to enable the Community's citizens to communicate with each other and to overcome linguistic difficulties which impede the free movement of persons, goods, services and capital'. Yet, the legal basis for *Lingua* was not sought among the internal market competences, but in Article 128 of the EEC Treaty (which allowed, prior to the Treaty on European Union, for the adoption of vocational training programmes by a simple majority vote in the Council[159]) in combination with Article 235, the residual competence clause which covered the part of the programme dealing with general school education.

Lingua funding is reserved for the so-called *Community languages*; Article 3 of the Decision provides that 'foreign language teaching in the context of the Lingua programme shall refer only to the teaching as foreign languages of Danish, Dutch, English, French, German, Greek, Irish, Italian, Letzebuergesch, Portuguese and Spanish'. This rule seems to be at odds with the objective of the programme as quoted above. If the intention of the programme really is to enable the Community's citizens to reap the benefits of a completed internal market and to enhance understanding and solidarity between the peoples of the Community,[160] there seems to be no valid reason to include languages like Irish and Letzebuergesch, spoken by a few hundred thousand persons, while leaving out of the programme the Catalan language, which is spoken by more than six million persons within the European Community.[161]

158 Council Decision 89/489, OJ 1989 L 239/24.

159 Recourse to Article 128 of the EEC Treaty was made possible by the Court of Justice's ruling in the *Erasmus* case, according to which Article 128 offered a sufficient basis for programmes in the field of vocational training and higher education, even if they contained binding obligations for the Member States. On this case, and the gradual expansion of the scope of Article 128 generally, see Lenaerts, *supra* note 41, at 18 et seq.

160 See also the Preamble of the Lingua Decision, eighth recital.

161 See the Resolution of the European Parliament of 11 December 1990, OJ 1991 C 19/42, demanding the inclusion of Catalan in the language programmes of the Community.

Still, within the privileged group of Community languages, the *Lingua* programme attempts to bolster the position of what are called the LWULT languages, that is to say, the 'least widely used, least taught' languages, to the detriment of the main three languages of the Community, English, French and German.[162] In this way, the programme may indeed, apart from its contribution to the improvement of communication skills needed within an internal market, also make a modest contribution to the promotion of linguistic and cultural diversity in Europe. In its latest Activity Report on the Programme, the Commission went out of its way and suggested that *Lingua* might be the first step of a 'coherent Community linguistic policy'.[163] Yet, because of its planned absorption within the new *Socrates* programme,[164] *Lingua* will remain restricted to the field of education and training, and will not be allowed to develop into a cross-sector linguistic policy instrument.

3. Community Support for the Arts

The terms 'Community support for the arts' might suggest that there is a coherent Community policy in this area, but that is not the case. There has, rather, been a gradually extending patchwork of disparate funding programmes, without clear coherence in policy terms, and without a uniform legal basis. Two such programmes were mentioned before: the *Media* and *Lingua* programmes. Those two programmes were based, wholly or in part,[165] on Article 235 of the EEC Treaty.

Article 235, the 'elastic competence clause' of the Treaty, could have served for further funding mechanisms in the cultural sector, or even for a global European Cultural Fund similar to the structural funds. New Community initiatives based on Article 235 are legitimate only when they are 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community'. The substantive limits in the use of Article 235 are probably to be sought in the words 'common market', in the sense that new Community actions must at the same time have a *transnational* dimension and an *economic* flavour. The practice in other fields of Community law shows that those criteria need not be prohibitive. Particularly in the period from 1973 until the entry into force of the Single European

162 A separate Action within the Programme is devoted to the promotion of LWULT languages, and those same languages are the object of special consideration also within the other parts of *Lingua*. The Commission has indicated that the proportion of *Lingua* funds spent on the teaching and learning of LWULT languages is steadily growing (Commission of the EC, *Lingua Programme – 1993 Activity Report*, COM(94) 280, 6 July 1994, at 25).

163 Ibid., at 27.

164 Commission Proposal for a Community Action Programme, 'Socrates', OJ 1994 C 66/3.

165 *Lingua* was also based, for the 'vocational training' part of the programme, on Article 128 EEC Treaty.

Act, frequent recourse was made to Article 235 for launching entirely new Community policies.[166]

Yet, such developments can only take place with the support of each Member State, because acts based on Article 235 must be adopted by unanimity. The unanimity requirement constitutes an effective protection of Member States' sovereignty, and attempts to base cultural policy measures on Article 235 have usually met with the veto of at least one government. Denmark used to be particularly restrictive in this respect, but other governments tended to be equally wary of European Community inroads in the cultural field based on this provision. On the whole, therefore, this Article has played only a minor role in the field of culture.[167]

Before the *Media* programme was enacted in the form of a Council Decision based on Article 235, it had been run for some years as a 'pilot scheme' for which budgetary appropriations had been voted even though there was no legislative framework. Several other cultural funding programmes were started in the same way during the decade preceding the entry into force of the Treaty on European Union. The 'soft' instruments of 'cultural action' mentioned in the introduction to this Part of the course, namely Communications of the Commission, Resolutions of the Council or the Ministers of Culture, and Resolutions of the European Parliament, while not legally binding,[168] were nevertheless considered to provide sufficient ground for attributing small amounts of Community funding to the cultural initiatives which they defined. The Community institutions had agreed, as part of their arrangements on the budgetary procedure, that such 'pilot actions' could be funded by the Community as long as they did not have a 'significant' volume.[169] Those funds have, indeed, remained insignificant when compared with the overall volume of the Community budget. In the budget for 1994, 14.8 million ECU were committed under the budget heading 'Culture', that is 0.02% of the total budget of the European Union.[170]

166 See the analysis by Weiler, *supra* note 42, at 2445 et seq. See also Flaesch-Mougin, 'Article 235', in V. Constantinesco *et al.*, *Traité instituant la CEE. Commentaire article par article* (1992) 1509.

167 See De Witte, *supra* note 43, at 276 et seq. For further discussion of the legitimacy of basing cultural policy measures on Article 235 in the pre-Maastricht period: G. Ress, *supra* note 45, at 40-42; and M. Niedobitek, *supra* note 30, at 290 et seq.

168 See the analysis of the legal effects of those instruments by M. Niedobitek, *supra* note 30, at 261-284; and Wellens and Borchardt, 'Soft Law in European Community Law', 14 *EL Rev.* (1989) 267.

169 Joint Declaration of the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure, OJ 1982 C 194. In point IV.3.c of this Declaration, it is stated that 'the implementation of appropriations entered for significant new Community action shall require a basic regulation'. *A contrario*, 'non-significant' actions do not require a basic regulation, and cultural expenditure could be fitted within this (rather capacious) rest category.

170 *Budget for the European Union for the financial year 1994*, OJ 1994 L 34, budget line B3-200. Those funds are allocated to five categories of activities: protection and devel -

If the *legal* basis for these support programmes appeared rather shaky, their justification in *policy* terms was equally problematic. It is difficult to perceive, for instance, why the EC should spend money on the preservation of the European architectural heritage, and not on other equally worthy cultural activities. There is, however, one policy objective which is more plausible: that of using Community funds in support of minority cultures. The argument in favour of supporting minority cultures runs parallel to the arguments usually made, and accepted, about less-developed regions within the Community. The Member States have enacted in the EC Treaty their view that open borders and free competition are not sufficient to ensure the development of peripheral or declining regions, and that the latter can become valid participants in the European market only by means of a deliberate policy for developing their economic structure. This policy view has two types of consequences. The 'negative' consequence is that the usual strict standards for the control of national subsidies need not be applied if those subsidies form part of a regional development programme. The 'positive' consequence is formed by the regional development policy of the Community itself, which essentially takes the form of grants from the EC budget to regional development plans proposed by Member States or regional and local authorities.

The argument in favour of positive incentives for less-developed regions may be applied, *mutatis mutandis*, to the smaller cultural communities within Europe. In order to create conditions of fair competition on the 'market for culture' and to effectively preserve linguistic diversity, the Community might adopt similar instruments as for regional development: the 'negative' instrument of accepting national systems of subsidy to smaller (national or regional) cultures as being legitimate under Article 92, and the 'positive' instrument of providing additional Community support to those same cultures.

IV. Culture After the Treaty of Maastricht: European Union and the Preservation of Cultural Diversity

A. The Road to Maastricht

Culture and the economy cannot be kept separate in two watertight compartments. The decision, which was made in the 1950s, to integrate the economies of the countries of Western Europe does necessarily have conse-

opment of the European cultural heritage, measures to encourage cultural initiatives in connection with European influence, promotion of theatre and music in the European Community, cultural cooperation with third countries, books and reading. One may compare the total amount of 14.8 million ECU for those activities with the 49 million allocated to *Media* and the 43.5 million allocated to *Lingua*.

quences for all those cultural activities that have an economic and potentially transnational dimension.

On the one hand, those consequences can be ranged under the heading *market integration*. The creation of a common market means that features of national cultural policy that hinder the establishment and functioning of the common market have to be changed or abolished. At the same time, it is recognized that market freedom is not an absolute value, and that national governments are entitled to maintain important cultural policy choices. The central value of the Treaty of Rome, as interpreted by the Court and the Commission, is that of *cultural freedom* for individual actors rather than that of *cultural diversity*; the latter is perceived above all as a possible obstacle to transnational economic integration. There is some room to allow for the specificity of culture within the process of market integration, but this room is rather limited, and the cultural arguments are carefully scrutinized in the practice of the European Commission and Court. In doing so, those institutions conduct an implicit and piecemeal cultural policy, for which the Treaty does not provide clear guidelines, and which leaves a large amount of legal uncertainty on many points.

Cultural consequences also appear in the *policy integration* dimension. The common market is not a deregulated space. The functioning of that market may require common European rules as a substitute for national rules that have been removed, or as a complement for national rules that have lost their efficiency because of the internationalization of cultural and economic life. Although the Community institutions have certainly not enacted a massive programme of cultural legislation, the general process whereby the principle of enumerated powers was 'progressively, relentlessly, but never dramatically, eroded'[171] has left its mark in this policy sector as in others. The functional powers attributed by the Treaty (such as the Articles 49, 63 and 100A) have been used for the adoption of binding measures of Community law with direct implications for cultural policy, but the precise scope of those powers has never been tested before the European Court.

All those developments, which were analysed in the preceding Parts of this course, have caused a breakdown of the original distinction (outlined in the Introduction) between the economic and the cultural sphere. Yet, the EEC Treaty did not, until 1993, provide adequate 'constitutional' resources for dealing with this phenomenon and for striking a considered balance between the needs of both spheres of activity. Indeed, a common criticism made in the literature was that the European Community viewed cultural activities through an economic prism, with a corresponding neglect of the cultural values served by those activities.

171 Weiler, *supra* note 41, at 2447.

The fact that the cultural sector was also being 'pulled' into the European integration process attracted public awareness only in the late 1980s. This greater awareness resulted in the elimination of discriminatory and protectionist measures which had lingered on for many years. But at the same time, there grew the concern that 'Europe' might start dictating cultural policies and eventually threaten cultural diversity. This attitude of distrust was most clearly visible among the smaller cultural communities, and particularly those that are more heavily exposed to foreign influences by their geographical location. In the difficult process of adjusting national identity to internationalizing trends, culture becomes a key variable and a matter of contention. The fear emerged that successful economic integration might, after all, cause cultural assimilation, and that, for instance, some of the smaller national languages (such as Dutch or Danish) might be reduced to the status of quasi-dialects while one (or a few) 'national' language(s) of Europe would emerge.

To this was added the view of regional institutions – particularly the German *Länder* – that the growing involvement of the Community with culture led to an erosion of their autonomous legislative powers.[172] It is true that both the central State and the autonomous regions find their powers being eroded by the European integration process, but the national governments compensate this loss by playing a decisive role in Community decision-making (through their representatives within the Council), whereas the regions were excluded from the institutional structure of the Community and yet have to accept the legal consequences flowing from Community acts which they did not help to shape. From their perspective, every advance in European integration constitutes a net loss in terms of power and influence. It should therefore not come as a surprise that some of the most vivid criticisms of Community cultural policy came from the side of the German *Länder* and from German legal writing.[173]

Beyond the specific situation of the small cultural communities and the regions, there were more widespread misgivings, in political and academic circles, about the economic undertones and the market-oriented outlook of Community interventions in the field of culture, and the lack of sensitivity which they show to the values protected by national cultural policies. This appeared to be at odds with the role of the State as the protector and promoter of cultural development, which finds broad recognition not only in

172 For a comparative study of the relation between regional autonomy and European integration in various Member States, see H-J. Blanke, *Föderalismus und Integrationsgewalt – Die Bundesrepublik Deutschland, Spanien, Italien und Belgien als dezentralisierte Staaten in der EG* (1991).

173 Schweitzer, 'EG-Kompetenzen im Bereich von Kultur und Bildung', in D. Merten (ed.), *Föderalismus und europäische Gemeinschaften* (1990) 147; Ipsen, 'Das "Kulturbereich" im Zugriff der Europäischen Gemeinschaft', in W. Fiedler, G. Ress (eds), *Verfassungsrecht und Völkerrecht – Gedächtnisschrift für W.K. Geck* (1989) 339.

continental European legal doctrine and political philosophy,[174] but also in the constitutions of most European States which declare the protection of the cultural heritage to be one of the duties of government.

Those constitutional mandates need not be exhaustively examined here; suffice it to refer to one typical illustration, namely the frequent references in national constitutions to the need to preserve the country's linguistic identity. The Irish and Luxembourg constitutions have, as was mentioned before, provisions which protect the position of the national language. French governments of every denomination pursue a policy of affirming the position of the French language in the face of the advance of English. This policy was entrenched in the Constitution in 1992; its new Article 2, paragraph 2, states: '*La langue de la République est le français*'. The amendment was made at the same time as another one, which was required to allow for French ratification of the Treaty on European Union.[175] There is no necessary connection between the two new provisions (the Treaty on European Union does not contain provisions affecting the position of French), and in fact the amendment was not proposed by the Government but by a group of parliamentarians. Yet, for those proponents, there was a strong symbolic connection, as they conceive of the French language as a central element of national identity which needs to be strengthened in the face of growing European unification.[176] As for Germany, the text of the Constitution is silent on the matter of language use, but one leading commentator argued that the protection of the German language is a constitutional duty for the government.[177] Even in countries in which there is no constitutional rule, the preservation of cultural and linguistic patterns against external threats is a broadly shared political priority. Only Britain would seem to have a vested interest in a free flow of

174 The literature on the cultural role of the State, which is situated on the borderline between constitutional law and political philosophy or '*Staatslehre*', is particularly well developed in Germany: Maihofer, 'Kulturelle Aufgaben des modernen Staates', in E. Benda, W. Maihofer, H.J. Vogel (eds), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (1983) 953; Maihofer, 'Zur Notwendigkeit einer europäischen Kulturfödera - tion', in Bertelsmann Stiftung, *Die Zukunft Europas – Kultur und Verfassung des Kontinents* (1991) 196; Steiner, 'Kulturauftrag im staatlichen Gemeinwesen', 42 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtlehrer* (1984) 8; Grimm, 'Kulturauftrag im staatlichen Gemeinwesen', *id.*, 46. In Italy, E. Spagna Musso, *Lo Stato di cultura nella Costituzione italiana* (1961); M. Ainis, *Cultura e politica. Il modello costituzionale* (1991); in France, A.-H. Mesnard, *Droit et politique de la culture* (1990) at 27 et seq.

175 On the latter constitutional amendment, see Oliver, 'The French Constitution and the Treaty of Maastricht', 43 *ICLQ* (1994) 1, at 16 et seq.

176 'Le droit de vote et d'éligibilité accordé à des non-français aux élections municipales, la disparition programmée du franc et l'impossibilité pour la France de contrôler ses frontières extérieures, de manière autonome, devaient faire émerger la revendication d'une garantie permanente pour la langue française' (Debbasch, 'La reconnaissance constitutionnelle de la langue française', *Revue française de droit constitutionnel* (1992) 457, at 461).

177 Kirchhof, 'Deutsche Sprache', in J. Isensee, P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* I (1987) 745, at 763.

culture and a free market for languages, in which it can exploit the advantage of possessing the leading international language and specialize further in 'cultural industries' like publishing, music, radio and television, and education.

In view of the nature of the European Community political system, one would expect those national policy preferences and constitutional values to be reflected in Community decision-making. Indeed, respect for, and promotion of, cultural and linguistic diversity became undisputed policy goals of the Member States and the Community institutions and were often celebrated in European Community documents from the late 1980s onwards. Those values were solemnly enacted in the Treaty on European Union, which gave a new constitutional foundation to the cultural law and policy of the European Community, but without calling into question the *acquis communautaire* described so far in this course.

B. The Cultural Provisions of the Treaty on European Union[178]

The Treaty of Maastricht is no *tabula rasa* in the field of culture. Like in other fields of Community activity, it builds upon earlier developments, which the Treaty expressly seeks to preserve.[179] The new provisions dealing with culture can be said to serve two distinct purposes, namely *codification* and *containment*.[180] The first of those purposes is achieved by the fact that the new Article 128 of the EC Treaty provides an express basis for many informal developments that had occurred in the interstices of the earlier Treaty system, and may hence put an end to some of the controversies about Community competences in the field of culture. Article 128 defines the areas in which the Community may develop its activities: 'improvement of the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; artistic and literary creation, including in the audiovisual sector'.[181] Those areas correspond, in part, to the domains covered by existing funding programmes of the Community. To this extent, Article 128 may be seen as codifying those programmes and transforming the earlier 'pilot actions' into stable elements of Community policy. Also, the need to keep those programmes very small, which was a

178 See the following commentaries: A. Loman *et al., supra* note 26, at 190 et seq.; Bekemans, Balodimos, 'Le traité de Maastricht et l'éducation, la formation professionnelle et la culture', 2 *Revue du marché unique européen* (1993) 99; Ress, 'Die neue Kulturkompetenz der EG', *Die Öffentliche Verwaltung* (1992) 944.

179 See Article B and C of the Treaty on European Union which refer to the *acquis communautaire*.

180 See A. Loman *et al., supra* note 26, at 195.

181 For a closer description of those areas, see Bekemans and Balodimos, *supra* note 178, at 119 et seq.

direct result of their dubious legal basis, is no longer there, and the Community would now legally be entitled to create a global 'European Cultural Fund' for the promotion of the various cultural activities listed in Article 128,[182] although the political consensus for such a move will probably be lacking for some time.

The third paragraph of Article 128 adds that the Community may help in fostering *cooperation with third countries* in the field of culture. Explicit provisions on cultural cooperation had already been included, prior to the Treaty on European Union, in a number of *mixed agreements* concluded by the Community and its Member States together, of which the most important have been the Lomé IV Agreement and the Europe Agreements.[183] It was probably the view of the Member States that those cultural provisions were covered by Member State competence, and did not fall within the 'Community compartment' of those mixed agreements. With the entry into force of the Treaty on European Union, cultural cooperation clauses can also be included, presumably, in external agreements concluded by the Community alone.

Apart from providing a legal basis for existing Community financial subsidy schemes, Article 128 also (and, perhaps, above all) seeks to *contain* the expansion of Community activity in this field, to restore a better balance between economic integration and cultural specificity and to formulate the proper division of roles between Member States and the Community in the field of culture.

The effort at containment is particularly visible in the general formulation of the role of the Community. Article 128 states that the central purpose of Community action in this field is not the development of a European culture but rather the protection and promotion of cultural diversity. The first paragraph directs the Community to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'.

Many questions arise when reading those provisions: what do the notoriously vague terms of national identity, cultural diversity, and common cultural heritage mean within the context of a binding Treaty text? And how can consideration be given to those values in the practice of the Community institutions, particularly when they appear to collide with other, and more immediately compelling, objectives of the European Community, such as market integration or economic growth?

182 The proposal was made by a Committee of Cultural Consultants in a report addressed to the Commission, *Culture and the European Citizen in the Year 2000*, November 1989, on page 17.

183 See for instance Article 97 of the Agreement with Hungary, OJ 1993 L 347/1.

The concept of cultural diversity would seem to occupy pride of place as the central policy objective in Article 128. It includes, according to the first sentence of the Article, both national and regional cultural diversity. But does it also include the cultural practices and characteristics of the immigrants from third States?[184] The notion of 'diversity' itself is broad enough to refer either to cultural *segmentation* (preserving distinctiveness by avoiding contacts with outsiders) or cultural *pluralism* (interaction with respect for differences). Insistence on the former or the latter interpretation may make quite some difference in the shape of future Community policies.

The insistence on the need to preserve cultural diversity is related to a principle which is not expressly mentioned in the Title on Culture, but which has come to play a central role in the Community debate post-Maastricht: the principle of *subsidiarity*. This principle defining the appropriate division of responsibilities between levels of government is formulated in general terms in Article 3B of the Maastricht Treaty. It has become, in the post-Maastricht discussion, the almost miraculous response to the diffuse fear that 'more Europe' will lead to the assimilation of national and regional specificities.[185] The new Title on Culture can be seen as containing a more specific formulation of the general principle of subsidiarity. While allowing for Community action in a field which is rather widely defined, it also constrains such action by imposing the preservation of cultural diversity as an overall aim, and by limiting the range of available legal instruments for Community action.

As to the latter point, paragraph 4 of Article 128 states that the Community institutions may adopt *incentive measures* complementing national policies, but they are expressly denied the power to *harmonize* national laws and regulations in the field of culture. The latter type of provision, which one could call a 'negative competence clause', is new in Community law; until now, the absence of any explicit denial of powers to the Community had allowed the dynamic expansion of the range of Community policies. The purpose of this prohibition is clearly to preempt any further expansion of

184 In the European Community context, cultural diversity usually means territorially based (national or regional) diversity. Yet, inside some European States (the United Kingdom, France, Germany, the Netherlands) the cultural diversity debate is rather more concerned with the contrast between national and immigrant cultures. It may well be argued that the European Community should be concerned both with traditional territorial minorities, and with the 'new' minorities formed by immigrants from third States. See De Witte, 'The European Community and its Minorities', in C. Brölmann *et al.* (eds), *Peoples and Minorities in International Law* (1993) 167.

185 There is an immense literature on the principle of subsidiarity. See, among many others: Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Colum. L. Rev.* (1994) 332, Part I; Dehousse, 'Community Competences: Are There Limits to Growth?', in R. Dehousse (ed.), *Europe After Maastricht – An Ever Closer Union?* (1994) 103; Lenaerts and Van Ypersele, 'Le principe de subsidiarité et son contexte: étude de l'article 3B du traité CE', 30 *CDE* (1994) 3.

Community involvement in the field of culture. A further guarantee is sought in the procedure for the adoption of incentive measures. Such Community action will have to be decided according to the so-called codecision procedure of Article 189B, which closely associates the Council and the European Parliament, with the addition of the unusual requirement that the Council should express a unanimous vote.[186] Moreover, the regional governments with legislative powers in the field of culture (mainly those of Germany and Belgium) will henceforth be closely associated to decision-making on cultural matters, as the Treaty now allows them to act as representatives of their State within the Council.[187]

The wording of Article 128 may be seen as a laudable attempt to draw a clear demarcation line between Community and Member State jurisdiction, as a reaction to the excessive blurring of those lines in the previous years. Yet, one may wonder whether the new provision will really permit that goal to be reached. A first doubt relates to the meaning and implications of the term *incentive measures*. They primarily mean *financial* incentives,[188] such as those the Community had been granting in the field of culture for some years. One should not underestimate the disruptive potential which they may have. The experience of federal States shows that 'conditional grants' attributed by the federal authorities for specific purposes exercise a substantive influence on the way the Member States conduct their autonomous policies,[189] and incentive measures may in fact bring about a semi-voluntary harmonization of some aspects of national cultural policy.

A second doubt relates to the real scope of the *prohibition of harmonization*. Community action with strong cultural implications, but which finds its

186 In the codecision procedure, a qualified majority vote in the Council will normally suffice for adoption (see Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union', *EL Rev.* (1994) 343, at 348-363). Only for the adoption of the framework programme on research (Article 130(I)(1)) and for culture is unanimity required throughout, which seems to indicate that the drafters of the Treaty considered those decisons to be particularly sensitive. The unanimity requirement for culture was apparently inserted on the initiative of the German Government acting on behalf of the *Länder* (Bekemans and Balodimos, *supra* note 178, at 133).

187 Article 146 of the EC Treaty was amended in order to allow for this possibility. It requires, obviously, a prior coordination of views among the *Länder* (in Germany) and the Communities (in Belgium), as every Member State can only express one single vote in the Council. One may further note the creation of the Committee of the Regions (Article 198A EC Treaty), in which the regions and local authorities of all Member States are represented, and which will be consulted on Commission proposals based on Article 128.

188 The European Council considers that the term 'incentive measures' refers to 'Community measures designed to encourage cooperation between Member States or to support or supplement their action in the areas concerned, including where appropriate through financial support for Community programmes or national or cooperative measures...' (European Council at Edinburgh, Conclusions of the Presidency, *Bulletin EC* 12-1992, at 14, footnote 1).

189 Bohr and Albert, 'Die Europäische Union – das Ende der eigenständigen Kulturpolitik der deutschen Bundesländer?', *Zeitschrift für Rechtspolitik* (1993) 61, at 64-65.

legal basis in other chapters of the EC Treaty, would seem to remain unaffected by the new rule of Article 128. The Directive on transfrontier television and the Directive on the restitution of works of art were based on internal market powers, and their validity has not been openly challenged before the Court of Justice. The scope of the powers granted in the Articles 49, 54, 63, 100A, and 113 (which have all formed the legal basis of Community measures in the field of culture) is not altered by the inclusion of Article 128, and similar legislative acts, or modifications of the existing measures, remain legally admissible in the future.[190] The same cannot be said about Article 235. The use of this elastic competence clause for harmonization measures in the field of culture was ruled out by the European Council,[191] and this view will undoubtedly be followed in the practice of the Council.

Yet, any future measures of harmonization, while still possible under other headings than Article 128, will henceforth be subject to more careful checks than before. They will first have to stand the check of *subsidiarity*. Although it is still controversial to what extent subsidiarity applies, legally speaking, to internal market acts, it will certainly provide a political argument to those opposing culturally coloured internal market initiatives.[192] More importantly, Article 128 contains a so-called *integration clause* stating that 'the Community shall take cultural aspects into account in its action under other provisions of this Treaty'. This seems to be a (somewhat veiled) recognition of the need to mitigate the full effect of the principles of the common market by giving due consideration to their cultural and linguistic consequences.[193] The implementation of this integration cause will require a fine-tuned interpretation, which is entrusted to both the political and judicial institutions of the EC.

The Commission is now also entitled, and obliged, to recognize the specificity of culture in its *State aids* policy. The Member States agreed to insert a new provision into Article 92 of the EEC Treaty, which declares to

190 Article C of the Treaty on European Union requires Article 128 to be interpreted in such a way that existing measures and powers of the Community are not removed by the new provisions introduced by the Treaty on European Union. A similar point is made, with regard to the new provisions on education, by Lenaerts, *supra* note 41, at 8-9.

191 European Council at Edinburgh, Conclusions of the Presidency, *Bulletin EC* 12-1992, at 14, footnote 1.

192 Subsidiarity does not apply to the sphere of exclusive Community powers, and for some authors the internal market powers are part of this exclusive preserve: Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *CML Rev.* (1992) 1079, at 1094; and, with special reference to cultural policy areas like the media and copyright, Schwartz, 'Subsidiarität und EG-Kompetenzen. Der neue Titel "Kultur". Medienvielfalt und Binnenmarkt', 24 *Archiv für Presserecht* (1993) 409, at 413-416. For other authors, on the contrary, measures with cultural policy implications are always subject to subsidiarity, even when based on internal market powers.

193 One may note that the integration clause is not limited to internal market policies, but may also influence the future conduct of various other EC policies, such as the structural funds policy and relations with third States.

be acceptable 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'. The German *Länder* had proposed a blanket exemption for cultural subsidies under Article 92(2), but they were not successful.[194] Under the new provision, cultural support schemes will have to be notified to the Commission, as before, and it remains to be seen how the Commission (under the control of the European Courts) will apply this sibylline provision in the course of its policy on State aids.

C. Conclusion: Cultural Diversity and European Identity

The Treaty of Maastricht has tried to correct some of the defects of the EEC Treaty as they had appeared in the course of the years. The main problem was that a number of economic principles of Community law applied to cultural activities but that there was no satisfactory legal mechanism for recognizing the specific nature of cultural activities and policies. The European constitution, as rewritten in Maastricht, offers better institutional conditions for striking a considerate balance between allowing progress of economic and political integration without jeopardizing the cultural heritage, the pluralism of the media and the linguistic identity of the nations and regions of Europe. It remains to be seen whether cultural diversity will merely be celebrated in official discourse, or whether it will be part and parcel of the daily activity of the European institutions.

The Court and the Commission, taking the hint from Article 128(4), will have to consider more carefully the cultural policy implications of their activities in the field of market integration. As for the Community legislator (the Council but also, increasingly, the European Parliament), they need not abstain from all action in this domain; on the contrary, it is submitted that there is a legitimate space for both *Community rule-making* and *Community incentives* for the protection of the common cultural interests of the Member States. Two policy goals could provide legitimate objectives for the post-Maastricht cultural policy of the Community.[195]

The first objective is to continue, but more judiciously than before, to regulate the functioning of the common market (including its external aspects), and correct the free play of market forces, with due consideration of cultural policy requirements. The original aim of ensuring a free flow of culture should further be pursued, also by making a judicious use of the Community's newly recognized spending power in cultural matters, which

194 See Bohr and Albert, *supra* note 189, at 65.

195 On the following, see also Dumont, 'Les compétences culturelles de la Communauté', in J. Lenoble and N. Dewandre (eds), *L'Europe au soir du siècle. Identité et démocratie* (1992) 189, at 212 et seq.

could be put to use for lessening the linguistic barriers of communication and favouring the circulation of cultural products (books, audiovisual works) between the countries of Europe.

The second objective is to protect cultural pluralism against external threats which smaller States could not effectively face alone. Indeed, national legal instruments of cultural protection have irremediably lost some of their potential effect, which is partly due to the principles of market integration, but also, and more importantly, to the growing internationalization of the economy and social life and the cultural changes caused by those processes. The single cultural communities within Europe cannot sufficiently counteract the negative consequences of this trend. Therefore, the preservation of cultural diversity is also a task and duty of the European Community.

One may therefore safely predict that in the years to come, Community law will continue to have a very limited influence on the question of the cultural integration of European societies, which is subject to a wide variety of social and economic forces whose role is more important than that of regulatory measures taken by either national or European institutions.[196]

The insistence on cultural diversity, and the limited role reserved for the Community institutions in the field of culture, stand in stark contrast with a phrase commonly attributed to Jean Monnet: '*si c'était à recommencer, je commencerais par la culture*'. This statement is certainly apocryphal, but the fact that it is so often repeated shows a widely shared perception that culture may well be a key variable for successful European integration. One of the recurring issues in the European integration debate is about the wisdom of the original choice to start integrating the *economies* first. Doubts are often expressed as to whether the model of *homo economicus* can be the source of a lasting bond, an 'ever closer union' between the peoples of Europe. Should one not, rather, give priority to creating European civic values and a European public opinion and are cultural institutions not the most appropriate instrument for diffusing those values ?

An 'identity policy' had been contemplated by the Member States and the Community institutions already in the early 1980s, as a response to the lack of progress in European integration.[197] In 1983, at the Stuttgart meeting of the European Council, the Heads of State and Government adopted a *Solemn Declaration on European Union* in which they proposed, among other things, to extend European cooperation into the new field of culture. Significantly, cultural cooperation was not to be pursued for its own sake but 'in

196 For a description of this wider phenomenon, and of the role played in it by national and European public authorities, see De Witte, 'Cultural Linkages', in W. Wallace (ed.), *The Dynamics of European Integration* (1990) 192.

197 On the attempts at formulating 'identity policies' in the 1970s and 1980s, see De Witte, 'Building Europe's Image and Identity', in A. Rijksbaron, W.H. Roobol, M. Weisglas (eds), *Europe from a Cultural Perspective* (1987) 132.

order to affirm the awareness of a common cultural heritage as an element in the European identity'.[198] No immediate action was taken following the Declaration, but a few years later the *ad hoc* Committee on a People's Europe reported to the European Council that it was 'through action in the areas of culture and communication, which are essential to European identity and the Community's image in the minds of its people, that support for the advancement of Europe can and must be sought'.[199]

The idea of using cultural initiatives in order to promote the European integration process was largely obliterated in the following years, because a new impetus to integration came from other directions: the new resolve to complete the internal market which suddenly appeared in the mid-1980s, and shortly after, the effort to elaborate Economic and Monetary Union and European Political Union. The latter led to the inclusion in the Treaty of elements of the former 'identity policies' such as the concept of citizenship of the Union, and the formal inclusion of Community powers in the field of education and culture, but those moves were no longer presented as part of an effort to promote a European identity, but as consequences of the maturing of political integration.

In the period of doubt and feeble legitimacy setting in with the post-Maastricht crisis, questions about European identity and about the role of cultural values in buttressing the integration process surfaced again. In the first paragraph of the new Article 128 there is, for the first time in a binding text of Community law, a reference to the existence of a 'common cultural heritage'.

Yet, the idea that the Community should take steps to promote a European identity would seem difficult to reconcile with the renewed emphasis, in the same Maastricht Treaty, on subsidiarity and preservation of cultural diversity. Moreover, the use of political power for constituting new forms of collective identity would mark a return to traditional legitimation strategies of the nineteenth century Nation State which European integration was designed to leave behind.[200] It shows continued adherence to the idea that a political structure can emerge and prosper only if it is based on a strong sense of collective identification by its members.

In fact, even those who favour the emergence of a European identity do not claim any exclusivity for this identity, but merely see it as an addition to the multiple layers of collective identity of which every individual partakes.[201] In this perspective, identities may be concentric rather than

198 *Bulletin of the EC* (1983-6) at 24.
199 *Bulletin of the EC, Suppl.* 7/85, at 21.
200 Cf. *supra*, the Introduction to this course.
201 Smith, 'National identity and the idea of European unity', 68 *International Affairs* (1992) 55, at 58-60; E. Morin, *Penser l'Europe* (1990) at 231-232.

conflictual, and there is no incompatibility between national identity and European identity.[202]

At present, there is therefore a general agreement at the political and at the ideological level, that the political and cultural frames of references can be distinct and separate and that cultural diversity is compatible with widely varying visions of the constitutional future of Europe.

202 Some authors have argued, however, that European integration may contribute to the emergence of a 'post-national identity', limiting the exclusivity of national claims to allegiance but without replacing them with a new European mould. See J.M. Ferry, 'Pertinence du postnational', in J. Lenoble and N. Dewandre (eds), *L'Europe au soir du siècle. Identité et démocratie* (1992) 39.

European Social Policy and Labour Law – Challenges and Perspectives

by

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Biography

Silvana Sciarra is Professor of European Labour and Social Law at the European University Institute.

She has taught Labour Law and Comparative Labour Law at the University of Florence Law School and at the Faculty of Economics and Banking of the University of Siena. As a Harkness Fellow she visited the Law Schools at UCLA and Harvard in 1974-1976; as a Fullbright fellow she then returned to UCLA in 1985.

In 1989 she was Leverhulme Professor of European Industrial Relations at the University of Warwick.

She is chief editor of the *Giornale di Diritto del Lavoro e di Relazioni Industriali* and member of the editorial board of *Comparative Labor Law Journal.*

Since 1983 she has been one of the organizers of the 'Pontignano Seminars in Comparative Labour Law', held at the University of Siena, in collaboration with the Italian Association of Labour Law and with professors of Labour Law from other European countries.

Principal Publications

Democrazia politica e democrazia industriale (ed.), Bari (1978).

Il Pluralismo e il diritto del lavoro (ed.), Roma (1982).

Contratto collettivo e contrattazione in azienda, Milano (1985).

'A Labour Law Perspective on Group Enterprises in Italy: Network versus Hierarchies', in D. Sugarman and G. Teubner, *Regulating Corporate Groups in Europe,* Baden-Baden (1990).

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'Social Values and the Multiple Sources of European Law', *European Law Journal* (1995).

I. Introduction: Market Supremacy and Social Policies. Proceduralization of Labour Law

Labour lawyers approaching European social policies have often found themselves wondering about the object of their research and investigating its boundaries. Like strangers moving around in an unknown country, they often gaze at their new surroundings with an air of curiosity, as well as of mystification. They look avidly at what is developing and seem willing to overcome an inborn prejudice against a system of rules which might appear to threaten the States' sovereignty and to nullify traditions and labour practices. However, these fears and prejudices do not prevent them from acknowledging a new dimension to legal research.

A thorough history of labour law searching for its own identity within the Community still has to be written;[1] such an enterprise would have its own methodological value and might represent an important phase in the interpretation of current trends. The way to envisage such a history is through the explanation of divergences and differences; not a history of harmonization, in the words of Article 117 of the Rome Treaty,[2] but a search for common ground in which common values must be rooted, leaving national peculiarities untouched.

This respect for national identities can be found at the dawning of the common market and has not lost its validity. Underlining the importance of 'political history' and 'public opinion' in the building of labour law and social security, Kahn-Freund wrote:

> ... there is nothing to show that even a functioning common market would, within an appreciable future, produce uniformity where for centuries there has been diversity.[3]

Such a cautious prediction was made by a scholar whose contribution subsequently became a landmark in the understanding of contemporary labour law. Behind diversity Kahn-Freund saw what Dicey was unable to predict at the beginning of the century, when analysing the relationship between law and

1 A brilliant example of how to open this road is in Davies, 'The Emergence of European Labour Law', in W. McCarthy (ed.), *Legal Intervention in Industrial Relations: Gains and Losses* (1992). Based on a comparative history of labour law in some European countries is the work by B. Hepple (ed.), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (1986). See also Lord Wedderburn, *Employment Rights in Britain and Europe* (1991).

2 Art. 117 was at the origin of the 'equivocation' as to whether social policies would result from the functioning of the common market, or be the outcome of the Member States' special initiatives: Davies, *supra* note 1, at 323.

3 Kahn-Freund, 'Labour Law and Social Security', in E. Stein and T.L. Nicholson (eds), *American Enterprise in the European Common Market. A Legal Profile* (1960) Vol. I, 304.

public opinion in England: the strength of organized pressure groups – among them of trade unions –, their scepticism towards the advent of legislation and their ability to interact with groups representative of other organized interests.[4]

His analysis of legal pluralism and of the role played by social rules[5] has made a whole generation of labour lawyers in Europe more attentive to non-legal sources and to the changes they bring about in the organization of collective interests. 'Groups', 'conflict' and 'collective *laissez-faire*' became in Kahn-Freund's scholarship the key words for the understanding of labour law. Within the domain of informal rules, based on the permanent observation of countervailing powers, the role of legislation, even of the protective kind, is nothing but subsidiary;[6] State intervention is not propitious, whereas abstention of the law is necessary for the internal equilibrium of collective forces.

When transferred to a supranational level, the theories of collective *laissez-faire* and of inter-group conflict appear alien to the debate built around the common market. Individuals can move freely across frontiers, whereas organized groups do not have legal standing and indeed are absent from the powerful decision making institutions; industrial conflict is not comprehensible as a social nor as a legal sanction in the organization of the market, despite the enlightened wording of Articles 117 and 118.

This is why Kahn-Freund's analysis may be only of heuristic value when applied to recent developments in European social policies. Nevertheless it can serve the purpose of signalling which methodological inclinations prevail within the subject and how they are being adopted. His scholarly contribution together with the practice of comparative labour law which grew out of it, brought about several changes in legal thinking across Europe. Not only did

4 Kahn-Freund, 'Labour Law', in M. Ginsberg (ed.), *Law and Opinion in England in the 20th Century* (1959), now in *Selected Writings* (1978) 1ff. and especially at 8.

5 See especially Kahn-Freund, 'Intergroup Conflicts and their Settlement', *British Journal of Sociology* (1954), now in *Selected Writings*, *supra* note 4, at 41ff. The intellectual formation of this author and his impact on the British system is traced by Lord Wedderburn, R. Lewis and J. Clark, *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983). For a more recent – and often critical – analysis of Kahn-Freund's theories see P. Davies and M. Freedland, *Labour Legislation and Public Policy* (1993) 8ff. and 642ff.; McCarthy, 'The Rise and Fall of Collective Laissez-Faire', in W. McCarthy (ed.), *supra* note 1, at 1ff. For comments mainly related to the reflex of such theories in the Italian collective bargaining system, see Sciarra, 'Norme "sociali" e norme "legali" nella formalizzazione delle procedure contrattuali', in G.G. Balandi and S. Sciarra, *Il pluralismo e il diritto del lavoro. Studi su Otto Kahn-Freund* (1982).

6 Kahn-Freund uses this expression in 'Labour Law', *supra* note 3, at 28 and 31. He does not deny the important function of legislation; he rather emphasizes how by 'trial and error' labour law has provoked the strengthening of collective bargaining. Although this analysis mainly reflects the English case at the beginning of the sixties, it can be proposed as a way of looking at recent developments of European social policies, in order to establish whether this kind of subsidiarity should apply to the relationship between labour law sources in the Community. See further IV.B.

the discipline gain a place of its own in national legal systems; it also opened up a wider research field, which allowed labour lawyers to link their analysis to economic and sociological approaches.

When introducing the notion of 'dynamic' collective bargaining, Kahn-Freund underlines the importance of the 'machinery', as opposed to the 'static' single contract.[7] In most European legal systems the dominance of trade practices and the affirmation of the unions as quasi-public organizations has permitted the construction of increasingly articulate procedures, which impart dynamism to collective bargaining and, at the same time, serve the purpose of regulating complexity. Collective agreements, while maintaining the function of creating minimum standards, must also take into account the administration of the machinery, levels of bargaining, the articulation of bargaining agents, mechanisms of information and consultation and ways of adapting general rules to differentiated professional needs.

Travelling through the complexity of new trade practices and new kinds of work organization, all industrial relations actors, including States as regulators, have learnt how to proceduralize labour norms, mainly -but not only – through collective bargaining. This has meant going well beyond 'dynamic' systems of negotiations, which Kahn-Freund described as *praeter legem*, that is to say successful even outside of – or against – the law.

Procedures, especially when applied in complex situations, such as economic crisis and unemployment, can be enshrined in the law and develop from there into more detailed negotiated practices. Kahn-Freund's legacy remains in the language of new pluralist lawyers, whenever they take into consideration dynamic sources of law, reflecting social reality, rather than empty forms.[8] Yet, the proceduralized law shaping contemporary labour relations does not resemble previous patterns of behaviour among groups, nor does it reflect previous legislative choices of the States.

It will be argued in this paper that paradoxically, especially after the Maastricht Treaty, and following the completion of the internal market, the European Community has provided an optimal scenario to experiment with a new labour law. Its features are beginning to appear, despite the widespread awareness that social policies have been imperfect and discontinuous. New European labour law should preferably be based on procedures, rather than on static regulations; structured around the activity of independent agencies, which should be empowered to enforce the law and to favour its impact on decentralized communities; balanced on differentiated sources, including

7 Kahn-Freund, 'Intergroup', *supra* note 5, at 53. See also P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law*, (3rd ed., 1983) at 70ff.

8 Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', *Cardozo Law Review* (1992) 1443.

non-binding rules; respectful of national peculiarities and yet built around common principles.[9]

In this flow of procedures one could include the dynamics established by national courts and the European Court of Justice either by way of interpretation of European sources, or following the Article 177 path. Here we touch upon a very specialized field which, nevertheless, is becoming progressively intertwined with other spheres of social policy. In particular the Article 177 cases exemplify the willingness of national judges to be active irrespective of the choices made by legislatures and indeed bypassing that stage.[10] Both for organizations and individuals, litigation may become one of the strategies used in order to establish clear principles and to strengthen the ties with supranational sources; in such a perspective harmonization is an unlikely outcome, if one considers that judges are often the direct product of national legal cultures.

To exemplify all these aspirations and to interpret existing legislation, the semantics of labour law will be adopted in this paper, despite their inadequacy when confronted with the challenges and the perspectives of European social policies. This will be an attempt to confront a specialist legal jargon with the language of the institutions. The conclusion to be anticipated is that policy choices do not reflect, at this stage of European integration, a solid and univocal political commitment; nor is it possible to draw a clear line along ideological beliefs, in order to indicate the necessary measures to be adopted.[11]

The urgency of filling empty gaps and of providing ideas is widely acknowledged. Yet dilemmas such as arguing in favour of collective rights, or putting the emphasis on individual contracts of employment, asking for flexibility or for more rigid guarantees should not be the starting point. What is required is a coherent frame of reference, which can be efficiently combined with the rules of the market, without wasting a well established European tradition and a widespread practice of social rights. The contribution now requested of legal culture appears to be *the linking of social expectations to clear indissoluble principles of social justice.*

9 The difficulty of building a European welfare State is counterbalanced by the adoption of many 'quality-of-life issues which traditional social policies have neglected', thereby creating the space for 'social-regulatory policies and institutions'. This is the view expressed by Majone, 'The European Community between Social Policy and Social Regulation', *J. Common Mkt Stud.* (1993) 153ff, in particular at 168.

10 Weiler, 'Journey to an Unknown Destination: a Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *J. Common Mkt Stud.* (1993) 439.

11 The most significant arguments used by the 'corporatists' and the 'neo-liberals' are commented by Rhodes, 'The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe', *J. Common Mkt Stud.* (1992) 27ff.

In order to create this new environment, collective *laissez-faire* at the level of the Community does not represent a valid solution. Recent developments in social policies seem to confirm this indication, despite the fact that in the Maastricht Treaty a wider space has been reserved to the social partners and to collective bargaining as such.[12]

The novelty of today's political agenda is attributable to several factors: the contingent economic situation in most Member States necessitates common solutions; these solutions, however, cannot be contingent, nor can they be allowed to wipe out previous achievements as far as fundamental principles are concerned.

Whereas, at the origins of the Community, social issues were selected as mere functions of a well functioning common market,[13] in the current situation no such mechanical consequence should be inferred.

Issues of *public policy*[14] are set to emerge and must be regarded as independent from the organization of the market, although measured by criteria of compatibility with market mechanisms in specific economic constraint situations. They must reflect the complexity of existing legal regulations in the Community, as well as the need to democratize European institutions. Complementary methodologies must be applied, taking into account the relevance and the specificity of decentralized labour markets within the European market. This rule-making process must involve the coordination of different legal sources, the setting of a clear hierarchy of norms as well as the controlling role to be played by groups and organizations representative of collective interests.

Complexity dominates the contemporary scene and makes it different from the 'sixties; complexity also represents a variable to be taken into

12 See Section III.B.3.

13 Factors of 'distortion' mentioned in the Spaak Report were equal pay for men and women, the length of the normal working week and of paid vacations. Kahn-Freund, *supra* note 3, at 326) comments on this by saying: 'The Treaty has accordingly crystallized the general aspirations of the Community in the areas of labour law and social policy into more tangible policies in these three respects'. References are to Articles 119 and 120 and to Protocol No. II, relating to Certain Provisions of Concern to France. Similarly, the freedom of movement principle was thought of in view of the creation of a common labour market, although the Spaak Report also mentioned the need to 'destroy prejudices' (at 338).

14 In H. Collins, *Justice in Dismissals* (1992) (especially at 16, 36ff and in the conclusion, at 272) 'public policy issues' are analysed as divergent from the ones left to 'private agreements' in employment relationships. In relation to the power structure and the governance of the workplace, such an analysis aims to identify the legal standards to be adopted, in the field of dismissals law. The same concepts can be – applied to a wider framework, such as that of European labour law, in which the notion of public policy must be referred to the *auspicious juridification to take place and to the priorities to be set in legislation as well as to the constitutionalization of existing principles*. As far as collective rights are concerned, see further Section III.B.1. By the same author see also 'Against Abstentionism in Labour Law', in J. Eekelaar, J. Bell (eds), *Oxford Essays in Jurisprudence* (1987) 79.

account for the democratization of all procedures,[15] including collective bargaining. The peculiarity of the latter is that it will fulfil different functions from those we are familiar with in national systems. It is difficult to envisage a normative function of European collective agreements; the very fact that minimum wages are outside the Treaty legal basis[16] and result in a lasting challenge to harmonization, is sufficient to break the traditional link between individual contracts of employment and collective sources of rights. The European market, capable since the early days of the Community of dominating and controlling social policies, continues to be free of common economic standards, such as those related to the cost of labour. This is yet another breakthrough for the new pluralist theories and for the emerging patterns of labour law. Collective organizations must invent new ways to be protagonists and to avoid the acquisition of 'a share in the exercise of bureaucratic domination',[17] which would be a deterioration of collective power.

Furthermore, collective organizations must confront and take into account the 'opportunistic Europeanism' pursued by single issue interest groups, which – especially in the UK – use the Community institutions to strengthen their domestic role.[18] This too is an example of how procedures can attract labour law into a new web of rules and interests, slowly transforming its identity: the protection of individual employees and the granting of rights to them becomes the outcome of complex activities promoted by complex organizations.

The emphasis on economic integration continues to be strong; the impulse coming from proceduralized labour law, however, also goes in the direction of new political balances and new institutional equilibria. Rather than being subdued by the market, social policies demand a new market regulation.[19]

II. Early Stages of Social Policies

A. The Social Action Program of the Seventies

The intellectual scenario available for the European reformers of social policies of the early seventies was very rich and articulate.

15 Lenoble and Berten, 'L'espace public comme procédure', in A. Cottereau and P. Ladrière (eds), *Pouvoir et légitimité* (1992) 83 and 88 in particular.

16 See further III.B.1.

17 H. Collins, *supra* note 14, at 93.

18 P. Teague, *The European Community: The Social Dimension* (1989) 105, referring mainly to the Equal Opportunities Commission in the UK and to strategic litigation which provoked ECJ's decisions having an impact on national legislation.

19 Scharpf, 'Un ordine costituzionale bipolare', 1 *Europa Europe* (1994) 77ff.; Schmitter, 'L'Unione politica e il capitalismo europeo: Quale impatto sul governo degli interessi economici e sociali', 1 *Europa Europe* (1994) 95ff.

During the fifties, the High Authority of the European Coal and Steel Community (ECSC) favoured and supported research on relevant aspects of labour law in the then six countries of the Community. The inspiration came from Article 3(e) of the 1951 Treaty, establishing the promotion of 'improved working conditions and an improved standard of living' and Article 46(5) which gave the High Authority, in consultation with governments, the power to obtain 'information' in order 'to assess the possibilities' for such improvements.

The publications, issued over the years as part of a series,[20] represent an invaluable source of documentation and a rich resource for tracing the history of labour law. They can also be read as early samples of comparative research aimed at the creation of a supranational legal culture. Although no power to intervene in the social field was granted to the ECSC institutions, the understanding of different labour law systems was considered part of the obligation to circulate information and to favour the harmonization of living and working conditions. This unusual combination of light social policies with regulations aimed at the creation of an internal market for coal and steel resulted in a 'less dogmatic liberalism' than the one underlying the EEC Treaty.[21] Pragmatism inspired the measures addressed to the enterprises undergoing restructuring, combined with genuine concern for the employees' welfare.

The social provisions of the Rome Treaty were less attentive in this respect. The free circulation of workers was thought of in relation to a redistribution of occupations within the Community, in an optimal context of full employment, that is to say, when offers of employment 'are actually made' (Article 48(3)(a)). No wonder then that this provision was placed next to the norms regulating the free movement of goods, services and capital. 'This arrangement tended to emphasize the market-creating rather than the social protection aspect of the provisions relating to the free movement of labour'.[22]

20 In the 'Collezione di diritto del lavoro' – quoted in the available Italian version – it is worth mentioning: G. Boldt, P. Durand, P. Horion, A. Kayser, L. Mengoni, A.N. Molenaar, *Le fonti del diritto del lavoro* (1957), published again in 1962. In 1959, an association was formed by publishers specialized in legal matters, which provided the contemporary publication in four languages, with the specific aim to help in pursuing European economic integration. See also, *I rapporti tra datori e lavoratori sul piano aziendale. Forme e funzioni* (1967), including reports from six countries and the concluding report by Kahn-Freund.

21 A. and G. Lyon-Caen, *Droit social international et européen* (8th ed., 1993) 160. See also G. Dehove, *Les aspects sociaux de la CECA et de la CEE* (1964).

22 Davies, 'The Emergence', *supra* note 1, at 320. Even after 1968, that is after all Member States had removed legal obstacles to free movement, the figures of European workers circulating in the Community have been very low. See P. Teague, *supra* note 18, at 16-17; more generally Marsden, 'European Integration and the Integration of European Labour Markets', in IIRA, *Economic and Political Changes in Europe* (1993) 53.

Similarly, we can retrace the history of the European Social Fund. Article 123 originally aimed at promoting labour mobility through supporting 'adaptation to industrial changes and to changes in production systems', mainly through recourse to vocational training and retraining. The many subsequent reforms undergone by the Fund testify to the fact that the original idea of the founders had to meet different goals in different economic situations. Not only was there a progressive decrease in employment, which worsened considerably over the years; the figures also showed that the numbers of unemployed were higher among young people and that some regions were more disadvantaged than others.

In the 'eighties the Social Fund become something different from the original instrument aiming to support workers' mobility; it was thought of rather as a tool to favour job creation, criticized by some observers for its inefficiency, due also to the bureaucratic trap in which it was entangled.[23] The SEA aimed at rewriting the whole map of rules, within the frame of social and economic cohesion; the Social Fund, one inlay in the 'mosaic' of other European funds,[24] was mainly addressed to long-term unemployed and to young people in need of training for entering the labour market.

Looking at the most recent and authoritative Community documents, all of these problems still appear unsolved. One of the recurring complaints expressed by most Member States, when answering the questionnaire sent by the Commission for the preparation of the White Paper on social policies,[25] concerned the existence of the numerous – but often too labyrinthine and therefore inaccessible – Community sources in this field. Similarly, the translation into concrete options of the Delors' White Paper[26] seems to imply that better coordination still has to be achieved between centre and periphery, as well as among the various available instruments.

Nevertheless, the link between the early and contemporary stages of social policies cannot be established only from a perspective of discontent and hindsight. A more useful exercise is the drawing of lines along which ideas and programs have slowly developed, incorporating different legal cultures and attempting original solutions.

This is why the 'Social Action Program' of 1974[27] must be framed within the intellectual climate and the legal achievements previously described, taking also into account all inherent difficulties. Activism in legislation was

23 P. Teague, *supra* note 18, at 44. In general N. Catala, R. Bonnet, *Droit social européen* (1991) 233; M. Shanks, *European Social Policy, Today and Tomorrow* (1977) 19ff.

24 A. and G. Lyon-Caen, *supra* note 21, at 270. See the Council Regulations 2052/1988 and 4255/88 (OJ 1988 L 185/9; 1988 L 374/21).?

25 European Commission, 'European Social Policy. A Way Forward for the Union', COM (94) 333 of 27 July 1994, at 23.

26 'Growth, Competitiveness and Employment', *Bull.EC Suppl.* 6/93.

27 *Bull.EC Suppl.* 2/74. The political orientations within the Community in the early seventies are described by Shanks, *supra* note 23, at 3ff.

accompanied by the creation of institutions,[28] with the aim of developing research and of improving the knowledge of the different legal and social systems. This accounts for the proceduralized nature of the programs to be pursued: ideas were diffused through institutions without normative powers, institutions which were capable nevertheless of designing maps of possible actions and of drawing comparisons with existing practices.

No-one, not even scholars or those producing legal research under the auspices of the European institutions, expected these programs to create uniformity. Article 117, combined with Article 100, offered a legal basis for interventions aimed essentially at supporting enterprises undergoing changes and restructuring; as a mere consequence of this priority, the employees were granted an indirect form of protection, that is of being informed and consulted through their representatives on collective dismissals and transfers of undertakings.[29] As for the enterprise's insolvency, measures were directly addressed to the employees and had stronger implications for social guarantees.[30]

There are no precise edges to delimit around this as yet undefined and incomplete set of norms. It is inaccurate to describe it as the origin of European labour law, mainly because its scope is different. When one raises one's eyes from national practices and traditions and compares them with this frail supranational system, it is clear that the program and the priorities set by the founding fathers were perfectly consistent with the establishment of fair competition rules and therefore not attentive to social objectives.

This was the official rationale behind Article 119.[31] In the light of subsequent developments, however, this norm can be regarded as an exception: not a tribute to the prevailing values of the market, but an innovative breakthrough, aimed at the establishment of fundamental principles of the individual.

Article 119 poses a direct obligation on Member States to ensure that equal pay for equal work is guaranteed for men and women. The directives

28 Cedefop – European Centre for the Development of Vocational Training – was founded in 1975, as well as the Dublin Foundation for the Improvement of Living and Working Conditions.

29 Council Directives 75/129/EEC, OJ L 48/29 and 77/187/EEC, OJ L 61/26.

30 Council Directive 80/987/EEC, OJ L 283/23. A. and G. Lyon-Caen, *supra* note 21, at 303ff. describe these sources as 'structural directives'. Subsequent developments have often been through ECJ case-law. See the Commission's Proposal for a Council Directive on the Approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of businesses (COM (94) 300 final – 94/0203 (CNS), OJ 1994 C 274/10). The amendments to the directive on collective dismissals (Council Directive 92/56, OJ L 245/3) link the old text with new social needs, such as expanding the notion of redundancies, giving a stronger role for consultation towards the adoption of alternative measures. A current challenge consists in coordinating previous provisions with the Directive 94/45 on European works councils. See further III.C.

31 Dehove, *supra* note 21, at 66.

on equal treatment[32] and the ECJ's jurisprudence – from the early days[33] – have developed incrementally a body of norms which enshrines in EC legislation a wide principle of non-discrimination on the ground of sex.

When referred to Article 119, the principle of direct effect meant the opening up of new space for democratic control over the institutions. The Community underwent deep changes after 1957, being 'infected with the democratic traditions of the Member States'.[34] The granting of individual rights by national courts acquired an even wider significance in this particular field: it provoked the visibility of equal treatment and non-discrimination even in the most reluctant legal systems; it gave an impulse to the enforcement of effective sanctions; it fertilized the ground of social policies, indicating new perspectives and leaving behind insoluble dilemmas.

The most recent confirmation of the extraordinary evolution of this subject matter is a Commission Recommendation on sexual harassment at work,[35] which enlarges the scope of the equal treatment legislation, by indicating that the risk of being exposed to sexual harassment is in itself discriminatory. A code of practice following the Recommendation indicates concrete standards to which employers must conform and attests to the opinion that soft law can successfully play the role of providing pragmatic and yet essential yardsticks for the enforcement and the specification of fundamental principles. In this sphere of regulation a non-binding measure does not constitute a step backward in the constituzionalization of the equality principle; rather it creates the conditions to enrich the essential legal value underlying that principle and, like a snowball, multiplies its effects, sowing new concepts of equality.[36]

B. The Advent of the Single European Market. The Social Dimension

Towards the end of the eighties the debate on 'social Europe' became more urgent, despite the fact that the 1985 Commission White Paper on the internal market[37] paid little if no attention to it. In the same year Jacques Delors started what was to result in a long and passionate presidency of the Com-

32 Catala and Bonnet, *supra* note 23, at 141ff.; R. Nielsen, E. Szyszczak, *The Social Dimension of the European Community* (2nd ed., 1993) at 153ff., with special emphasis on the role of soft law and particularly on the Community Action Programs on Equal opportunities.

33 Case 80/70, *Defrenne v. Belgian State I*, [1971] ECR 445.

34 Mancini and Keeling, 'Democracy and the European Court of Justice', *MLR* (1994) 177.

35 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work (92/131 EEC, OJ L 49/1 of 24 February 1992).

36 As a development of the before mentioned Recommendation, see the French law on sexual harassment at work of 2 November 1992, JO 4 Novembre 1992.

37 COM, Completion of the internal market. Commission White Paper to the Council, Luxembourg 1985.

mission. Opening up l' *espace social* was not an easy task, as it was attempted at the end of a very controversial decade, which had witnessed historical changes in Central and Eastern Europe, as well as political and economic uncertainties. The achievements of social policies must be judged taking into account all of these variables. This is to say that the severe criticism addressed towards the Community institutions for its failure to believe in the support of collective and individual rights, could – at least partially – be tempered.

From the point of view of labour law, the adventure was, nevertheless, disappointing. Among other innovations, the SEA introduced Article 118a, according to which the qualified majority vote in the Council could be adopted for directives related to the improvement of the 'working environment, as regards the health and safety of workers'. Because of this norm, labour lawyers were forced into interpretative acrobatics. The obstinate adversity of the UK to social measures and the consequent deadlock in the adoption of legislation, made the advantages of the majority vote appear mirage-like. Article 118a was, in fact, an optical illusion; labour law was constrained within unnatural boundaries, marked by Article 100a(2), mentioning among the exceptions to the qualified majority rule as in Article 189b 'the rights and interests of employed persons'.

This critical evaluation must be maintained even if one takes into account the increased number of directives and their importance.[38] Although the protection of health and safety must be regarded as a fundamental principle and ranked very high in the hierarchy of legal sources, it may not generate principles of an equal value. European legislation adopted on the 118a legal basis, valuable in itself as an expansion of protective measures in various specialized areas of labour law, has left untouched other innovative and related fields in observance of the limits established in the Treaty.[39]

The other important innovation of the SEA in the social field – Article 118b – is the object of controversial interpretations. The notion of social dialogue is in itself very vague: it implies a loose relationship between the par-

38 References to what is defined a 'minimal labour law' are in Sciarra, 'Social Values and the Multiple Sources of European Law', *ELJ* (1995) 67. In particular, the framework directive on health and safety (89/391/EEC, OJ 1989 L 183/1) must be recalled for its being at the origin of other legislation, strictly linked to its legal basis. See in general Lo Faro, 'EC Social Policy and 1993: the Dark Side of European Integration', *Comparative Labor Law Journal* (1992) 1ff.

39 Meaningful examples – among others – are the directives on pregnant and breastfeeding workers (92/85/EEC, OJ L 348/1) and on working time (93/104/EC, OJ L 307/18). In the first case the consequence has been to leave out the regulation of parental leaves and to disregard the protection of the child; in the second case, flexibility measures linked to working time reduction remain outside the scope of the directive. The most frustrating example is that the complex provisions on so called atypical workers, resulted, finally, in the directive for the protection of the health and safety of fixed term or temporary workers (91/383/EEC, OJ L 206/19).

ties, without envisaging any duty to bargain; the Commission is not an intruder, but simply favours the dialogue, without imposing it on management and labour. Due to the lack of a coherent system of collective labour relations, this trilateral relationship has only meant the creation of customary rules. Such are the 'joint opinions' of the social partners, implying a common point of view on certain matters.[40] These documents do not possess a properly legal value, although their political value could be relevant; it could be argued that they constitute the basis for future developments of proper bargaining activities, which should acquire new strength from the Maastricht Agreement on Social Policy.

In evaluating the overall impact of Article 118b, a critical optimism is unnecessary; it is hard to imagine that fundamental social rights will be acquired through this fragile mechanism.[41] In a 1989 opinion, requested by the government on the occasion of the French presidency of the Community, the French *Conseil d'Etat* expressed many reservations in its evaluation of the legal relevance of social dialogue and consequently in building up the notion of European collective agreements.[42] The *Conseil's* position was clarified in more general terms in its assessment of the impact of Community sources on national legal systems:[43] especially with regard to *actes innommmés* and to non binding sources, the implication was that they would bring about confusion in setting the hierarchy of norms, without offering immediate advantages to individuals.

This rather formalistic approach cannot be applied as such to the dynamics of collective labour law. Nevertheless, it remains a matter of political – rather than legal – interest to analyze the visible consequences of social dialogue. Examples of this are the Commission's choice to open up a chapter of its budget to finance transnational meetings for the pursuit of social dialogue,[44] and the initiative of some large European group enterprises to start consultation and information procedures.[45]

The output of Article 118b must not be interpreted as an expression of soft law, nor as an early form of proceduralized collective labour law; the parenthesis opened by Article 118b is nothing but a small and limited step in

40 Weiss, 'Social Dialogue and Collective Bargaining in the Framework of Social Europe', in G. Spyropoulos and G. Fragniere (eds), *Work and Social Policies in the New Europe* (1991) 59ff.; 'Social Europe 1988', special issue on The Social Dimension of the Internal Market; 'Cohésion sociale et dialogue social européen', 12-13 *Les Cahiers de la Fondation Europe et Societé* (1989).

41 As in the view of Bercusson, 'The European Community's Charter of Fundamental Rights for Workers', *MLR* (1990) 641.

42 On the point see Catala and Bonnet, *supra* note 23, at 228.

43 Conseil d'Etat, 'Rapport Public 1992, Sur le droit communautaire, Etudes et documents', n. 44 (1993) 15ff. especially at 22-25

44 Information on this point is in EIRR 231/1993.

45 M. Gold and M. Hall, *Report on European Level Information and Consultation in Multinational Companies. An Evaluation of Practice* (1992).

the slow formation of a system of rules. In the light of more significant recent developments, that parenthesis can be considered closed, whereas the process of the social dialogue, founded on the weak premises of the Treaty and revitalized by Delors' coherent dedication, is still open and likely to grow on more meaningful grounds.

Where Article 118b left empty the space of legal rules, the Maastricht Social Chapter opened up a new dimension for management and labour. While it may appear merely as a virtual dimension, as we shall see further on, it provides the social partners with specific powers and the Commission with specific obligations.

C. The 1989 Charter of Fundamental Social Rights

The stages of social policies described so far exhibit the peculiarities of a weak regulatory system and, at the same time, the development of diversified sources, all playing a different role in the context of the Community legal order. Because of the choices made in the Rome Treaty – as has been argued above – coherent policies followed, with a view to establishing fair rules in a competitive market. Consequently, the 'constitutionalization'[46] of social rights had a very limited visibility; in the case of Article 119, the importance and breadth of subsequent developments was quite unexpected. Even 'in the shade of a vote'[47] social policies did not gain sufficient strength to permit the abandonment of an indistinct area of regulation and the conquest of a new field of their own remaining an anomalous area in the brave new world of the SEA with qualified majority voting having only limited purchase in areas of social policy.

This anomaly lies behind the slow motion of Community social legislation: its weakness is due to an originary and persistent lack of constitutional grounds and to the reduced effects provoked by more efficient and democratic decision-making mechanisms.

The choice made in 1989 by eleven Member States signing the Charter of Fundamental Rights at the Strasbourg summit[48] was intended to open a new phase and to overcome previous anomalies. Whereas the non-inclusion of the UK among the signatories might indicate the victory of the majority vote

46 This terminology is adopted by Weiler, 'The Transformation of Europe', *The Yale Law Journal* (1991) 2413.

47 *Id.*, at 2462.

48 In general see: Lord Wedderburn, 'The Social Charter, European Company and Employment Rights', *The Inst. of Empl. Rights* (1990); Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers', *MLR* (1990) 624ff.; Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights', *MLR* (1990) 643; Sciarra, 'La libertà sindacale nell'Europa sociale', *Giornale di Diritto del Lavoro e di Relazioni Industriali* (1990) 653ff; Watson, 'The Community Social Charter', *CML Rev.* (1991) 37ff.

over the power to veto, the non-binding nature of the Charter diminishes its symbolic relevance. But history may prove that the extraordinary aspect of the Charter was the fact that a mere 'declaration' could provoke an extreme ideological contraposition, namely Mrs Thatcher's fierce opposition to the then French presidency of the Council.

History may also prove that, notwithstanding the feeble efficacy of the Charter, it generated a wide variety of legislation;[49] in this respect its programmatic value proves stronger that the one recognized to the relevant articles in the Rome Treaty. Furthermore, the Commission's Action Program,[50] running parallel to the Charter, establishes a continuity of social policies: as they were before Maastricht, so they should proceed afterwards. Because of this institutional commitment, the 'spirit' of a non binding document has permeated the social policies of the nineties.

III. The 'Social Chapter' in the Maastricht Treaty

A. Essential Elements

The Maastricht Treaty includes the so-called Social Chapter, that is to say, Protocol No. 14 signed by 12 Member States, followed by the Agreement on Social Policy signed by 11, with the exclusion of the UK. The Protocol provides for the derogation from Article 148.2 of the Treaty, thus opening the door to a different decision making mechanism. This is the institutional result of an unresolvable political deadlock: right up to the last minute of negotiation, the chances of including social matters in the Treaty seemed very slim and the advocates of social innovation must have seen the compromise agreed to on the eve of the summit's final meeting as a last-ditch solution.

One exceptional event is central to explaining the pressures on the negotiators. On 31 October an agreement was signed by ETUC and the employers' associations dealing with the reforms of Article 118A and 118B, which was then included in the text of the Maastricht Agreement in almost identical terms. This is a well known labour law technique in various European countries; it allows legislation to be negotiated and therefore brings into the law the experience and the consensus of the social partners who were acting as negotiators. It must be recalled that this result is so far unique at the European level; it is also important to stress that it will be remembered as an

49 Rhodes, *supra* note 11, at 36 thinks that it was 'politically inconceivable' to promote the accession of the EC institutions to international labour conventions and the Council of Europe's sources, as it was suggested by some labour lawyers as a reaction to the Charter's fragility. See the different proposals put forward by a group of German lawyers: W. Daubler, *Market and Social Justice in the EC – the Other Side of the Internal Market* (1991), where the draft of a European Fundamental Rights Act is presented.

50 COM (89) 568 final.

extraordinary period of cohesiveness among the social partners and within each organization, despite some very critical positions taken by members of UNICE.[51] The faith expressed by the employers in renovating the Treaty on such issues must be contrasted with their attitude towards the final text of the Agreement and also with the criticism presented afterwards on legislative proposals.

With regard to the Social Chapter, the discussion which promptly ensued among specialists centred on the legal nature of the Protocol, in order to ascertain whether it was part of Community law. In the preamble it is specified that its provisions do not prejudice the provisions of the Treaty; Article 1 refers to 'institutions, procedures and mechanisms of the Treaty'; Articles 3 and 4 of the Agreement refer to 'Community action' and 'Community level'. It is even more relevant to stress that – as for Article 3 – the Protocol is annexed to the Treaty and therefore Article 239 can be singled out as the reference point from which the Community relevance of the sources in question can be derived.[52] The multiple links established between the Rome and the Maastricht Treaties create an original set up for social matters, which are forced to take parallel roads. The legal basis provided for in the Rome Treaty remains available for legislative initiatives which will involve all 12 Member States. It is the Commission's political choice to decide which road to take and which consensus to reach: although the road offered by the Rome Treaty may appear preferable for the inclusion of the UK, it may also become an alibi for not exploiting sufficiently the wider opportunities offered by the road leading from Maastricht.

Considerable light has been shed on the Social Chapter by a Commission Communication,[53] in which tentative solutions are put forward to answer most interpretative doubts and which offers policy indications. This document is followed by three annexes providing an overall investigation of the social partners in Member States, of the affiliations to the European federations and of the criteria to measure employers' and trade unions' representativeness.

51 See for instance the unusual reaction expressed in a leading newspaper by the Italian Confindustria, referring to the Social Chapter as to 'a monster with two heads' (Gli imprenditori contrari alla politica sociale CEE, *Il Sole 24 Ore*, 8 January 1992)

52 The majority of commentators have argued in favour of the Social Chapter as Community Law. See, among others, Sciarra, 'Il dialogo fra ordinamento comuniyario e nazionale del lavoro: la contrattazione collettive', *Giornale di Diritto del Lavoro e di Relazioni Industriali* (1992) 717ff; Watson, 'Social Policy after Maastricht', *CML Rev.* (1993) 489; Bercusson, 'The Dynamic of European Labour Law after Maastricht', *Industrial Law Journal* (1994) 1; Curtin, 'The Constitutional Structure of the Union: a Europe of Bits and Pieces, *CML Rev.* (1993) 17; Weiss, 'The Significance of Maastricht for European Community Social Policy', *International Journal of Comparative Labour Law and Industrial Relations* (1992) 3; Whiteford, 'Social Policy after Maaastricht', *EL Rev.* (1993) 202.

53 Commission of the EC, Communication concerning the application of the agreement on social policy, presented to the Council and to the European Parliament, COM (93) 600 final, 14 December 1993.

The complex structure resulting from the parallel availability of two different sets of norms – the Rome Treaty and the Maastricht Protocol – is further enriched by the comprehensive map of supranational industrial relations included in the Communication. Apart from the importance of empirical evidence, it is clear that soft law is acquiring an increasingly important role in this sphere. Through the Commission's eyes we are compelled to look at possible future scenarios of European labour law. We are also propelled into a comparative frame of reference, as a consequence of the new collective sources dealt with in the Agreement on social policy. We shall analyze the contents of the Communication further on, intertwining them with the reading of the Agreement; meanwhile, even the sceptical interpreter of non-binding measures in EC law must be aware of the importance that a 'proactive'[54] measure – such as the one in question – may acquire. Soft law pushes all actors towards a more visible definition of their roles: the European Parliament, as evidenced by its social policy agenda for the 1996 intergovernmental conference,[55] has raised its voice, demanding its inclusion in the new legislative process and an institutional capacity to be an active proponent of reforms in the social field.

While looking at the most innovative contents of the Social Chapter, we must be aware of the fact that only very limited use has so far been made of this source. The only directive adopted on its legal basis is, nevertheless, of extreme relevance and could prove crucial for the development of future social policies.[56]

B. The Main Innovations in the Agreement on Social Policy

1. Subjects Excluded from Community Competence. How to Comply with Fundamental Labour Law Principles

The analysis of the Agreement on social policy must begin by setting out the subject matters which have been explicitly excluded from the scope of Community measures – pay, the right of association, the right to strike and

54 This is the expression used by Snyder, when dealing with Communications and with the Commission's power to present its own interpretation, thus bypassing the Council: Soft Law and Institutional Practice in the European Community, in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (1994) 5.

55 European Parliament, Resolution on the new social dimension of the Treaty on European Union, A3-0091/94, OJ C 77/30, 14 March 1994. See also the annexed joint declaration of the institutions involved in the implementation of Article 3 of the Agreement, indicating a further step in the formalization of the relevant procedures. Parliament's reaction in this case is a sign of non-submission to a unilateral use of soft law, but rather of a dialectical interpretation of the same.

56 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Comunity-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64, 30 September 1994, which will be discussed further on in II.C.

impose lock-outs – as for Article 2(6). This implies an evaluation of the priorities set at Maastricht and of future social policies, in the perspective of a coherent frame of reference of constitutional relevance, which still appears to be missing.

As for pay, the exclusion should be referred to minimum wage regulation. If one looks at Article 6 of the same Agreement, one finds equal pay for equal work for male and female employees is subjected to detailed regulation. This norm is of some importance, although the wide definition of pay and of discriminatory criteria affecting pay on the basis of sex is almost completely covered by Article 119.

The reason for this reiteration – apart from providing the eleven countries bound by the Agreement with a specific legal basis, distinguished from the Treaty basis – can be found in point 3 of the same article, to be read as the origin for possible – and auspicious – positive action plans. In such a context, 'specific advantages' for women should be read in the widest possible way, using the reference to 'vocational activity' as the most relevant indication of measures to be adopted, in order to encourage and improve women's occupations.

The cost of positive action is not as such included in the notion of equal pay, but set independently, with the purpose of making all work opportunities equal for employees of both sexes. Equality transpires from this norm as an even clearer fundamental principle in Community labour law.[57]

It remains to be seen whether some aspects of pay determination should become the object of coordination and be covered by collective bargaining, rather than Community legislation.[58] The economic situation and the unemployment figures push governments towards centralized 'social pacts', the relevance of which is acknowledged indirectly in other Community sources.[59] Rather than favouring the creation of common standards at the widest possible levels of negotiations, new criteria in work organization could be agreed upon in homogeneous sectors of economic activity, as a precondition for similar criteria in wage setting. The field most open to innova-

57 Although not referring to this particular norm, Hepple sees the principle of sex equality as an affirmed fundamental one in the Community, especially through the case-law of the ECJ. No such treatment is reserved to racial equality in any of the EC sources. See B. Hepple, *European Social Dialogue- Alibi or Opportunity?*, The Institute of Employment Rights (1993) 33.

58 Rhodes, *supra* note 11, at 45 argues that 'the constraints of EMU and the importance attached by national policy-makers to wage flexibility could also stimulate new forms of national and transnational pay co-ordination'. As for soft law, a Commission Opinion has been adopted (OJ C 248 of 11 September 1993) on equitable wage, based on Article 118 of the Treaty.

59 Article 103(2) of the Maastricht Treaty, which is part of Title VI on economic and monetary policies, enables the Council to issue Recommendations on broad guidelines for the Member States' economic policies, including issues of wage moderation and anti-inflationary measures. Comments in Sciarra, *supra* note 38, at 64

tion seems to be that of working time and of consequent changes in work organization due to restructuring of the enterprises.

The right of association is the second subject left out of the Agreement's provisions; the right to strike and to impose lock-outs is the third. Here we face a question of extreme relevance on symbolic as well as on legal grounds, 'a contradiction at the heart of the Community',[60] particularly when the other side of collective labour law, that is to say the right to collective bargaining, is examined.

The complex procedures put forward in the Agreement assign a protagonists' role to management and labour, despite the missing pre-condition consisting in the right to associate. As for the right to strike and lock-out, reference must be made to legal values enshrined in most legal systems of the Member States and guaranteed in national Constitutions. The Court of Justice has shown on several occasions a willingness to appreciate these legal values and to adopt them as guiding principles in its legal reasoning.

The interpretation of national constitutional norms must run parallel to that of Article 117 and moreover of Article 118 of the Rome Treaty. Among the matters for which 'close co-operation' in the social field is required we discover that 'the right of association and collective bargaining between employers and workers' is expressly mentioned, albeit in the shade of other dominant objectives of the Community.

Through the social dialogue, born with the SEA, and the 1989 Charter of social rights, further tools have been provided for the construction of stronger relations between management and labour. This is not a satisfactory conclusion, in terms of a coherent legal basis for European collective labour law; as these tools are nothing but starting points, to be developed in more advanced reforms. While continuing to tell the story and to discover new happy endings to it, it is assumed that, after the 1989 Charter, the conditions have been laid down for the social partners to act on a more solid legal basis, presuming the right of association to be a pre-existing right and building on it for the creation of further guarantees.

The 'anomaly' of Community labour law has already been discussed; collective rights need to be looked at with a fresh and non-conformist point of view, strong enough to counterbalance the potentially negative effects of the subsidiarity principle. Constitutional social rights should therefore be included in the Treaty and be dealt with in a very broad sense. This step forward in the constitutionalization of labour law should result in a coherent combination with 'auxiliary' legislation already in force in some Member

60 Lord Wedderburn, *Employment Rights in Britain and Europe* (1991) 332ff. and 'Labour Standards, Global Markets and Labour Laws in Europe', in W. Sengenberger and D. Campbell (eds), *International Labour Standards and Economic Interdependence* (1994) 252ff.

States, capable of enforcing the right of association at the place of work and providing positive rights for employees and for union organizations.

One other example of principles that should become part of the Treaty can be traced to national legislation regulating the right to strike in the context of essential services or banning it in limited cases. Such laws, in line with the international standards provided for in ILO Conventions and in the Council of Europe's Social Charter represent a way of balancing the right to strike with other essential rights of the individual.

Subsidiarity cannot apply in the setting of common fundamental principles at the European level; even in Community law the right to join an association and to take part in conflict should be regarded as free choices of the employees, from which no negative consequences should flow in the contract of employment.[61] It is possible to argue that such rights, part of the patrimony of collective labour law, also serve the purpose of protecting the employees' dignity at the place of work and of setting them free from their position as the weaker parties in employment contracts.

Equal treatment, when applied to contracts of employment, must be regarded as the establishment of equal opportunities in the expression of opinions, within the limits of the respective obligations. Free choice and free speech are the fundamental liberties to be borne in mind when delimiting the obligations of employees. Such liberties do not infringe upon the duty to carry out work according to management's indications, nor do they modify the status of subordinate employees. Leaving aside ideological implications, regarding the choice to join one particular union or to support one particular strike, the collective nature of such rights simply reflects a shared position of subordination, meaning common obligations, common work environment and common risks, even when skills and job descriptions are different.

Following this line, albeit in the field of individual rights, the ILO Convention on part-time workers[62] aims at equalizing working conditions and protective measures, such as maternity, protection of employment, paid annual leave and holidays and sick leave. In so doing it leaves behind the notion of 'atypical' workers and indicates a common ground for the construction of essential rights.

In this perspective, collective rights should not be regarded as irrelevant in the sphere of individual contracts of employment. In the new constitutional

61 Lord Wedderburn refers comparatively – especially with regard to France and Italy – to the notion of 'suspension' of the mutual obligations in the contract of employment, as a necessary enforcement of the right to strike (*supra* note 60, at 329). It remains to be seen whether the choice between law and collective bargaining, which the Action Program, following the 1989 Charter left to national systems, should instead be decided at Community level, as for the setting of general standards (at 332) and for the establishment of dispute resolution machinery.

62 ILO, Convention concerning part-time work, 1994 (No. 175), adopted by the ILO Conference 81st session 1994.

dimension that individual rights should acquire, this implies the granting to the employee of specific protection against the employer's discretionary exercise of power. The implication, following the constitutional tradition in most Member States and the assumptions in relevant international sources, is that collective rights – such as the right to organize and to take part in industrial conflict – are fundamental human rights,[63] enforced through collective organizations or through collective means.

In relation to the position of the individual employee at the place of work, they serve the purpose of counterbalancing management prerogatives and the 'bureaucratic power'[64] created by these prerogatives.

2. New Contents of Social Policies

Article 2(1) accounts for the previous limitations deriving from Article 118A; it deals in wider terms with matters to be decided by qualified majority vote, among which it is worth mentioning information for and the consultation of workers. Equality between men and women is recalled with special emphasis on labour market opportunities and treatment at work. This would allow legislation well beyond the equality issues, which originated with the interpretation of Article 119 of the Rome Treaty and of the subsequent equality directives.

As for matters to be decided by a unanimous vote (Article 2(3)), we encounter an issue representing a challenge for the construction of European collective labour law. Despite the specific exclusion from Community competences of the right of association (Article 2(6)), mention is made in Article 2(3) of 'representation and collective defence of the interests of workers and employers, including co-determination'. A textual analysis of this unusual language could bring about innovative interpretations: the combination of the words 'collective' and 'defence' may become explosive, if one thinks, to take just one example, of dispute resolutions and of joint committees for the interpretation and the administration of collective agreements at the place of

63 The inclusion of collective rights among human rights characterizes one of the approaches to labour law. See Verdier, 'En guise de manifeste: le droit du travail, terre d'élection pour les droits de l'homme', in *Ecrits en l'honneur du prof. J. Savatier* (1992) 427 and recently Wheeler, 'Employee Rights as Human Rights, *Bulletin of Comparative Labour Relations* (1994) 9. The most interesting approach is based on the analysis of international sources, such as the 1950 European Convention of Human Rights and the 1961 European Social Charter. See Sudre, 'L'Europe des droits de l'homme', 14 *Droits* (1991) 105; Russo, 'La justiciabilité des droits économiques et sociaux', in *AEL* (1992) Vol. III-2, 213. In the philosophical perspective important insights come from Bobbio. A short journey into his in-depth theory is offered in 'Diritti dell'uomo e società', *Sociologia del diritto* (1989) 15ff. See also Ferrari, 'Sociologia dei diritti umani', in the same issue of the journal, at 165ff.

64 Collins, *supra* note 14, at 79ff., where the conclusion is that individual rights must be enforced abandoning the abstentionist tradition.

work. Furthermore, the explicit inclusion of co-determination has a liberating effect on the construction of all possible participatory schemes.

The pre-conditions framed in the text of the Agreement are promising; they are well tuned into contemporary industrial relations culture, aimed at searching cooperation at plant level, with a view to settling wider issues of crucial importance for management and labour. What remains difficult to predict is the willingness of political actors to take initiatives on such grounds. The Commission which began work in January 1995 will have to face the agenda set by its predecessors in the White Paper on social policies and in the Delors' White Paper;[65] in both documents, albeit with different emphases, the issues of flexibility and reorganization of work at plant level are raised as meaningful components of a new European strategy to combat unemployment.

3. *Consultation of Management and Labour; the Legal Status of Collective Agreements*

Several innovations are brought about by the Agreement on Social policy towards the construction of a European collective labour law. The aims are different and so are the tools that have been provided in order to open up new space for recourse to collective sources.

There can be a devolution from the State to social partners, at their joint request, for the implementation of directives; collective agreements are now regarded as adequate means, as long as the State takes responsibility for the transposition of the directives within the established period of time and for the correct achievement of the expected result.[66]

The Commission is obliged to consult the social partners at all stages, when proposing and drafting legislation. Article 2(4) is therefore at the heart of new rights for management and labour, although it remains unclear whether collective organizations – and which of them – can enforce such rights against the Commission.[67]

As a result of consultations, management and labour may volunteer to transpose their dialogue into contractual relations. No duty to bargain arises from Article 3(4), since this is a spontaneous procedure, with no legal impli-

65 European Social Policy, COM (94) 333 of 27 July 1994; Commission EC, 'Growth, Competitiveness, Employment', *supra* note 26.

66 The previous contradictions in this long standing legal quarrel are reported by Adinolfi, 'The Implementation of Social Policy Directives through Collective Agreements', CMLR (1988) 291

67 This 'onus to consult' makes invalid all actions taken by the Commission without consultation and implies that proposals should be sent back to management and labour. See on this point Sciarra, 'Il dialogo', *supra* note 52, at 43. The Commission's Communication (*supra* note 53, at 1) states that 'the social partners now have a right to be consulted' and sets a very formal procedure to be followed.

cations for reaching a final agreement;[68] the Commission's self-restraint must be exercised for nine months and must consist in the abstention from taking initiatives. The European collective agreement, which may result from this social dialogue, shall be implemented according to 'the procedures and practices' in each Member State.

Declaration No. 2, added at the end of the Agreement, specifies that Member States have to develop the content of the agreements, but are not compelled to transpose them in their own systems, nor to amend legislation for this purpose. This tribute to subsidiarity does not exclude the States' responsibility for compliance Community obligations; this should imply that whenever collective agreements are not *erga omnes* there is no such compliance and the State should fulfil its obligations by other means.

If an agreement is reached under this procedure, that is to say, as a result of a tripartite consultation and a bilateral negotiation between the social partners, a new star in the sky of European sources will finally be visible: a European collective agreement dealing with matters which are now included in the community competences, as in Article 2 of the Maastricht agreement.

Why is this new star to be considered European?

It is certainly important to emphasize that collective agreements of this kind only deal with the subjects indicated in Article 2, whether they are decided with a majority vote or unanimously, whereas proposals based on the Rome Treaty should not be assigned to collective agreement implementation arising from the Social Chapter, because the bargaining agents only find their legitimation in the latter source and remain separated from the former.

According to Article 4(2), the social partners may decide and the Commission may propose to transpose the agreement into a Council decision. This is an innovation to be limited within the scope of the Agreement; nevertheless it emphasizes the strict link that can bind a collective source to a European institution. The Communication has specified that the decision should be adopted 'on the agreement as concluded', showing respect for the autonomy of the social partners and for the final product of their bargaining activity. The European Parliament has also intervened in the matter,[69] in a bid to gain a role in this new legislative process and to ascertain that 'all Council decisions on agreements between management and labour must be agreed in advance under its partnership with Parliament'. No recourse has so far been made to the procedure laid down in Article 4(2), nor has there been any clarification of the nature of the Council decision, to be interpreted in its technical sense (as for Article 189) or atechnically, thus leaving to the Coun-

68 G. Lyon-Caen, 'Le droit social de la Communauté européenne après le traité de Maastricht', *Recueil Dalloz* (1993) 151.

69 European Parliament, Resolution on the New Social Dimension of the Treaty of the European Union A3-0091/94, OJ C 77/30, 14 March 1994.

cil itself the choice of means for the acquisition of the collective agreement into the sphere of Community measures. At this stage, it can only be stressed that without a Council decision a merely voluntary source would have to find its own place in the hierarchy of Community norms; exciting as this might appear in terms of innovations within the structure of legal sources, it could also prove disorienting for the enforcement of rights stemming from the agreements.

Nothing in the wording of the Maastricht agreement restrains the social partners from negotiating on matters which do not fall under Article 2 and which could never therefore develop into a Council decision. Agreements such as these will place no obligations on the State to act for their enforcement; as for national social partners they would be the addressees of mere 'recommendations'[70] since the effects of such supranational agreements would be procedural rather than normative. No individual employee or employer in member countries could claim to enforce them directly. Nevertheless, they might be chosen by management and labour in order to set a frame of reference and to experiment with common evaluations and common initiatives in certain fields.

The future of framework agreements of this kind remains very much in the hands of the negotiators. Although it may seem rather premature to imagine a European system of collective bargaining and to establish proper links among different levels of negotiation, this experimental area of confrontation can be identified as more suitable for large but homogeneous sectors of the economy, in which similar productive systems determine common working conditions and shared interests of both collective parties.[71]

All possible models of European collective agreements – formally and informally referred to the Agreement – raise the issue of representativity.[72] Negotiators would have to be fully empowered in order to represent national associations at such high and widespread levels of negotiation. Furthermore, whereas national negotiators see the effects of their bargaining activity, through the incorporation of terms and conditions of employment in individual contracts, the European negotiators would produce documents of less direct relevance, the enforceability of which would be uncertain – probable but not compulsory in Member States.

70 G. Lyon-Caen, *supra* note 68, at 152.

71 Working time could be dealt with in procedural agreements of this kind, in terms of general criteria for its reorganization, rather than detailed regulations; training schemes would be a most urgent and adequate subject; positive action for women would be a very ambitious target.

72 In the Labour and Social Affairs Council Meeting of 6 December 1994 a Resolution – signed by 11 – has been issued, dealing with social policy (see 11560/94 Presse 263-G). Among other points, it is indicated that 'all representative European organizations on the employer and employee sides' should be consulted within the social dialogue.

C. In the Realm of Procedures: Information and Consultation in European Undertakings

As stated earlier, the only – albeit very important – directive based on the Maastricht Agreement deals with an issue particularly relevant for the future shaping of European labour law. It seems appropriate to analyze this source in some detail, not only because it is the latest newborn, but also because of the germs of possible further innovations nestled within it. These could be better disguised by way of interpretation and practice, since the implementation of the directive can give way to imaginative and differentiated solutions.

Works councils have – from time to time – represented a frontier in the progress of social legislation, whether the issue being raised arose in the context of company law or labour law. During the 'seventies the debate around the European Company Statute was at its most intense; it linked with the proposal of the so called V directive on the coordination of national company law, which included proposals for the election of workers' representatives in the supervisory board.[73] Challenges on participation in company structures, as well as on other forms of workers' involvement in economic matters – such as the Danish proposal on participation in an investment fund, the Sudreau report in France, the Bullock report in the United Kingdom – seemed pervasive in most European countries and the climate in the political discussion appeared full of hopes for positive changes.[74] European work councils were born in this rich and promising context and faced an unusual dynamism of national governments, balancing the strength of domestic labour movements against the stimulus to introduce a supranational structure of workers' representation.

The outcome of such new ideas was disappointing. Even the advocates of non-traumatic changes in legislation affecting the company's prerogatives and its internal decision making structures have had to agree on the fact that the extraordinarily long gestation period necessary for these reforms, subject ever since to recurring settlements, has not produced meaningful results. The main reason for this standstill may be found in the altered situation of the economy during the 'eighties. As a consequence of this, the political orientation of governments took other directions, displaying a lack of commitment for industrial democracy. Social policies followed a different path, through the enactment of the Social Action Program and the adoption of the

73 For references to all proposals see the Commission's Green Paper on Employee Participation and Company Structures, *Bull.EC, Suppl.* 8/1975. For a recent evaluation of this topic see Holle, 'Workers' Participation and EC Legislation', 23 *Bull of Comp. Lab. Relations* (1992) 19ff.

74 See S. Sciarra (ed), *Democrazia politica e democrazia industriale* (1978). One of the most passionate defenders of industrial democracy now considers with scepticism the results of the European social dimension. See Lord Wedderburn, 'Companies and Employees: Common Law or Social Dimension?', 109 *The Law Quarterly Review* (1993) 220ff.

'structural' directives:[75] on collective dismissals in 1975 and on transfers of undertakings in 1977.

Despite the lack of an institution to which information should be addressed, these directives were centred on the employer's obligation to consult employees' representatives. The need to provide protection for the employees affected by major restructuring of industry was confronted by existing practices and legislation in some of the Member States. The legal basis was found in Article 100 EC, although the aims to fulfil were those of Article 117.[76] The result was to create a procedure, but not an entity responsible for the enforcement of the employees' rights.

The present directive follows this line of thought, with one major innovation: the establishment of the EWC is presented as an alternative to the establishment of the procedure. The latter then becomes a substantial part of the legal right to be informed, which must be referred to the individual employee, as long as he or she is employed in an undertaking falling within the definitions of Articles 2 and 3. These two alternatives do not make the establishment of the EWC a residual (therefore less propitious) outcome; although the procedure stems out of negotiations, the EWC is the product of the employees' direct involvement in expressing their own representativeness. Nevertheless, it must be pointed out that the procedure is meant to counterbalance the employees' lack of initiative; to use a mechanical metaphor, the procedure is like a robot, functioning because of the impulse it receives from management and the employees, whereas a EWC is a living body and represents the direct result of the employees' initiative, enforceable because of the new specific obligations to inform and consult addressed to the employer.

The Directive 94/45 is innovative in many ways. It combines the legal command with collective negotiations, thus creating differentiated options for both management and labour. When confronted with national legislation, the peculiarity of the Community solution lies in the need to guarantee equal treatment to employees working in transnational company structures. This is specified in one of the 'whereas' preceding the directive and is of great importance, since the supranational source acquires its own supremacy, through the fact of being wider in scope than national sources and more specifically addressed to the protection of employees' rights.

The right to establish a EWC or a procedure (Articles 1(2) and 3) is strengthened by the corresponding central management obligation to make its establishment possible, by providing the 'conditions' and the necessary 'means' (Article 4). The model recalled by this legislative solution resembles that of the so called auxiliary legislation, diffused in several Member States: by imposing on the employer duties of cooperation, the employees' rights are

75 A. and G. Lyon-Caen, *supra* note 21. See *supra* II.A.
76 See Nielsen and Szyszczak, *supra* note 32, at 169ff.

concretized and may find their own expression at the place of work. This implication is further clarified in the subsidiary requirements annexed to the directive. By imposing on the employer the cost for all operating expenses – including travelling expenses to take part in meetings and interpreting facilities –, members of the EWC are put in the position 'to perform their duties in an appropriate manner'. Furthermore, Article 10 extends to such members the same protection provided in national legislation for employees' representatives. Although one cannot expand the meaning of this provision too far, it is conceivable to think that even in cases where national regulations on these matter do not exist, the employer should be prohibited from retaliating against EWC members, while performing their duties, and unfair labour practices should be sanctioned.

Another innovation should be mentioned. The central management is responsible for starting negotiations or for complying with the written request of at least 100 employees towards the creation of the so called special negotiating body (Article 5(1)); in accordance with the principle of subsidiarity, management cannot choose its interlocutors, which will have to be selected according to the methods in force in Member States (Article 5(2)(a)). If no such representatives exist, the employees' right to elect or appoint representatives exists as a free-standing right based on the Community source.

This is not an irrelevant detail: in two recent cases[77] the ECJ found the UK to have infringed both the 75/129 and 77/187 Directives. In that country, no State regulation provides for the election of employees' representatives, when recognition is denied by the employer; therefore full discretion is left to the employer not to inform and consult. The importance of such cases also derives from the fact that the 94/45 Directive is not binding on the UK, which has remained out of the Agreement on social policy.

Although the special negotiating body's characteristics are meticulously described in Article 5, as the contents of the agreement are in Article 6, the autonomy – and indeed the imagination – of the parties involved are neither limited nor constrained. The directive gives rise to procedural rights and yet, through the enforcement of procedures, to subjective rights. The agreement coming out of the activity of the special negotiating body constitutes a floor of minimum regulations: it can be improved upon but not worsened. There is a somewhat circular structure in the procedures on information and consultation; the annexed subsidiary requirements, in fact, permit the closing of the circle by providing further indications for management and labour, so that the objective set in Article 1(1) of the directive is pursued. As indicated in Article 7, the requirements can either be chosen by management and the

77 C-382/92, 383/92, *Commission v. UK*, 8 June 1994, not yet reported. See comments by Davies, 'A Challenge to Single Channel', *Industrial Law Journal* (1994) 272; G. Lyon-Caen and Lord Wedderburn, forthcoming in *Giornale di Diritto del Lavoro e di Relazioni Industriali* (1994).

negotiating body, in the absence of other agreed solutions, or be imposed on management which refuses to start negotiations, or be the final resort after three years of failures in reaching an agreement.

Although negotiations occupy a very significant place in the directive, the obligations on Member States to lay down legislation are equally important. Looking at Articles 5 and 7, such obligations emerge as the corner stones of a new kind of procedural collective labour law: no right to organize is at the origin of these new rules and yet Member States have to determine regulations which appear as the natural outcome of such a right. Of great significance is the obligation set out in Article 5 – previously mentioned – which deals with the method of electing or appointing members of the special negotiating body. By September 1996 all necessary steps must be taken by Member States in order to adopt the directive by way of agreement. Since the alternative is adopting within the same deadline legislation or other binding provisions to comply with the directive, a very clear border is marked around unilateral and discretionary managerial prerogatives.

It could prove misleading to overemphasize the main innovations brought about by the Directive 94/45. There are well known difficulties – both in national legislations and in Community law – to sanction effectively possible failures by management and labour and to make them comply with the new obligations.[78] It would be equally misleading not to acknowledge that important principles have been laid down as the basis of this embryonic European labour law, such as the principle of independence of employees' representatives from management and that of direct election or appointment.

Furthermore, the inactivity of the legislature in company law, dating back to the 'seventies, has been counterbalanced by a detailed definition of what constitutes a Community-scale undertaking, a Community-scale group undertaking and a controlling undertaking, definitions which enrich the patrimony of European social law, notwithstanding the limited purpose for which they have been proposed, that is to say the improvement of information and consultation rights.

Finally, the contradictions arising from the exclusion of the UK – such as in the case of British companies with operations out of the country being affected by the directive – may produce a spill-over effect of some relevance. The inclusion of British representatives in the councils should find no objec-

78 Article 11(3) states that Member States must provide for appropriate measures in case of failure to comply with the directive; Article 11(4) deals with the States' obligations to provide judicial or administrative procedures for the employees' representatives on matters of confidentiality.

tion from the employees' side; this could push management towards negotiated solutions which could prove preferable to the absence of regulations.[79]

IV. Challenges

As anticipated in the introductory remarks, this paper has attempted to adopt the semantics of labour law, while describing recent trends in European social policies. Legal language in this field seems to reflect the uncertainties of political and social factors; its expansion in order to cover a richer and more articulate subject matter indicates that new patterns of regulations are emerging.

While indicating the challenges of European labour law, one cannot ignore the fact that the lack of an overall strategy in this field seems counterbalanced by the political commitment shown in the latest White Papers.[80] No precise ideology lies behind them; the attention paid to market values is combined with the presentation of social values, as it appears from the indication of priorities in policy-making. Scepticism, in this regard, must give way to trust in future institutional choices, although in growing unemployment figures and ruling monetary policies complicate the analysis.

Due also to the constraints imposed by economic policies, the peculiar dynamism coming from judicial review mechanisms is becoming more and more visible even in labour law issues. Not only is this an original feature of Community law, when compared to public international law;[81] it also creates a confrontation among national and EC actors which still has to be fully incorporated into the social policies discourse and evaluated as one of the most significant variables.

For these reasons and because of the complex changes often brought about by decisions of the Court in national systems, the dialogue among judges must be considered as a perspective, as well as a challenge. The role of collective organizations needs to be clarified, when judiciary policies at Community level are perceived as an alternative to traditional law-making processes and indirectly as a sign of dissatisfaction with governments' performances. It remains to be established, in fact, whether the sensitivity towards Community sources, and indeed towards the ECJ, develops out of individual choices, even when it has an undeniable collective relevance. The

79 The first agreements have in fact been signed in the UK by UK owned multinationals (United Biscuits, November 1994, BP Oil Europe, June 1994). They are reported in 251 *EIRR* (1994) 20.

80 *Supra* notes 25 and 26.

81 As in Weiler's view 'The Transformation...' *supra* note 46, at 2419ff. See also Shapiro and Stone, 'The New Constitutional Politics of Europe', *Compara. Pol. Studies* (1994) 397ff.

responsibility of national judges in preliminary ruling procedures becomes more evident in the social field, due to the constitutional anomalies described above, that is to say the limitations coming from the Treaty competence and the exclusion from this competence of a substantial part of collective rights.

A. Social Dumping

When commenting on the Hoover case, a French scholar pointed out with a streak of pride that the expression 'social dumping' did not have an equivalent in his language; he also admitted, with some regret, that such an expression would have had to be created in order to teach labour law in the years to come.[82]

In 1993 Hoover moved from France to Scotland, firing six hundred employees and hiring a similar number in the new set up. Transparency was not the leading criterion, since the new working conditions were not officially made known, a decision facilitated by the lack of legal rules regarding the publicity or registration of collective agreements in that country. Informed opinion in specialized journals and in newspapers was that Scottish employees at Hoover would have been admitted to a pension scheme after two years of service; all contracts would be fixed term and salaries would be frozen for a few months; peace clauses would restrain the employees from taking industrial action; no seniority scheme would be constructed, but evaluation would be based on ability and other criteria.[83] It cannot be simply implied that moving Hoover away from France meant leaving behind social regulations and aiming towards lower costs in terms of salaries and other legal guarantees; nevertheless, the case was reported – and still is referred to – as a symbol of social dumping.

The philosophy enlightening the common market's founding fathers did not envisage these outcomes and certainly could not have predicted the globalization of the markets as a phenomenon which would affect employees' rights so deeply.[84] Harmonization of social systems was described as a natural consequence of market mechanisms, while unanimity was taken as the golden rule in decision making. This might have implied, at least at the origins of the Community, an under-evaluation of deeply rooted national prerogatives in social matters, in contradiction with over optimistic expectations for spontaneous harmonization, and an inclination towards maintaining the status quo through unanimous voting.

82 G. Lyon-Caen, *supra* note 68, at 151.

83 The details are taken from 230 *EIRR* (1993).

84 Wedderburn, 'Labour Standards...', *supra* note 60; Deakin and Wilkinson, 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards', *Industrial Law Journal* (1994) 289ff.; Erikson, Kuruvilla, 'Labour Costs and the Social Dumping Debate in the European Union', *Industrial and Labour Relations Review* (1994) 20ff.

As a result, very little was done to create a common ground of legal guarantees for employees, solid enough to counterbalance the employers' choices to move freely within the market and to seek the most flexible legal and economic environment.

Complex economic evaluations, far beyond the mere calculation of direct and indirect labour costs, stand behind management strategies. The ultimate completion of the single market and the consequent reorganization of economic activities ran parallel to economic recession in most Member States and to growing unemployment. For all these reasons, the profound changes occurring in the labour market could hardly be framed within contingent legal policies; similarly, the search for more flexible rules in employment has not yet provided final solutions.

Whereas in the 'seventies the central issues were collective redundancies and transfers of undertakings, in the 'nineties working conditions have moved to the centre-stage of legislative policies aiming at more flexible employment rules. The function of labour law, in both cases, has had to be measured against new market demands, up to the point of introducing relevant changes in the law and in bargaining practice. Neo-classical economics does not satisfactorily answer all the questions raised by this slow but inexorable mutation; nor can the prediction of such complexities be traced in the liberal thinking of the early days.

European research in labour law must go against the stream of social dumping and aim at the dismantling of such a notion. A 'dynamic process' of harmonization should be envisaged, 'in which transnational labour standards interact with economic integration to produce a continuous upwards movement in social and economic outcomes'.[85] It should be so, despite the quasi-virtual dimension of collective labour law, counterbalanced by the new political commitment shown by the European institutions.[86]

Labour law research must also accept the challenge of confronting the free market and its rules: competition law serves the purpose of imposing fair rules just as labour law does within the domain of employment contracts.[87] The new frontier of social justice, as indicated in the opening remarks, must allow for a new definition of rights. Rather than maintaining distinct and

85 Deakin and Wilkinson, *supra* note 84, at 308.

86 Although not a binding instrument, the Commission's Opinion on an equitable wage (OJ C 248, 11 September 1993) is an important element for the development of future policies. The Commission adopted a Memorandum on equal pay for work of equal value: COM(94) 6 final, which also must be considered as very significant. See also European Parliament, Resolution on the Introduction of a Social Clause in the Unilateral and Multilateral Trading System, OJ C 61/89, 28 February 1994; Labour and Social Affairs Council Resolution, 6 December 1994.

87 G. Lyon-Caen, 'L'inflitration du droit du travail par le droit de la concurrence', *Droit Ouvrier* (1992) 313ff. indicates a few examples of conflicting social and market values in recent cases of the ECJ.

highly specialized legal cultures behind the new legislative proposals, the attempt should be to interrelate them, so as to combine the values which inspire and support them.

A striking contradiction cannot be ignored in this regard: the separatism shown by the UK, when refusing to sign the 1989 European Social Charter and, later on, when opting out of the Maastricht Social Chapter, can be viewed as an extraordinary distortion of competition, a contradiction in terms in the rhetoric of European integration.

B. The Principle of Subsidiarity

The challenge inherent in the interpretation and in the enforcement of the subsidiarity principle can be presented as parallel to the one underlying social dumping. Whereas the latter is the direct outcome of an unregulated market, refusing to accept the coordination of economic and social principles, the former is the product of a functional division of competences within the EC. Assigning to the Community an almost residual power to intervene may indicate consideration for national prerogatives and respect for embedded traditions. It can also give rise to unplanned consequences, such as the 'renationalization' of labour law.[88]

Enshrined in the Maastricht Treaty in Article 3(B) and specifically recalled in Article 2 of the Social Agreement, subsidiarity is progressively emerging from an indistinct and rather mysterious area of legal interpretation. At the Edinburgh Council's meeting held in December 1992 several clarifications were made: subsidiarity means that 'national powers are the rule and the Community's the exception'; it 'provides a guide' as to how the powers referred to in the Treaty are to be used; it is a 'dynamic concept', since it allows Community action to be expanded, restricted or even abandoned, when it is no longer justified.[89]

The same document refers to 'proportionality' with regard to the choice of Community acts: binding measures should be kept as a 'last resort' and mutual recognition should be preferred to harmonization. If read in conjunction with the Declaration on the Hierarchy of Community Acts, attached to the Maastricht Treaty, proportionality may have some repercussion on labour law issues. If nothing else, it will impose on Member States and on the Commission a general reorganization of Community instruments and will

88 Simitis, 'Europeizzazione o rinazionalizzazione del diritto del lavoro?', *Giornale di Diritto del Lavoro e di Relazioni Industriali* (1994, forthcoming).

89 Communication of the Commission to the Council and the European Parliament, 'The Principle of Subsidiarity', SEC (92) 1990 final. Comments in Toth, 'Is Subsidiarity Justiciable?', *EL Rev.* (1994) 268 and 284 in particular, where the dynamism of subsidiarity is seen as a problem, because it gives rise to 'subjective interpretation' of an 'ever changing boundary'.

favour the indication of both national and European priorities at the 1996 Intergovernmental Conference.

Subsidiarity and proportionality may be applied to different sources, as well as to different levels of law-making; this brings about the alternative use of law and collective bargaining, particularly relevant in the light of the Social Chapter. It is of some interest to point out that the adoption of recent directives through collective agreements is favoured by the social partners, particularly by employers' associations. Particularly with regard to the EWC directive, voluntary means may lead to innovative solutions, although the final obligation to transpose the directive rests with the Member States.

In such cases, law is not subsidiary to collective agreements, as Kahn-Freund liked to think when envisaging a harmonious relationship among labour law sources.[90] When the Community norm is adopted, its enforceability within each national legal system cannot be left to purely voluntary measures, notwithstanding the fact that collective agreements may represent a way of getting closer to the needs and the expectations of the social partners and of the individuals they represent and be therefore observant of the subsidiarity principle. Both in implementing Community legislation and in representing an alternative to it, as envisaged in the Social Chapter, collective agreements are required to play a role which is similar if not equal to that of the law. Here again Kahn-Freund's perception of dynamic collective bargaining as a *praeter legem* institution is difficult to adopt; the final product of such an open process, when transferred to the Community legal order, must have generalized and reliable effects, as only agreements enforceable *erga omnes* have.

Subsidiarity, in this respect, can only be evaluated as a constitutional principle governing the Treaty and the Member States competence; as such it must stop at the border line of each legal system, without interfering with the internal equilibrium between voluntary and legal sources.

Collective *laissez-faire*, a familiar expression in the semantics of labour law, does not represent an essential communicative device for the integration of European labour law, since it very much reflects the options of organized groups within each legal system and the inclination of governments to set them free of legal constraints. It is Community legislation which leads to integration of social issues and stands as a solid barrier against distortion of competition in the market. Through merely voluntary means the possible outcomes, important as they can be for the creation of new labour standards, remain outside the principle of subsidiarity, since they fulfil a function different from the exercise of Community competences.

90 See text and note 6.

V. Perspectives

Under this heading, some concluding remarks will be formulated. We have argued that it is a paradox for the post-Maastricht labour law to be still a fragile system of regulation and yet to represent an important field for experiments. The most significant perspective in this regard is the emergence of a proceduralized law, which takes advantage of the multiplicity of actors involved as well as of the differentiated legal instruments to be adopted. The outcome is an intricate web of rules, serving several purposes: it constitutes an answer to the constitutional anomalies often referred to in this paper as being at the root of the weakness of social policies; it favours transparency, where the democratic deficit is more than an empty motto; it also favours mutual control among institutions, thus fulfilling a function equivalent to that of conflict.

Proceduralized labour law is also the visible result, at a European level, of a widespread tendency within Member States to decentralize powers, creating public or semi-independent bodies capable of approximating the abstract rules to effective needs and to develop technical standards by which to apply general legal rules. Although the example that first comes to mind is that of agencies dealing with environmental issues and with health and safety regulations, a similar model is spreading to the administration of other matters, such as labour market regulations, training and even strike regulations in essential services.

Even the dialogue established among national lower judges and the Court of Justice may represent an original expression of proceduralized labour law. The web of rules, in this case, is set formally by the Treaty, although the most challenging procedures seem to be those set informally by the litigants and the national institutions and, once the judgment is given, by the Community and the State authorities.

In the attempt to capture the dynamics of European labour law, soft law has often been referred to as a flexible tool for the understanding of convergencies and for the explanation of divergencies among national systems. These 'rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects',[91] are called upon to understand the relationship among European institutions, in particular between the Commission and the Court of Justice.

In the interpretation of the Social Chapter, references to the Commission's Communication have been made in order to show that soft law was the only lens through which national practices could be looked at and magnified.

91 Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *MLR* (1993) 32. See also for a general overview, Klabers, 'Informal Instruments before the European Court of Justice', *CML Rev.* (1994) 997ff.

The purpose of a non-binding document is to rationalize different procedures and bring them together into a coherent framework, leaving untouched national peculiarities.

Soft law can be used as a fulcrum against the standstill of European social policies, when hard law seems to be a far away achievement. It can anticipate future developments or interpret current ones; when combined with subsidiarity, it can give rise to recommendations and framework directives, rather than to other, more rigid detailed measures.[92]

The Court of Justice has on many occasions specified that, irrespective of the definitions, it is essential to look at the final purpose each measure is trying to serve. This is why even recommendations, not yet translated into national regulations, should be taken into account by national judges, especially when they can help them in interpreting national and community laws.[93] Furthermore, a directive which is not yet transposed into national law, although unable to produce horizontal effects, can be referred to by national judges, called on to interpret domestic legislation in the light of the same directive.[94]

The perspective of soft law is evocative of the labour law tradition of customs and practices, which proved in many legal systems as important for employment relationships as did binding legal regulations. A potentially positive combination of ingredients seems therefore possible: the fluid state of European collective labour law can benefit from rules which are not laid down in their final form, but are slowly emerging from the practice of the institutions and of the collective actors.

92 Communication, *supra* note 88, 13-14.
93 C-322/88, *Grimaldi v. Fonds des maladies professionelle,* [1989] ECR I-4407.
94 C-106/89, *Marleasing,* [1990] ECR I-4135.

Economic Analysis of European Integration

by

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Academy of European Law (ed.),
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Table of Contents

Biography

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Education

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Detur Prize, Harvard College, for highest academic distinction, 1968;
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The University of Michigan, Associate Professor of Economics, 1979-1983;

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Harvard University, Visiting Assistant Professor of Economics, 1973-1974;
Harvard University, Assistant Head Tutor in Economics, 1971-1973;
Harvard University, Teaching Fellow in Economics, 1969-1973.

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Council for European Studies, Training Committee, 1974-1976;
American Economic Association, Nominating Committee, 1975-1976;
Quarterly Journal of Economics, Associate Editor, 1973-1974;
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Principal Publications

Corporate Power and Profitability in the North Atlantic Community. Ph.D. Dissertation, Harvard University, 1973.
French Industrial Policy (The Brookings Institution 1986) (edited with Christian Stoffäs), 228p.
Restructuring the French Economy: Government and the Rise of Market Competition since World War II (The Brookings Institution 1989), 400p.
(editor), *Singular Europe: Economy and Polity of the European Community after 1992* (University of Michigan Press 1992), 375p.

I. Introduction

The origins, organization, evolution, and behaviour of the European Community (now called the European Union, or EU), are so interesting and important intrinsically that students of European integration sometimes neglect to think carefully about its economic effects. Although the European economy functions and performs far differently today than it did before implementation of the EU treaty and its predecessors, one cannot conclude *ipso facto* that the changes in behaviour and welfare are attributable exclusively or even primarily to Union-sponsored integration.

The purpose of this essay is to introduce legal students of the EU to the manner in which economists explore linkages between market integration on the one hand and economic behaviour and performance on the other. Section II describes the economic performance of the European economy since World War II. It also presents several explanations of that performance – explanations that have little to do with the birth and growth of the EU. Section III explains why in theory one might expect economic integration to affect economic performance. Section IV explores the degree to which the EU has actually achieved economic integration. Section V provides a compact summary of the lessons learned, together with some speculation on my part as to what further empirical study is likely to show regarding the impact of the Union on the structure and performance of the European economy.

II. The Standard of Living in Europe since World War II

National economic performance is a multi-dimensional concept that resists accurate summary in a small clutch of statistics. Since our present purpose is less to evaluate carefully the economic performance of individual countries than it is to explore methods of explaining such performance, it suffices to focus here on just one performance criterion.

The best single measure of national economic performance is the standard of living, measured as the ratio of gross domestic product (GDP) to population.[1] Since the standard of living can rise and fall over time, national economic performance depends on its growth as well as its level.

Broadly speaking, since World War II, the European standard of living admits of three generalizations.[2] First, during the three decades that followed

1 As defined here, 'the' standard of living is really the nation's *average* standard of living. Since virtually no one experiences the average standard of living, a second important dimension of economic performance is the dispersion of actual standards of living around the mean.

2 See Boltho, 'Growth', in A. Boltho (ed.), *The European Economies: Growth and Crisis* (1982); and W. J. Adams, *Restructuring the French Economy: Government and the Rise*

the war, in virtually all European countries, it tended to grow considerably more rapidly than it had before the war.[3] Second, since the mid-1970s, it has tended to grow distinctly less rapidly than it had earlier on in the postwar period. Third, throughout the postwar period, nontrivial differences in growth have existed among European nations – and between Europe as a whole, the United States, and Japan.

To the inexperienced eye, differences in rates of growth can appear small. Cumulated over time, however, even small differences can produce large effects. For example, in 1950, the standard of living was 23 percent higher in the United Kingdom than in France. One generation later, however, in 1975, the standard of living was 22 percent higher in France than in the United Kingdom.[4] Dramatically rapid reversals of this sort are unusual indeed.

What is the relationship between European economic integration and Europe's economic performance since World War II? Can the particulars of economic integration explain the timing of the acceleration and deceleration in growth? Can they explain the international variation within Europe?

Not all students of the European economy attribute its postwar performance to economic integration. In fact, several have attempted to explain the growth record without reference to economic integration. Before considering explicitly the relationship between integration and living standards, let us examine a few of these rival hypotheses in some detail.

Charles Kindleberger explains Europe's postwar growth in terms of its labour force.[5] At the end of World War II, in many European countries, agriculture still accounted for a large share of total employment. Although labour productivity was growing quite rapidly in the agricultural sector, it remained low by the standards of manufacturing. As a result, as labour migrated occupationally from agriculture to manufacturing, aggregate output (and hence income) per capita tended to rise.[6] Such migration accounts for the acceleration in growth after World War II. By the late 1970s, however, in most European countries, agriculture ceased to account for a large share of total employment. To attract more labour from the land to the factory, manufacturers had to offer unprofitably high wages. As a result, the incentive to invest abated; so therefore did the incentive to migrate, and the rate of growth

of Market Competition since World War II (1989) 1-14. For data on standards of living see Organization for Economic Cooperation and Development, *Historical Statistics 1960-1990* (1992).

3 Even in the United Kingdom, where standards of living grew more slowly than they did in other European countries, postwar growth exceeded the interwar benchmark. See R.E. Caves (ed.), *Britain's Economic Prospects* (1968).

4 W.J. Adams, *Restructuring the French Economy*, Table A-2.

5 C. P. Kindleberger, *Europe's Postwar Growth: The Role of Labor Supply* (1967).

6 Suppose the marginal product of labour is 10 ECU per hour in agriculture but 15 ECU per hour in manufacturing. Redeployment of one hour of labour from agriculture to manufacturing would increase aggregate output by five ECU.

declined. Since some countries – notably the United Kingdom and the United States – had experienced the rural-urban conversion well before World War II, they did not partake of the felicitous growth experienced in most other rich countries.

Angus Maddison explains Europe's postwar growth in terms of technological change.[7] Starting from the observation that income per capita is closely related to output per worker (i.e., to labour productivity), he asserts that increases in productivity are usually attributable to improvements in technology. Normally, technological development is limited by the pace of scientific progress. During the depression of the 1930s and World War II, however, business enterprises often lacked the commercial incentive or the intellectual access to convert new science into new production technology. As a result, by the end of the war, a considerable backlog of new methods was ripe for commercial application. Dipping into that stock accounts for the acceleration of growth at the end of the war. Depletion of that stock then accounts for the deceleration of the mid-1970s. The relatively slow growth of the United Kingdom and the United States is explained by the fact that Anglo-Saxon entrepreneurs had been far less cut off from scientific advance than had their counterparts in other rich countries. Hence the Anglo-Saxon menu of untapped technology was considerably smaller than the rest.

Finally, Mancur Olson explains postwar growth in terms of social and political institutions.[8] In his view, an essential feature of economic growth is its disproportionality: some activities and resources grow in importance, while others decline. As a result, growth creates winners and losers. To the extent that they can anticipate the effects of growth, the prospective losers can be expected to resist the change. If they resist successfully, neither adaptation nor growth will occur. In Olson's view, successful resistance to change is especially likely to occur when (1) existing economic and political élites have occupied their positions for some time, conferring on them the expertise and clout to implement various sorts of governmental impediments to economic innovation, and (2) each interest group associated with the existing order is sufficiently small, relative to society as a whole, to permit group members to believe that their own protectionist behaviour will not affect aggregate welfare so detrimentally as to affect the group itself adversely.

After explaining these general principles, Olson applies them to postwar Europe. The postwar acceleration can be attributed to the replacement of heavily compromised economic and political élites at the end of the war. Such replacement occurred not only in countries that 'lost' the war (e.g., Germany, Japan, and Italy) but also in countries deeply troubled by their

7 A. Maddison, *Dynamic Forces in Capitalist Development: A Long-Run Comparative View* (1991).

8 M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (1982).

wartime comportment (e.g., France). With new élites in place, protectionist manipulation of the economy by experienced interest groups abated for a time, prompting an acceleration of economic growth. Deceleration occurred when the new élites came to function as successfully as those they had displaced. International variations in growth occurred because some countries (such as the United Kingdom and United States) were sufficiently satisfied with their wartime behaviour as not to change their élites. Unsurprisingly, says Olson, these countries experienced slower growth than did the rest. Meanwhile, long-term growth proceeded satisfactorily in the smaller rich countries (such as Austria and Sweden) because powerful interest groups were usually sufficiently large, relative to the economy as a whole, to find that their private interest coincided with the public interest. Hence they did not find it advantageous to block growth-inducing economic change.

I have already suggested that none of these interpretations of postwar growth relies heavily on European economic integration.[9] For those who believe that such integration matters, it is comforting to realize, therefore, that none of these hypotheses is devoid of blemishes.

The basic weakness of Kindleberger's argument stems from the fact that surplus agricultural labour existed already before World War II. Although the existence of such a surplus permits society to effect a rural-urban transition, one must still explain the timing of that transition. A second weakness in Kindleberger's thesis stems from the fact that surprisingly few premature alumni of agricultural occupations go to work in industrial lines of business. Most of those leaving the land either retire fully or take jobs in the service sector. Unlike manufacturing, services do not display high levels of labour productivity; so switching workers from agriculture to services will not tend to raise the standard of living dramatically.

Maddison can be criticized for overestimating the backlog of inventions at the end of World War II. He can also be criticized for failing to appreciate the implications for his hypothesis of the current technological revolution in telecommunications and information processing. That revolution is probably as profound as any since the harnessing of steam. Such a revolution should, in the Maddison scheme, offer tremendous opportunities for growth; and yet, the structural dislocations associated with technological revolution seem to have sedated rather than stimulated the growth process.

Finally, in the case of Olson, not everyone would agree that Europe's national élites changed fundamentally after World War II. With the exception of those at the very pinnacle of power, many supporters of fascism during the war were able to recoup their positions of responsibility fairly quickly

9 One could argue, of course, that formation of the EU altered profoundly the dynamic of interest-group politics in Europe: those groups that had fattened successfully at a national trough were not necessarily destined to feed equally successfully at the EC trough.

thereafter. For every Hitler, Mussolini, or Pétain, one could cite many examples of eminent persons who conducted business more or less as usual both during and following the war.

III. Economic Integration and the Standard of Living

To argue that rival theories cannot explain postwar European growth is not, of course, to establish that economic integration does. How does one make the affirmative case that economic integration is likely to enhance the standard of living? The case for economic integration is closely related to the case for free trade. The most famous argument for free trade is comparative advantage, but, in the European context, several others are at least as important. These include the effects (all due to the economies of scale) of market size on the cost of production, the diversity of available products, and the state of competition, and the effects of monetary union on the propensity to trade. Let us examine each of these arguments in turn, devoting special attention to product diversity,[10] and indulging in a modicum of the quantitative reasoning often associated with economics. Quantitative reasoning is especially useful when a single cause produces numerous and conflicting effects – and, as we shall see, ambiguity of effect is endemic in theories of economic integration.

A. Comparative Advantage

The rough intuition of comparative advantage is simple. Consider the production of wheat and olives in Ile-de-France and Tuscany. Although each region could produce both products, inter-regional differences in terrain and climate result in inter-regional differences in production possibilities: if the production of wheat were reduced by one ton in each region, and the associated resources redeployed to production of olives, then the gain in olives would be far greater in Tuscany than in Ile-de-France. Were Ile-de-France to limit its production to wheat and Tuscany to limit its production to olives, each region then importing from the other the product not grown locally, then both regions could enjoy more of both wheat and olives than they could if each tried to produce all that it consumes. The standard of living would rise in both places.

European economic integration is not an unadulterated example of comparative advantage at work. Although the EU fosters free movement of goods and services between Member States, it also impedes imports from the rest of

10 The effects of market size on product diversity have not received the attention they deserve.

the world. To understand the impact of such selective recourse to free trade on the standard of living requires more than rough intuition. I shall present a simple version of the necessary analysis in three steps, starting with the total absence of trade, proceeding to a world with tariffs applied indiscriminately to all imports, and concluding in a world characterized by preferential trading arrangements between certain nations.

Consider the effects of integration[11] on a particular market (call it wheat) in a particular country (call it Belgium). Initially, Belgium bans the importation and exportation of wheat, so that domestic producers sell only to domestic consumers and domestic consumers buy only from domestic producers. The Belgian wheat market can be represented as in *Figure 1.* The amount of wheat that consumers wish to buy depends on the unit price charged for the wheat: the higher the unit price, the smaller the amount purchased. With unit price measured vertically (e.g., in ECU per ton) and quantity purchased measured horizontally (e.g., in tons per year), consumer demand is represented by the line DH. The amount of wheat that producers supply also depends on the unit price paid for wheat: the higher the price per ton, the larger the amount offered for sale. The line BG represents producer supply. At one (and only one) price (represented by the amount AC), the quantity that consumers wish to purchase is just balanced by the quantity that producers wish to sell (i.e., the quantity AF). This is the equilibrium price of wheat.

Assuming that the price of wheat settles at its equilibrium level,[12] it is possible to quantify the benefits to consumers and to producers of participating in the wheat market. In the aggregate, consumers are willing to pay an amount equal to the trapezoid ADEF for the tons of wheat they actually purchase. Having paid an amount equal to the rectangle ACEF for that quantity, their net benefits amount to the triangle CDE. These net benefits are known as *consumers' surplus*. Similarly, the minimum amount that producers would be willing to accept in return for supplying AF tons is the trapezoid ABEF, while the amount they do receive for that quantity is the rectangle ACEF. The net benefits to producers, known as *producers' surplus*, thus amount to the triangle BCE. The triangle BDE thus measures the net benefits to society as a whole (i.e., the *social surplus*) associated with market equilibrium.

Now suppose that Belgium removes its ban on the importation of wheat, replacing it with a tariff of a specific amount per unit imported (e.g., in ECU per ton). Suppose that two foreign countries (call them France and Canada) stand ready to supply wheat to Belgium. Each of these countries produces far

11 Traditionally, integration is analyzed within the framework of a customs union. In a customs union, all tariffs and quotas are eliminated insofar as they apply to the movement of goods and services between Member States. In addition, in principle at least, all Member States apply the same schedule of tariffs and quotas to imports from the rest of the world.

12 When supply exceeds demand, (some) producers offer to sell below the market price; when demand exceeds supply, some consumers offer to pay more than the market price. These pressures cease only when supply and demand match.

more wheat than Belgium could possibly consume. As a result, Belgium can purchase as much wheat as it pleases from either country at the going price for that country's wheat.

The new situation is represented in *Figure 2*. In *Figure 2*, GY represents Belgian demand for wheat. On the supply side, BT represents the offer of Belgian wheat to the Belgian market, DW and FU represent the supply of French wheat to the Belgian market before and after the Belgian tariff is taken into account, and CX and EV represent the supply of Canadian wheat to the Belgian market before and after the Belgian tariff is taken into account.

To determine market equilibrium, we must aggregate the relevant supply curves (Belgian, French with tariff, and Canadian with tariff). At any given market price in Belgium, the amounts supplied to the Belgian market from each country are simply added to get the aggregate market supply. In other words, at any given price, the aggregate supply curve is simply a horizontal summation of all individual supply curves. Thus, 'the' supply curve in *Figure 2* is BJNV, and market equilibrium (equalization of aggregate supply and Belgian demand) occurs at point N. In equilibrium, Belgium consumes AQ tons of wheat, produces AM tons of wheat, imports no wheat from France, and imports MQ tons of wheat from Canada.

Using reasoning similar to that developed in the context of *Figure 1*, consumers' and producers' surplus amount to EGN and BEJ, respectively. In addition, the benefits to the Belgian Government, in the form of tariff revenue, are given by the amount of the tariff per ton imported (i.e., CE) multiplied by the number of tons imported (i.e., MQ). This product is depicted in *Figure 2* as the rectangle LJNP. Note that Canadian producers receive no net benefits from supplying the Belgian market: the amount they receive per ton sold is just equal to the minimum amount necessary to induce them to supply the Belgian market.

Now assume that Belgium and France form a customs union, so that tariffs on the movement of wheat between the two countries disappear. Assume also that Belgium and France agree to charge the same tariff on Canadian wheat as Belgium had charged prior to formation of the customs union. Within the framework of *Figure 2*, the Belgian demand, Belgian supply, and Canadian supply curves remain as they were. The relevant French supply curve changes, however, from FU to DW.

The new equilibrium in the Belgian wheat market is at R. Belgium now consumes AS tons of wheat, produces AI tons of wheat, imports no wheat from Canada, and imports IS tons of wheat from France. In comparison with the situation prior to customs union, Belgian production falls and Belgian consumption rises; imports from France rise and imports from Canada fall. The rise in imports from France exceeds the fall in imports from Canada.

Consumers' surplus in the new equilibrium amounts to DGR. In comparison with the pre-customs-union equilibrium, Belgian consumers are clearly better off. Producers' surplus in the new equilibrium amounts to BDH. It is smaller than the producers' surplus associated with pre-customs-union equilibrium. Given the absence of tariff duty on Belgian imports from France, the Belgian Government loses all of the tariff revenue it had captured on pre-customs-union imports from Canada. Note that French exporters, like their Canadian counterparts before them, receive no surplus from supplying the Belgian market. Because the Canadians had received no surplus in the pre-customs-union equilibrium, they cannot be said to have been harmed by their displacement by the French.

We are finally able to determine how, if at all, comparative advantage affects the standard of living when a customs union is formed. In comparison with Belgium, both Canada and France enjoy cost advantage in the production of wheat.[13] In the absence of customs union between Belgium and France, Belgium benefits from foreign cost advantage by importing Canadian wheat. Granted, in comparison with the equilibrium when no foreign wheat is allowed into Belgium, Belgian producers are worse off with Canadian imports. The important thing to realize, however, is that Belgian consumers gain more from Canadian imports than Belgian producers lose. Add in the tariff revenue captured by the Belgian Government and it is clear why the average standard of living (net benefits per capita of population) rises.

But what happens with the move from non-discriminatory tariffs to customs union? Consumers gain DENR, producers lose DEJH, and government loses LJNP. The area DEJH is lost by producers but gained by consumers. The area KJNO is lost by government but gained by consumers. The area LKOP is lost by government but gained by nobody. The areas HJK and NOR are gained by consumers but lost by nobody. The net effect of customs union on the Belgian standard of living thus depends on the relative magnitudes of LKOP on the one hand and HJK and NOR on the other. If the first exceeds the sum of the other two, then customs union reduces the Belgian standard of living. If the first is smaller than the other two combined, then customs union has the opposite effect. This ambiguity in the effect of customs union is difficult to appreciate without *Figure 2* in mind. Hence the utility of going beyond rough intuition when discussing comparative advantage.

13 The reader with some knowledge of economics will ask at this point how one can invoke *comparative* advantage in a setting furnished with but a single good. The answer is that one cannot. That is why I refer at this point to *cost*, rather than to comparative, advantage. Unfortunately, a diagram designed to illustrate comparative advantage is a diagram too complicated, I suspect, for this context. Suffice it to say that the partial equilibrium approach employed here is the traditional one used by economists to analyze the effects of customs union.

B. Economies of Scale and Production Cost

In the comparative advantage argument for economic integration, in a two-country, two-good world, one country produces one good relatively cheaply while the other country produces the other good relatively cheaply. Now consider a situation, still in the context of two countries and two goods, in which the resources required to produce the first good are exactly the same in both countries. Ditto for the second good. In this situation, comparative advantage does not exist. Even so, however, the two countries might be able to increase their standards of living by specializing in production and trading with each other.

Suppose initially that the two countries (call them Germany and the United Kingdom) prohibit trade with each other, so that domestic demands are satisfied entirely by domestic production. Suppose also that both countries produce both goods (call them detergent and bleach) subject (over some range of output) to increasing returns to scale. Suppose finally that each good is produced in each country by a single firm. The variation of unit cost with output produced is depicted for one of the goods (i.e., detergent) in *Figure 3*. Given the tastes and incomes that prevail in each country, in the absence of trade, suppose that Germany produces AK units (call them tons) of detergent for itself while the United Kingdom produces AG tons of detergent for itself. Notice that the total cost of production in Germany is given by the amount of detergent produced multiplied by the cost per ton, which, geometrically, amounts to the rectangle ACIK. Similarly, the total cost of production in the United Kingdom amounts to the rectangle ADEG. For the two countries combined, the total cost of production can be represented geometrically as the hexagon ACIHLN, where, by construction, KN=AG and KH=AD.

To simplify the discussion to the utmost, suppose that the other good produced in Germany and the United Kingdom (i.e., bleach) is produced and desired under conditions identical to those obtained in the market for detergent. Suppose, in other words, that *Figure 3* applies to bleach as well as to detergent.

Now suppose that the two countries drop their ban on trade. Suppose further that Germany begins to produce exactly the amount of detergent that had been produced in the no-trade situation by the two countries combined, while ceasing to produce bleach. Meanwhile, the United Kingdom begins to produce exactly the amount of bleach that had been produced in the no-trade situation by the two countries combined while ceasing to produce detergent. Each country then exports to the other the amount of the good that it now produces that the other country had consumed in the no-trade situation.

We can use *Figure 3* to establish that both countries can gain from such trade. The total cost of producing AN tons of detergent in (just one firm and) just one country is ABMN. This is necessarily smaller, given the shape of the

unit cost curve, than the cost of distributing the production of AN tons between (two firms, one in each of) the two countries. In fact, the savings in economic resources can be measured precisely: in *Figure 3*, they are the sum of the two rectangles BCIJ and BDEF or, equivalently, the hexagon BCIHLM. Those saved resources can be used to produce more detergent, some bleach, or both. Meanwhile, *mutatis mutandi*, the same can be said of bleach production in the United Kingdom. Since international specialization permits a given stock of resources to provide every citizen with more of each good, the formation of a customs union can be said to improve the standard of living.

The specialization described here differs in one important respect from that described under the heading of comparative advantage. In the context of comparative advantage, it clearly matters which country produces which good. Each country must produce the good in which it enjoys comparative advantage if standards of living are to rise. In the context of cost-reductions associated with scale economies, it does not matter which country produces which good. As long as both countries operate along the same unit cost curves, the direction of specialization could be determined by the flip of a coin.

C. Economies of Scale and Product Variety

To this point, I have been assuming implicitly that each of our two goods comes in just one version. Most goods, however, do or can come in several varieties. Automobiles, for example, can be produced with engines and bodies of varying size, with bodies and interiors of varying colour, with manual or automatic transmission, windows, and locks, with or without a sun-roof. In a world of constant returns to scale, nothing prevents an automobile manufacturer from combining automotive features in distinctive packages for each consumer. More precisely, the cost of producing a particular package of characteristics does not depend on how many identical vehicles are produced.

In a world of increasing returns to scale, however, the manufacturer faces a dilemma: if he produces many identical vehicles, he can produce and sell cheaply, but few if any consumers will consider his vehicles to be perfectly suited to their tastes. As a result, they are unlikely to be willing to pay as much for one of his vehicles as they would for their dream car. On the other hand, if he tailors each vehicle to the tastes of each consumer, he will incur high production costs. As a result, even if he can charge high prices for his vehicles, he may not earn much in profit from his sales. Depending on the particulars of the situation – on the degree of scale economies associated with standardization, on the number of people sharing a given set of tastes, and on the configuration of tastes in the market as a whole – the producer might respond to this dilemma by producing and selling multiple varieties of auto-

mobile, a small number of varieties at prices which induce most consumers to buy, or a small number of varieties at prices which induce just a few consumers to buy.

By increasing the size of the market, economic integration weakens the producer's dilemma between lowering the cost of production and catering to consumers' tastes. As a result, it can serve to improve standards of living by facilitating desirable product diversity.

This argument can be formalized in a simple example. Suppose that automobiles differ from one another in just one respect: colour. A manufacturer can produce automobiles that are blue, white, or red. To produce a single blue vehicle, the manufacturer must devote resources to development of just the right blue pigment; then he must devote resources to the production of each blue vehicle. Once the chemical composition of the appropriate blue pigment is available for one blue vehicle, it is available for any blue vehicle. The unit cost of manufacturing each blue vehicle does not depend on the number of blue vehicles produced. The combined effect of developing the appropriate blue pigment and producing the blue cars thus results in increasing returns to scale. The same situation applies, *mutatis mutandi*, to production of white and red vehicles. The precise costs of developing pigments and producing automobiles appear in *Table 1*.

Now consider consumers. Each consumer resides in one of two countries (call them France and Germany). Each consumer is willing to pay some maximum amount rather than go without the services of a car. No consumer is willing to pay anything for a second car. The amount each consumer is willing to pay for a first automobile depends on the vehicle's colour. The colour valued most by the consumer may be labelled his *preferred* colour. In ranking the three colours, each consumer belongs to one of two consumer types. One type of consumer is willing to pay most for blue and least for red. The other type of consumer is willing to pay most for red and least for blue. For both types of consumer, then, white is of intermediate value. The exact willingness to pay for each type of vehicle is given in *Table 1*. The consumer chooses which car, if any, to buy on the basis of the net benefit (i.e., the difference between his willingness to pay and the market price) to him of the purchase: if the net benefit (i.e., his consumers' surplus) is negative for all colours, he buys no car. If the net benefit is positive for one or more colours, he buys the colour for which his consumers' surplus is greatest. Notice, therefore, that the consumer does not necessarily choose to buy his preferred colour.

The number of consumers in France is the same as the number of consumers in Germany, but the tastes of the typical consumer differ between the two countries. In France, most consumers are of type 1; in other words, the majority of consumers like blue vehicles best. In Germany, on the other hand, most consumers are of type 2, preferring red vehicles to all others.

Suppose now that each country insulates itself artificially from trade with the other. Suppose further that automotive production is undertaken by one firm in France and one firm in Germany. Suppose still further that each firm knows exactly how much each type of consumer is willing to pay for each type of vehicle, and how many consumers of each type inhabit his country. Suppose finally that each producer must charge the same price for a vehicle of a given colour to all who wish to buy it. Which types of vehicle will each supplier choose to produce, and at what prices will he sell them? Let us analyze the situation confronting the producer in France, understanding that the situation facing his German counterpart is entirely symmetric.

The simplest strategy for the producer is to offer just one colour. If the colour is blue, and he charges a price of (just less than) 10,[14] then consumers of type 1 will buy but consumers of type 2 will not (recall the data in *Table 1*). As a result, his total revenue will be (roughly) 80, his total cost of pigment development will be 15, his total cost of vehicle production will be 8, and thus his profit will be (roughly) 57. By the same reasoning, were he to sell at a price of 6, his profit would amount to just 35. Clearly, if the manufacturer produces just blue cars, he will sell them at a price of 10.

Using the data in *Table 1*, the reader can verify for himself that the most profitable of the single-colour strategies consists of producing white vehicles, selling them at a unit price of 9, and earning profit of 65. The reader can also verify that no multi-colour strategy yields as much profit as does the white-and-only-white strategy.[15]

The choice of a white-only strategy by the manufacturer might seem surprising; after all, most French consumers prefer blue vehicles to white vehicles, and none prefers white vehicles to both of the others. The explanation of white's attraction lies in the interaction of scale economies with consumer tastes. Although no consumer likes white vehicles best of all, all consumers consider white a close substitute for their preferred colour. In contrast, lovers of blue are willing to pay relatively little for red, and lovers of red are willing to pay relatively little for blue. In the absence of scale economies, each country's producer would sell both blue and red cars, each at a price of 10.[16] In the presence of scale economies, however, the shortfall in revenue associated with selling white cars at the lower unit price of 9 is outweighed by the saving in unit cost that occurs because 10 vehicles (rather than 8 blue only, or 8

14 If the producer were to set his price at exactly 10, consumers of type 1 would be indifferent between buying a blue car and buying no car. To simplify the discussion that follows, I shall omit henceforth the 'just less than' aspect of each pricing strategy.

15 In so doing, the reader must remember (1) that the seller who makes a colour available to one person at a given price must make that colour available to all consumers at that price, and (2) that consumers base their decisions on net benefit rather than on preferred colour.

16 To appreciate the importance of the assumption of scale economies, the reader should suppose the cost of pigment development to be 0 and recalculate the profits associated with the several pigment-development and pricing strategies.

blue and 2 red) are produced. Consequently, every consumer buys a car; but none gets his preferred colour.

Now suppose that the two countries agree to open their borders. Suppose also the absence of all natural barriers to trade. Suppose finally that the two companies merge. How, if at all, does the profit-maximizing supply of vehicles change?

As before, let us begin with single-pigment strategies. The supplier who chooses blue only would earn a profit of 75 were he to sell at a unit price of 10; and he would earn 85 were he to sell at a unit price of 6. Exactly the same profits would be available were he to sell only red vehicles at those prices. In the case of white vehicles, however, the seller could earn 145 by selling at a unit price of 9. The most profitable single-colour strategy remains white.

Consider, however, the strategy of selling both blue and red vehicles, each at a unit price of 10. The manufacturer would earn 75 on sales of red vehicles and 75 on sales of blue vehicles. The overall profit of this two-colour strategy exceeds the profit earned with the all-white strategy. In fact, the reader can satisfy himself that every other combination of colours and prices yields less in profit than blue and red, both at a unit price of 10. This, therefore, is the combination that the manufacturer will select. Consequently, each consumer in each country will buy an automobile bearing the colour he likes best. When the size of the market increases, each consumer in each country is able to buy his preferred vehicle.[17] The change in market size affects not only those with minority tastes (in their own country) but those with majority tastes as well.

The effects of market integration on product variety depend, of course, on the particular assumptions made regarding the willingnesses to pay of consumers, the variable costs of producing automobiles, the fixed costs of developing appropriate colours,[18] and the states of competition before and after

17 Although each consumer now acquires his preferred colour, he is no better off than he would have been had the two national markets remained segregated. In each situation, his net benefit is the tiny difference between his willingness to pay and the market price, the latter being 'just less than' the former. In this simplified example, all of the benefits of integration flow to the producer. In more complicated and realistic examples, the benefits of integration would be shared between buyers and sellers.

18 In the example just discussed, I assumed implicitly that a pigment developed for the French market is equally appropriate for the German market. If the reader reworks the example on the assumption that the German version of each colour differs from its French counterpart and requires separate development, he will find that the colour(s) available in the market place will be unaffected by market integration. The applicability of German pigments to French conditions, and *vice versa*, has another important implication as well: strictly speaking, in my example, economic efficiency depends not on the sizes of economically meaningful markets but rather on the number of countries in which a pigment can be used. In principle, a multinational enterprise could use the pigment research it conducts in one country to advantage in the other – whether it chooses to produce the cars in the foreign country or to export them from its home base. The reason is that the economies of scale in this example apply to pigment research, not to production. As a

integration occurs.[19] Consumers' surplus might rise or fall with integration; so might producers' surplus. The point of the foregoing example is simply to establish that, in the presence of scale economies, economic integration is likely to affect the degree to which individual consumers in countries with heterogeneous tastes and/or incomes will be able to purchase the versions they desire of differentiated products.

D. Competition

Every economic activity is characterized to some degree by economies of scale. Activities differ, however, in the rate at which those economies disappear as the rate of output increases. In some activities, the economies of scale are so pronounced that they remain quantitatively important until very high rates of output are achieved. In others, they are exhausted at very low rates of output. Minimum efficient scale is the term used by economists to identify the smallest rate of output at which a firm can reap all of the scale economies associated with a particular economic activity.

As long as minimum efficient scale is small in relation to the amount that consumers wish in the aggregate to purchase, the market is likely to be populated by a number of sellers sufficient to ensure reasonably competitive market outcomes. If, however, consumers fail to provide 'enough' demand for a large number of sellers of efficient scale, seller-concentration is likely to be high and prices are likely to exceed competitive levels.

Here, then, is a third way in which the economies of scale interact with the size of the market: given the state of technology, and hence the array of minimum efficient scales in various types of economic activity, the larger the size of the market, the greater the likelihood of competition. Since economic integration affects the size of the market, it also affects the likelihood that competitive market outcomes will be achieved.

Our interest, however, is in the effect of economic integration on the standard of living – not in its effect on the state of competition *per se*. It is important, therefore, to understand that the state of competition affects the standard of living. It does so in ways that are numerous, subtle, and conflicting, so I cannot discuss all (or even all of the most important) of them here. Rather, I shall simply present the standard economic argument as to why monopoly lowers the standard of living. The reader who understands this argument can then embellish it with others *au choix*. To simplify the argu-

result, this example could be construed to reveal not the advantages of market integration but rather the advantages of Hymer-Caves-type multinational enterprises. See R.E. Caves, *Multinational Enterprise and Economic Analysis* (1982) 31-45.

19 Note the effect of the merger on the cost of supplying cars to the integrated market. In reducing the number of producers from two to one, the merger ensures that the fixed cost of developing each pigment is paid just once rather than twice.

ment's presentation as much as possible, I shall actually consider an economic activity characterized by constant, rather than increasing, returns to scale.

Suppose that a product (call it steel) is produced by (just) one firm in one country (call it Belgium) and by (just) one other firm in a second country (call it Germany). Production is characterized by constant returns to scale, implying that both the average and the marginal cost of production fail to vary with the rate of output.[20] Production-cost is the same in Germany as it is in Belgium.

Suppose initially that the Belgian and German markets for steel are distinct (due, say, to prohibitive tariffs levied in each country). The Belgian firm monopolizes the Belgian market, and the German firm monopolizes the German market. Each monopolist faces the same downward sloping demand curve for his product (line DL in *Figure 4*).[21] Assuming that he must charge the same price for each unit sold, the monopolist faces a dilemma: the higher the price he charges, the greater his ability to extract full willingness to pay for those tons of steel that are valued greatly by consumers; on the other hand, the higher the price he charges, the greater the number of tons of steel that will not be purchased even though consumers are willing to pay more for them than they cost to produce.

The profit-maximizing quantity to produce and sell is determined by the equation of marginal revenue and marginal cost.[22] In this example, characterized by constant returns to scale, marginal cost is just equal to average cost, whatever the rate of output (in *Figure 4*, BK represents both marginal and average cost). On the other hand, marginal revenue is less than unit price (i.e., average revenue): to sell another ton of steel, the monopolist must lower his price – and, by assumption, he must do so on all tons that he otherwise would have sold at a higher price. As a result, marginal revenue is smaller than the new selling price (which is the new average revenue). In fact, it can be demonstrated that the marginal revenue curve associated with a linear demand curve is also linear and twice as steep. In *Figure 4*, therefore, the marginal revenue curve is DH, and the monopolist maximizes profit by producing AG tons of steel (as determined by the intersection of marginal revenue and marginal cost) and charging the maximum unit price that

20 Average cost is total cost divided by the number of units produced. Marginal cost is the extra cost associated with production of one more unit of output.

21 Recall that a demand curve describes the quantity that can be sold at each particular unit price.

22 Marginal revenue is the extra revenue generated by selling one more unit of output. If marginal revenue exceeds marginal cost, then, by definition, profit rises as output increases. If marginal cost exceeds marginal revenue, then, by definition, profit falls as output rises. Thus, profit has achieved its maximum only if marginal revenue is equal to marginal cost.

consumers will pay (i.e., EG, the height of the demand curve at the quantity AG) to buy that number of tons.

What are the net benefits associated with the monopolist's behaviour? The monopolist himself receives the rectangle ACEG in total revenue while incurring the rectangle ABFG in total cost. As a result, his profit amounts to the rectangle BCEF. Meanwhile, consumers are willing to pay an amount equal to the trapezoid ADEG for the AG tons they consume, but they only have to pay ACEG. As a result, consumers' surplus amounts to the triangle CDE. The trapezoid BDEF measures the net benefits to society as a whole (i.e., social surplus).

Now suppose that monopoly is replaced by competition. In a competitive regime, there are many sellers, each too small to manipulate the price prevailing in the market place. In other words, each takes the price as given and believes that he can sell as much as he pleases without disturbing that price. In effect, the individual seller considers his marginal revenue to be equal to the going market price. As a result, in maximizing profit, by equating marginal revenue and marginal cost, he also equates the market price to his marginal cost. In *Figure 4*, price and marginal cost are equated at the point I, resulting in industry output of AJ and market price of IJ.

In comparison with the monopoly outcome, the net benefits to producers shrink from BCEF to 0. On the other hand, the net benefits to consumers rise from CDE to BDI. Notice that the rise in consumers' surplus exceeds the fall in profit by an amount equal to the triangle EFI. Thus, consumers could compensate the producer for his loss and still be better off. Since everyone could be made better off (in surplus terms) by ending monopoly, we can say that the standard of living rises when monopoly is eliminated. This is a rather general result. As long as the demand curve displays negative slope, and as long as the monopolist charges the same price for each ton of steel sold, monopoly will create an area such as the triangle EFI which accrues to social welfare under competition but not under monopoly.[23]

Let us now try to bring this general discussion of monopoly to bear on the process of economic integration. Suppose Belgium is considering integration of its steel market with that of Germany. Initially, the two countries erect artificial barriers that effectively prevent trade between them. During this period, the steel market in Belgium is monopolized; so is the steel market in Germany. Now suppose that the two countries dismantle their prohibitive barriers to trade. How do the erstwhile monopolists behave?

One possibility, of course, is that the two now compete with one another in the single market comprising the two countries. This competition can take

23 This result does depend, however, on the market demand curve and the production-cost curves being the same under competition as they are under monopoly. These are strong assumptions.

any of several forms,[24] but, in general, it will occasion a reduction in market price,[25] an increase in output, a contraction of profit, and an expansion of consumers' surplus that outweighs the reduction of profit. In general, then, the standard of living will rise.[26]

E. Monetary Union

In modern industrial societies, goods and services are not normally bartered for other goods and services; rather, they are exchanged for money. Sellers accept money, despite its lack of intrinsic value, because it can subsequently be used by them to purchase goods and services they themselves wish to buy. It follows that, in a world of multiple monies, sellers are especially desirous of receiving currencies acceptable to those who supply them with goods and services. To the extent that he receives payment in a currency that fails to possess that virtue, a seller bears two distinct types of cost. First, he must pay a transactions fee, typically to a financial institution, to convert his monetary receipts into a currency of use to him. Second, he must bear the risk that the money he has received will decline in value, relative to the currency he plans to purchase, before the currency transaction can be consummated. If such a decline occurs, then the seller suffers as if he had sold his goods or services at a price below that actually charged. Since currency usage tends to be coextensive with national boundaries, the existence of these two types of cost tends to impede the free movement of goods, services, workers, and capital across national boundaries. In a world of fixed exchange rates, the second problem disappears, but the first remains – unless of course the same currency is used in more than one country. To the extent that monetary union eliminates both the exchange fee and the exchange risk costs associated with the multiplicity of currencies,[27] it liberates real economic resources for other uses. In so doing, it may raise the standard of living throughout the currency area.

24 In the Cournot model of duopoly, each firm would choose its production level on the assumption that its selection does not alter the quantity produced by the other firm. In the Bertrand model of duopoly, each firm would attempt to undercut slightly the price charged by the other such that, in equilibrium, both firms charge the competitive price.

25 In this particular example, price will fall in both countries. In a world of decreasing returns to scale, coupled with differential cost curves as between the two countries, price might actually rise in one of the countries.

26 To the extent that market integration stimulates competition, that competition reduces profits, and that consumers fail to compensate producers for lost profits, we must ask whether the erstwhile national monopolists are likely to allow such competition to develop. They might simply agree not to compete with each other. Or they might choose to merge. If either perfect collusion or complete merger occurs, then integration will not have the salutory effect on standard of living that would otherwise have resulted from increased competition.

27 Creation of a monetary union will not eliminate exchange risk if the union is not perceived to be durable.

Unfortunately, imposition of a single currency can also affect the standard of living adversely, especially in the short run. To the extent that economic shocks affect different members of an economic community in different ways, then each member might wish to adopt a different monetary policy. In a monetary union, however, with a single currency and a single central bank, such differentiation of monetary policy is impossible. As a result, economic stabilization – full employment without inflation – may be that much harder to effect. The net effect of monetary union on the standard of living will depend on the degree to which macroeconomic shocks are country-specific in fact, the degree to which the shocks require policy intervention, and the efficacy and cost of monetary policy, in relation to other policies, in blunting the force of such shocks.

F. Conclusion

In this section, I have presented five arguments to support the view that economic integration can increase the standards of living of those who reside within the integrated space. In so doing, I have resorted not simply to intuition but also to some measure of formalism. I hope that the justification for such formalism is now clear. In some situations, such as the comparative advantage case for integration, in which integration might increase or decrease the standard of living in a particular country, quantification is required to determine whether or not the economic benefits of integration exceed the costs. In other situations, such as the production-cost case for integration, it permits one to go beyond determination of whether or not the standard of living might rise to determination of just how much the standard of living might rise. In other words, at most, intuition signals the direction of integration's effect; formalism is required to guide the process of quantification. To the extent that other, non-economic, factors might prompt one to oppose integration, it is useful to know just how much of a decrease in standard of living will result from a decision not to participate in a unified market.

IV. Economic Integration in Practice

In Section III, I described a variety of potential linkages between economic integration and standards of living. Throughout that discussion, I focused on the effects of integration, not its extent. In other words, I did not attempt to establish that the formation and expansions of the EU served in fact to integrate the European economies. Before attributing the evolution of European living standards to the evolution of European integration, it is necessary to evaluate the extent of the integration that has actually occurred in Europe since World War II.

For jurists trained in the civil-law tradition, the reflex way to ascertain the extent of European integration is to examine the texts of the treaties that created the EU. Using this approach, one would expect the degree of integration to be substantial. The Treaty of Rome, for example, creating the EEC, is a remarkable document. It identifies and prohibits a wide variety of impediments – private as well as public – to genuine economic integration; and it endows the EU's institutions with considerable enforcement authority. Examination of the Union's secondary legislation simply reinforces this assessment.[28]

Jurists trained in the common-law tradition do not usually rely on statutory exegesis to determine statutory effect. Rather, they tend to examine how judges interpret statutes and how enforcement agencies undertake their responsibilities – the amount of staff they hire, the amount of budget they spend, the number of cases they file, the proportion of their cases that they win, the penalties they dispense, and so on.[29] Applied to European integration, this approach, no less than statutory exegesis, would seem to suggest that substantial integration has occurred. From the earliest years of the EEC, the Court of Justice has adopted an aggressively integrationist stance. Procedurally, this has taken the form of asserting, successfully, that the EU treaties form the basis of a system of law that takes precedence over the national systems of Member States, and that the pro-integration Court of Justice is the ultimate arbiter of what constitutes Union law.[30] Substantively, the Court has consistently interpreted the EEC Treaty restrictively regarding derogations from the treaty's prescription of free movement of goods, services, workers, and capital. It has also supported the Commission's effort to stamp out private impediments to trade – even when the Commission could be faulted for procedural anomalies. For its part, Project 1992 illustrates the Commission's eagerness to propose the secondary legislation needed to implement integration. The Commission has not hesitated to haul Member States before the Court of Justice for having failed to fulfil their obligations under the EEC Treaty. Nor has it avoided strenuous enforcement of the Union's competition policy. In fact, since the mid-1970s, competition policy in Europe has been pursued far more actively than it has in the United States.

Whatever the tradition in which they are trained, economists tend to be unwilling to assume that public policies – even those that are pursued sustainedly and vigorously – are likely to have their intended effects. Rather they like to ask explicitly, 'What difference, if any, to the market behaviour

28 In the context of the EU's competition policy, for example, not only does Regulation 17 confer broad investigative powers on the Commission, but it also authorizes the Commission to impose large financial penalties on enterprises that infringe certain provisions of the EEC Treaty.

29 See, for example, R.A. Posner, *Antitrust Law: An Economic Perspective* (1976) 23-35.

30 See Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403-2483.

of actual households and enterprises does it make when a governmental authority acts in one way rather than another?' In short, what impact does government have in practice on what happens in the marketplace? To put questions of this sort is to shift the focus from what government does (which may be thought of as akin to inputs in a production process) to the behaviour of those presumably affected by government (which may be thought of as the output of the policy process).

The remainder of this section is devoted to descriptions of the principal techniques that could be used to measure empirically the impact of governmental policy on the extent of market integration. The first three techniques are designed to apply to particular governmental measures. The remaining three techniques are designed to apply to the ensemble of governmental measures undertaken during a specified period.

A. Event Studies

Especially fashionable in the United States currently is the so-called event study. The logic of the approach is simple. Suppose that the Court of Justice decides that a firm has infringed Article 86 of the EEC Treaty. Suppose that the firm's share capital is traded on a stock exchange and that its abuse of dominant position in the common market involved segmentation of the EU market along national lines. If the Court's decision is expected to carry bite – if, that is, the Court's decision is expected to put an end to the practice – then investors will expect the profit-stream of the firm to decline, prompting them to reduce their estimation of the firm's value. The amount by which the (stock-market) value of the firm falls indicates the appraisal made by actual and potential stockholders of the impact of the Court's decision.[31] The impact in question concerns both the likelihood and the economic significance of ending the firm's segmentation of the European market along national lines.

Implementation of this logic can, of course, be complicated. The researcher must control for other factors affecting movements in the price of the firm's stock. Even if extraneous factors are controlled successfully, however, the method suffers from two defects. First, outside the United States, stock markets tend to be thin in two senses: only a small fraction of enterprises finance their assets primarily with share capital traded on a public exchange, and only a small number of actors (individual and entrepreneurial) are active on the buying side of the market. As a result, the method is

31 For an application of this approach to the famous decision of the U.S. Supreme Court (in 1911) involving illegal monopolization by the Standard Oil Trust, see Burns, 'The Competitive Effects of Trust-Busting: A Portfolio Analysis', 85 *Journal of Political Economy* (1977) 717-739.

inapplicable to many European enterprises, and, where applicable, it is suspect: unless an enterprise's share capital is traded, actually or potentially, by a large number of parties, the price of its shares will not necessarily reflect fully (and only) the financial market's evaluation of changes in the profit prospects of the enterprise. Second, in the United States no less than elsewhere, share prices register at best the effects that government policy is expected *ex ante* to have on the relevant enterprise. In other words, at best, the event study embodies society's best guess as to what will happen in the future. But the future is necessarily uncertain, sometimes radically so. Event studies based on financial-market responses to government actions may be useful in situations where one lacks the luxury of waiting until the results of policy have occurred in fact;[32] in academic research, however, it may be preferable to wait and observe directly the policy intervention's actual effects in the (product) market.[33]

B. Comparisons across Policy Jurisdictions

One alternative to the event study, which relies not on what happens in the stock market but rather on what happens in the firm's product market, consists of correlating variations across policy jurisdictions in policy choices with corresponding variations in market outcomes. For example, Stigler and Friedland[34] assess the degree to which governmental regulation of electric power companies affected the price of electricity in the United States. Noting that American regulation is conducted at the State level, and that States differ in the degree to which they regulate public utilities, Stigler and Friedland examine the cross-State correlation between the price of electricity and the nature of the regulatory regime. Since there are many prices of electricity (residential versus urban, large user versus small user, interruptible versus guaranteed service), Stigler and Friedland choose a measure of price that controls for interstate differences in consumption patterns. Moreover, since the cost of generating electricity also varies across States (depending, for example, on the prevailing method of power generation), they also control for various cost-based explanations of price differences.

In the context of European integration, the cross-jurisdiction approach to determining the impact of a governmental policy suffers from one important drawback. The policy subject to scrutiny is likely to be implemented at Union level. As a result, cross-jurisdictional comparisons will have to involve such other rich economies as the United States, the EFTA countries, and Japan. In

32 For example, event studies may be useful to firms deciding how to adjust their portfolios of assets in response to particular governmental actions.

33 I shall discuss below the strengths and weaknesses of using wait-and-see evidence.

34 Stigler and Friedland, 'What Can Regulators Regulate?: The Case of Electricity', 5 *Journal of Law and Economics* (1962) 1-16.

such comparisons, the limited number of data points will make it difficult to control all extraneous factors and isolate the effects of integration *per se*.

C. Before-After Studies

This leads us to a third (and for present purposes final) method of ascertaining the impact of a particular governmental policy on market behaviour and performance. This consists of comparing the structure or function of the product market before and after the governmental action. For example, in the American setting, Elzinga[35] has explored the efficacy of the Clayton Act's prohibition of anti-competitive mergers by examining what happens to the structures of relevant markets after court-imposed remedies are applied to illegal mergers. Elzinga concluded that successful relief occurred in just three of the 39 cases he studied. His findings are regrettably consistent with the fear once expressed by Justice Jackson that, all too often, government 'has won a lawsuit and lost a cause'.[36]

Before-after studies are well suited to the study of European integration. Even after the EU's formative period, many particular policy choices – adoptions of secondary legislation and decisions of the Commission – were sufficiently momentous to affect the structure of and behaviour in relevant product markets.

To avoid *post hoc* fallacy, of course, the meticulous employer of before-after techniques must compare what happens in fact with what would have happened had government failed to intervene as it did. And construction of this anti-monde, as it is often called, is inherently speculative. Hence, when compared to the event study, the before-after approach should not be viewed as devoid of counterfactuals.[37]

A second problem with before-after involves determination of how long to wait, following governmental decision, before evaluating governmental effect. The longer the wait, the greater the risk of attributing to governmental decision effects properly attributable to other causes. On the other hand, the shorter the wait, the greater the risk of failing to allow all important ramifications of the governmental action to be felt.

35 Elzinga, 'The Antimerger Law: Pyrrhic Victories?', 12 *Journal of Law and Economics* (1969) 43-78.

36 *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

37 In evaluating the relative merits of before-after studies of the product market and event studies of the financial market, one might use the following criterion: when uncertainty regarding the future (at the time of governmental decision) is large in relation to uncertainty (some time after the decision has been made) regarding what would have happened absent government's behaviour, use the before-after method. Otherwise use the event study.

This problem of timing appears clearly in the context of attempts by the Commission during the late 1980s and early 1990s to control the financial support of Renault by the French Government.

On 29 March 1988, the Commission decided that several transfers of money from the French Government to Renault amounted to State aid within the meaning of Article 92 of the EEC Treaty and that the aid failed to qualify for the exemption sought by the French Government.[38] Nevertheless, the Commission decided to tolerate some of the aid, provided that the French Government complete in timely fashion the financial and economic restructuring of the company as specified in the Commission's decision.

Twenty months later, on 15 November 1989, the Commission decided to rescind its decision of 29 March 1988.[39] Neither the financial nor the economic restructuring of Renault appeared likely to be completed before the deadline established in the earlier Commission decision. As a result, the later decision instructs the French Government to recover all of the aid it had granted to the company.

Six months after the second decision, however, the French Government had not yet complied; on 22 May 1990, it reached a bargained agreement with the Commission regarding the disputed aid to Renault. Apparently, the Commission was now satisfied with the pace of the company's financial and economic restructuring.[40]

Meanwhile, however, the French Government was negotiating an agreement with Volvo whereby Renault and Volvo would each acquire shares in the other.[41] In the context of the battle between the Commission and France over aid to Renault, this exchange of shares was highly significant. While the Commission was mulling its original decision in the matter, France had argued that its injection of fresh equity capital into Renault was not a grant of aid but rather the sort of money that flowed perfectly normally from owner to enterprise. Because Renault was owned 100 percent by the French State, 100 percent of the fresh capital was coming from the French Government. The Commission had rejected this argument on the grounds that owners normally care about profit and, given the financial health of Renault at the time, normal profit could not be expected from investment in the enterprise. Volvo's decision to invest in Renault served to undermine the Commission's argu-

38 Commission Decision 88/454/EEC, OJ 1988 L 220/30.

39 See Commission of the European Communities, *Nineteenth Report on Competition Policy* (1990) 165-66.

40 'Renault and the EC: Victory for All', *The Economist*, 26 May 1990, 73-74.

41 Specifically, Volvo acquired 20 percent of Régie Nationale des Usines Renault and 45 percent of Renault Véhicules Industriels, while Renault acquired 25 percent of Volvo Car Corp. and 45 percent of Volvo Truck Corp. On balance, Volvo paid SEK 6.45 billion to Renault to complete the transaction. Further details appear in Volvo's annual report for 1991. On the first year of experience of the alliance, see 'Renault and Volvo: Keeping Japan as the Wallflower', *The Economist*, 18 January 1992, 70.

ment. If an ordinary, private, profit-maximizing enterprise was willing to sink billions of Swedish kronor into Renault equity, then shouldn't the French Government be able to do the same thing without having the money be branded a subsidy? In other words, by surrendering a small fraction of Renault's equity to a private enterprise,[42] the French Government had arguably outmanoeuvred the Commission and positioned itself to grant further aid to Renault with impunity.[43]

Since 1990, however, Renault's situation has continued to evolve. In March 1993, the French Socialist Party suffered a massive defeat in legislative elections. The incoming Conservative Government wasted little time proposing and securing passage of a law which identified over 20 State enterprises as candidates for privatization. Renault was on the list. Meanwhile, according to the press, at least, Renault had recovered from its grave maladies of the mid-1980s. To quote the *New York Times*,

> Renault, despite a deep slump in the European auto market, has managed to return to profitability through a mixture of radical cost-cutting, sharply improved quality, some inventive new models and a highly successful alliance with Volvo.[44]

To an outsider, of course, it is unclear whether this kind of assessment reflects accurately the underlying reality or whether Renault was using accounting and media manipulation to position itself for favourable terms in a merger or receipt of one last shot of equity capital from the government. Nevertheless, it does suggest that Renault's health has improved considerably over the past several years.

Due perhaps to the turnaround in September 1993, Renault and Volvo announced their intention to effect a full-scale merger of their automotive operations.[45] By December 1993, however, the parties were obliged to abandon their merger plan after important Volvo shareholders revealed their intention of voting against it.[46]

At what point in this story, then, should one evaluate the impact of the Commission's initial intervention in the French Government's financial dealings with Renault? Depending on the moment selected, both the efficacy and

42 So small, in fact, that it entailed little or no dilution of governmental control of Renault's behaviour.

43 Hence the conclusion of *The Economist*: 'What the French Government is forced to take from Renault with one hand it may give back with the other. There is already talk in Paris of a FFr 2.5 billion capital injection at the start of 1991, perhaps followed by a further FFr 3.5 billion increase later in the year... If Volvo, a private-sector shareholder, now agrees to such a capital increase for Renault, the commission will find it difficult to label the additional funds a subsidy, although that in fact is what it would be'. 'Renault and the EC: Victory for All', *The Economist*, 26 May 1990, 74.

44 'France Is Selling 21 Big Companies', *New York Times*, 27 May 1993, C1.

45 'Renault-Volvo Marriage Is On', *New York Times*, 7 September 1993, C1.

46 'Volvo Revolt Kills Merger with Renault; Swedish Auto Maker's Chairman Quits', *Wall Street Journal*, 3 December 1993, A3.

the wisdom of the Commission's actions could assume any of many appearances. Even if one studies the full history of the relationship between France and Renault,[47] it is difficult to determine whether or not the Commission succeeded in promoting a freer and less distorted market in automobiles within the EU. On the one hand, it could be argued that the French government had its way until the very end – that the weakness of the Commission, stemming from its lack of authority to impose financial penalties on an obstreperous Member State, was all too apparent. On the other hand, it could be argued that five years after the Commission's original decision, the flagship of France's fleet of State-owned enterprises was already subject to ordinary company law and on the road to privatization. Moreover, it had ceded its bed in industry's hospital – in some measure, perhaps, because the Commission had imposed achievement of painful restructuring.

* * *

The process of economic integration in Europe comprises a multitude of specific policies. To evaluate each separately may be very difficult. The minimum threshold of detectable impact may be large in relation to the actual impact of a particular policy event; and the coexistence of multiple policies creates the need for, as it reduces the likelihood of, effective isolation of the policy under examination. Attempts to evaluate individual episodes of policy-making are also rendered problematic by the possibility that a particular intervention reflects not only on the case at hand but also, via signalling and hence deterrence, on other situations which, as a result, might never actually materialize.

For these and other reasons, it may make sense to study the net effect of all policies adopted during a given period, rather than the individual effects of past policies. To measure the overall effect of policy on the degree of integration, economists have tended to rely on three types of study. The first two are based on *Figure 2*.

D. Estimates of Trade Creation and Trade Diversion

One type of study simply focuses on patterns of international trade, asking, 'By how much did such trade expand following each step of integration; and was the increment a manifestation primarily of trade creation or rather of trade diversion?' In the European context, such studies tend to show considerable amounts of trade creation and relatively little trade diversion.[48] They

47 On Renault's early years as a State-owned enterprise, see J. Sheahan, *Promotion and Control of Industry in Postwar France* (1963) 102-126.

48 See Mayes, 'The Effects of Economic Integration on Trade', 17 *Journal of Common Market Studies* (1978) 1-25. In the context of *Figure 2*, trade creation is measured as IM+QS (the amount by which Belgian imports increase following customs union); trade diversion is measured as MQ (the quantity of imported wheat that was produced in

have also provided structural explanations of why market integration (as measured by the ratio of international trade within the EU to the total international trade of Member States) has proceeded more rapidly in some industries than in others.[49]

E. Measuring Changes in Social Surplus

Measurements of trade creation and trade diversion address the extent of economic integration but not the change in standard of living. An alternative use of *Figure 2* consists of measuring the areas HJK, NOR, and KOPL – the magnitudes of which determine the net benefit of integration. The negative effect of integration on the standard of living (rectangle KOPL in *Figure 2*) can be measured as the product of KL (the difference between the price of French wheat in Belgium without tariff and the price of Canadian wheat in Belgium without tariff) and LP (the amount of wheat imported from Canada before integration). The consumption effect of integration on the standard of living (triangle NOR) can be measured as one-half the product of NO (the difference between the price of Canadian wheat in Belgium with tariff and the price of French wheat in Belgium without tariff) and an estimate of OR (the amount by which, according to the Belgian demand curve, consumption would increase if price fell by NO).[50] The production effect of integration on the standard of living (triangle HJK) can be measured as one-half the product of JK (equal to NO, discussed above) and HK (the amount by which, according to the supply curve for Belgian wheat, Belgian production would fall if price fell by JK).[51] Note that all of these magnitudes are easily measured at the moment integration occurs.

F. Examining Changes in Prices

The last method used commonly to evaluate the extent of integration consists of looking directly at the prices prevailing at various locations within the integrated market. As long as Member States and/or business enterprises impede the spatial movement of goods within the market, the price of each good might continue to vary across locations within the market. On the other hand, if neither Member States nor business enterprises can compartmentalize the

Canada, a relatively low cost country, before customs union, and in France, a relatively high cost country, after customs union).

49 Jacquemin and Sapir, 'International Trade and Integration of the European Community: An Econometric Analysis', 32 *European Economic Review* (1988).

50 The amount OR is usually derived from a pre-existing estimate of the price elasticity of demand for wheat in Belgium.

51 The amount HK is usually derived from a pre-existing estimate of the price elasticity of supply of Belgian wheat.

market, then, abstracting from transport costs, goods should carry the same price (net of tax) in all of its parts. The degree of price dispersion thus indicates the degree to which economic integration has not been achieved.

Studies of price differentials within the EU tend to find that significant heterogeneity remains. In this respect, the several studies of price-differentials in the automobile market are quite revealing. Looking at the prices of specific models of automobile in different EU countries, the European consumers' union (BEUC) has found that the price at which a given model is sold varies greatly across countries. Moreover, the ranking of countries tends to be quite similar across models. For example, British prices tend to exceed those in other countries, regardless of whether the model under observation was made in Britain or in another Member State. As a result, it cannot be argued that price differentials are attributable primarily to transport costs.[52]

On occasion, price movements at the macroeconomic level can provide additional evidence on the degree of market integration. German unification provides a case in point. The decision of the German Government to exchange East for West German marks on a one-for-one basis served to augment appreciably Germany's aggregate demand for goods and services. What effect on the price level – in Germany and elsewhere in the Union – would we expect this positive demand shock to have had? If the German economy is simply a part of a fully integrated EU market, then the supply-response to the surge in German demand would have occurred in other EU countries no less than in Germany itself. As a result, unless the increment to German demand had been large in relation to total European supply, we would not expect German prices to have risen very much, if at all – whether or not German interest rates had risen (inducing consumers to save rather than spend their money) and whether or not the German supply-response had been slight (due, say, to the absence of underemployed resources available in the short term for productive deployment). Moreover, to the extent that German prices had in fact risen (due, say, to the importance of the German demand shock, even at Union level), we would expect prices to have risen similarly in other Member States as well. On the other hand, to the extent that economically meaningful markets remained national in scope within the EU, the expansion of German aggregate demand could not be expected to have increased output, exports to Germany, or prices in other Member States. Unless German interest rates rose, or German supply expanded (whether in the former East or in the former West), prices could be expected to have risen in Germany – and in Germany alone. In any event, the evidence from German unification appears mixed. Lending support to the single market hypothesis is the fact that German imports from each original member of the EEC rose

52 Price-convergence is discussed in Adams, *Restructuring the French Economy*, 172-177; and M. Emerson *et al.*, *The Economics of 1992: The E.C. Commission's Assessment of the Economic Effects of Completing the Internal Market* (1988) 75-79.

markedly, in relation to German exports to that Member State, just after unification.[53] On the other hand, the German inflation rate rose after unification while the inflation rates of the other large original Member States did not.[54] The evidence on market integration that lies implicit in the German experience of unification deserves further study.

V. Conclusion

What, then, should the legal student of European integration take away from this semi-methodological essay? Let me suggest three simple but significant propositions.

First, it is important to imbed discussions of the European Union in the broader context of postwar economic history. Not only does such an effort force one to reflect upon the tremendous growth in standards of living that has occurred in Europe since World War II, as well as upon the intertemporal and international variations in growth that characterized the period, but it also impels one to contemplate exactly how European integration might affect economic behaviour and performance, and what competing explanations of the growth record might exist. Absent this attempt to relate the birth and growth of European institutions to the economic history of the period, the literature on European Union runs the risk of becoming dangerously isolated and overly self-important.

Second, the economic impact of any government's policies, including those of the European Union, cannot be taken for granted; they must be evaluated. Using the tools of economic analysis, especially those which focus on what happens in the market place after the Union's institutions have made their pronouncements, it is possible to posit first theories and then measures of impact. These measures are capable of providing rough estimates of the magnitude and the desirability of the effects of Union policies on European economic performance.

To those accustomed to reading the Treaty of Rome, the secondary legislation it has spawned, and the judgments of the Court of Justice, many measurements of the extent of integration actually achieved to date are sobering indeed. In the automotive context, for example, the Union has eliminated tariffs and quotas on intra-EU movement of EU-produced automobiles, harmonized many safety and environmental standards for automobiles, challenged the efforts of particular automotive manufacturers to segment the EU market

53 The basic data appear in International Monetary Fund, *Direction of Trade Statistics Yearbook, 1993* (1993).

54 Organization for Economic Cooperation and Development, *OECD Economic Outlook*, No. 53 (1993), Tables 63 and 64. Inflation is measured as the GDP deflator. Interestingly, the pace of inflation in the smaller founding members appears to parallel that in Germany.

along national lines, and even adopted a specific piece of secondary legislation to prevent private restraints of intra-Union trade. And yet, the continued existence of important price differentials across national borders within the EU suggests that one cannot infer the extent of economic integration from the vigour of integrationist policy. Well after its proclaimed completion, the single internal market, in many lines of business, remains in the formative stage.

Nevertheless, the methodologically satisfying empirical work that has been conducted to date on European integration remains sparse, rough, and (therefore) hardly definitive. The third point of this exercise is to suggest that the quality of one's assessment of European economic integration depends at least as much on the quality of one's empirical work as it does on one's identification of the relevant economic concepts.

The quasi-definitive empirical work having yet to be performed, the dispassionate observer should refrain from speculation as to what it will show. Lest my remarks here be interpreted as signifying that I am sceptical of the (beneficial) effects of European integration, however, I must confess my belief that European economic integration is the central event in Europe's postwar economic history – due largely to its effects on the state of competition in relevant product markets. Admittedly, much integration would have occurred even if, other things equal, there had been no march toward European Union. The technological revolution in telecommunications, coupled with such global institutional developments as GATT, would have seen to that.[55] Moreover, such integration as the EC itself engendered has not proceeded steadily. Periodically, political and economic difficulties have decelerated the pace of integration. Occasionally, actual backsliding on past achievements has occurred. Such problems are easily exaggerated, however – especially at a moment marked by the difficult ratification of the Maastricht Treaty on European Union, the near-collapse of the European Monetary System in August 1993, and the evident discord surrounding agricultural reform within the Union and military intervention (in the former Yugoslavia, for example) outside it. Fundamentally, the situation is not unlike that involving the racial integration of the United States during the same period. Integration is not complete, and it cannot be attributed exclusively to governmental initiative; but, despite the vicissitudes of political and judicial enthusiasm, the EU should be profoundly proud of the role it has played in generating an economic world in Europe that differs both unmistakably and desirably from that of 1945.

55 I recognize, of course, that GATT and the rest might never have blossomed fully had the EU not developed as it did. The view that much European integration is attributable to global economic integration is advanced in the banking context in Dufey, 'Banking in the EC after 1992', in W.J. Adams (ed.) *Singular Europe: Economy and Polity of the European Community after 1992* (1992) 171-201.

Table 1

Customs Union and Product Diversity

Number of Consumers			Reservation Price		
Type	France	Germany	Blue	White	Red
1	8	2	10	9	6
2	2	8	6	9	10

	Colour of Vehicle		
Costs	Blue	White	Red
Pigment development	15	15	15
Construction (per vehicle)	1	1	1

Note. Reservation price denotes the maximum amount a consumer would pay for an automobile of the given colour.

Figure 1

The Belgian Market for Wheat: International Trade Prohibited

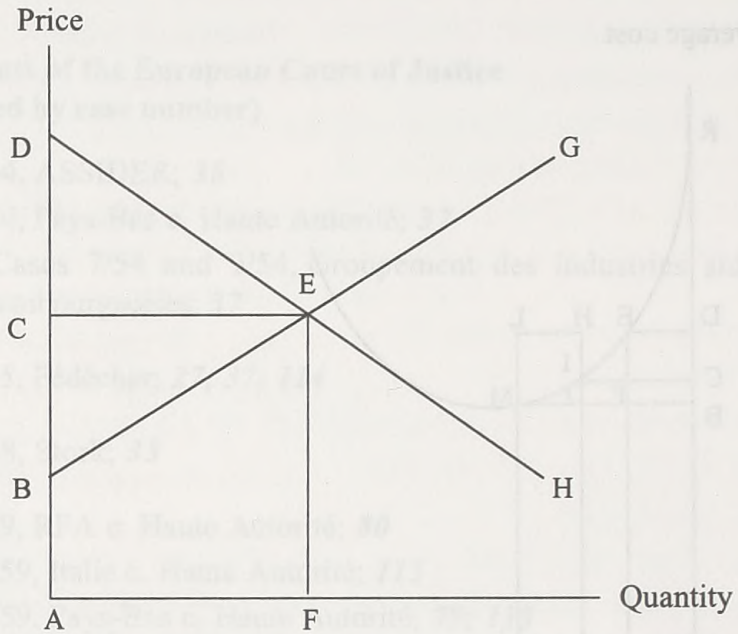


Figure 2

The Belgian Market for Wheat: Effects of Custom Union

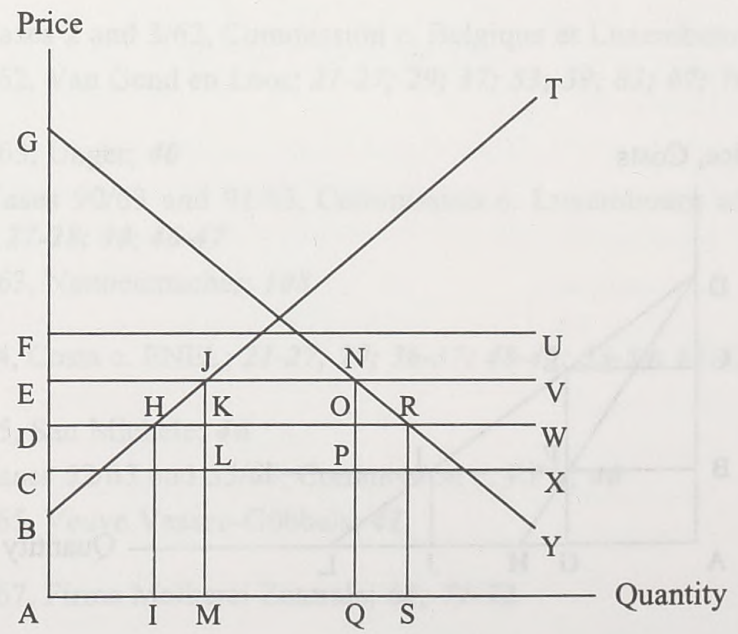


Figure 3

The Economies of Scale

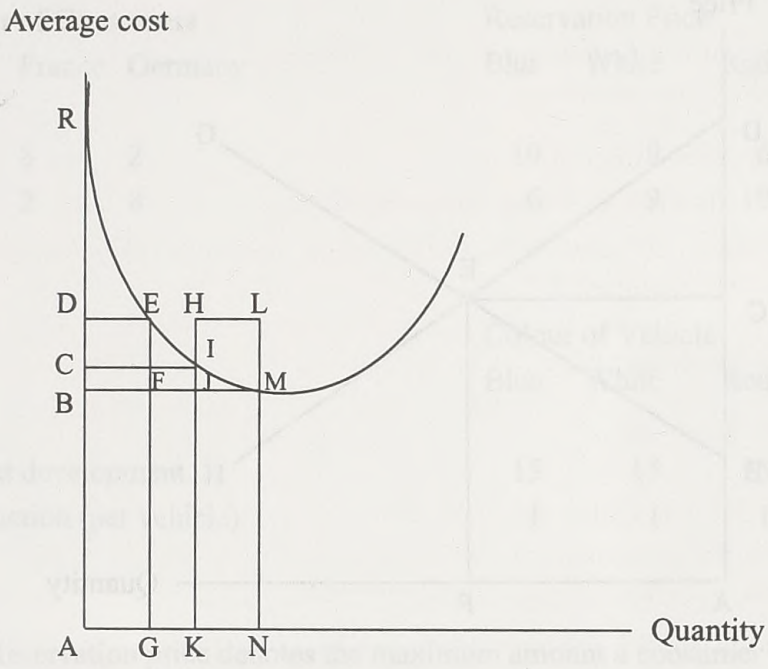
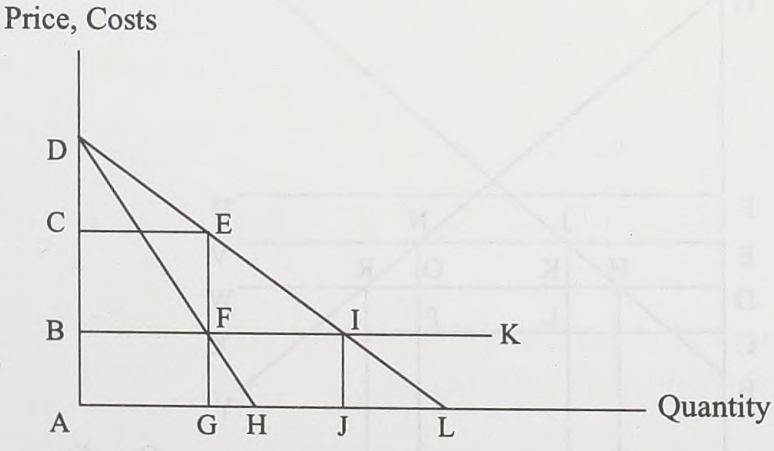


Figure 4

Monopoly and the Standard of Living



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