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# *The Transposition of the Principle of Member State Liability into the Context of External Relations*

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## **Abstract**

*The European Community is increasingly entering into international agreements as a party. These agreements are Community law to the extent to which they are covered by Community competence. Member State liability for the breach of Community law, as established by the Court of Justice, is a *conditio sine qua non* to ensure the effectiveness of Community law. This situation leads to the question whether an individual can also hold a Member State liable for the breach of an international agreement. As the Community's external relations are characterized by specific legal and political conditions, the answer to this question very much depends on the Court's will to uphold its past jurisprudence as well as its concern for the Community's position in the international political arena.*

## **1 Introduction**

In the 1991 case of *Francovich and Others v. Italy*,<sup>1</sup> the European Court of Justice ruled that a Member State could be held liable for a breach of Community law. This judgment put an end to many of the uncertainties that had until that point characterized the opinions of national courts and legal commentators<sup>2</sup> on the existence of Member State liability. Although the principle of Member State liability has been subsequently elaborated by the Court, it in many respects remains uncertain.

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<sup>1</sup> Judgment of 19 November 1991, in joined cases 6 and 9/90, *Francovich and Others v. Italy*, [1991] ECR I-5357.

<sup>2</sup> Cf. Simon and Barav, 'La responsabilité de la puissance publique en cas de violation du droit communautaire', [1987] RMC 165.

The present work is intended as a contribution toward resolving one of the less explored areas of application of this principle: Member State liability in external relations. In particular, the paper will examine whether Member State liability can arise when a Member State breaches an agreement concluded by the Community under Article 300 of the Treaty.<sup>3</sup> Given the increasing number and importance of agreements concluded by the Community under Article 300, the findings of this investigation may provide valuable insights for the future of the Community's external relations.

The paper will firstly outline the nature of Member State liability as a means of securing the uniform application of Community law, before examining the conditions that must be satisfied in order for an international agreement to become part of Community law. The other conditions imposed by the Court on Member State liability will be analysed in the fourth section of the paper. Finally, this article will raise the question whether in external relations, a field in which no Member State has yet been held liable under Community law, special conditions — conditions *sui generis* — can be required.

## 2 The Principle of Member State Liability for Breach of Community Law

The Court referred in the *Francovich* case to the need to secure the 'full effectiveness'<sup>4</sup> of Community law, through its uniform application<sup>5</sup> guaranteed by legal sanctions.<sup>6</sup> It is apparent that the Court viewed the 'inherent' principle of Member State liability as being one of the means available to secure the primacy of Community law.<sup>7</sup> Thus, in assessing whether the principle of Member State liability can be extended to the field of external relations, it is necessary to firstly determine whether international agree-

<sup>3</sup> As the analysis focuses on Member State liability, breaches of international agreements by the Community itself will only be taken into consideration in so far as they may be relevant to explain the possible regime of Member State liability in the context of external relations. More generally see D. Simon, *Le système juridique communautaire* (1997), at 385–413, paras 397–424; Huglo, 'Cour de Justice — Responsabilité extracontractuelle', *Juris-Classeurs* (1993), Fasc. 370 and 371; concerning joint liability see Oliver, 'Joint Liability of the Community and the Member-States', in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997) 285.

<sup>4</sup> *Francovich*, *supra* note 1, [1991] ECR I-5414, para. 33.

<sup>5</sup> Judgment of 15 July 1964, in case 6/64, *Costa v. ENEL*, [1964] ECR 594; cf. opinion of Advocate-General Mischo of 28 May 1991, in joined cases 6 and 9/90, *Francovich and Others v. Italy*, [1991] ECR I-5391, para. 61.

<sup>6</sup> Opinion of Advocate-General Tesouro of 28 November 1995, in joined cases 46 and 48/93, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex parte Factortame and others*, [1995] ECR I-1066, para. 17.

<sup>7</sup> Opinion of Advocate-General Léger of 2 June 1995, in case 5/94, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, [1996] ECR I-2580, para. 104; Léonard de Juvigny, 'Responsabilité (des Etats membres)', in *Encyclopédie Dalloz* (1997) 3, at para. 11; Simon, 'L'incidence du droit communautaire et responsabilité de la puissance publique — Glissement progressif ou révolution tranquille', [1993] *AJDA* 239.

ments entered into by the Community form part of the Community law that is to be accorded primacy.

In *Haegeman v. Belgium*,<sup>8</sup> the Court declared the provisions of the Association Agreement entered into between the Community and Greece by virtue of Article 228 (today Article 300) to 'form an integral part of Community law'.<sup>9</sup> It follows that if the provisions of such an agreement form part of Community law, they must also necessarily bear all the characteristics of Community law,<sup>10</sup> including that of its primacy. As the principle of Member State liability flows from the need to secure the primacy of Community law, it follows that the principle of Member State liability should also exist in the context of external relations.

Community law can only exist in fields where the Community has competence.<sup>11</sup> The same must therefore apply in relation to its primacy, which, being an essential feature of Community law, must also exist within the limits of the Community's '*compétences*'.<sup>12</sup> However, the Community's competence to enter international agreements is continually evolving. This is particularly the case in relation to 'mixed' agreements.

Before turning in the next section to the consequences of this uncertainty for the extension of Member State liability to the field of external relations, one important point about the Court's approach to Member State liability in relation to the breach of Treaty provisions must be noted.

In the joined cases of *Brasserie du Pêcheur* and *Factortame III*,<sup>13</sup> the Court confirmed the existence of Member State liability, in an action for compensation for damages caused by national legislation in breach of Treaty provisions. This it did by interpreting Article 215(2) (today Article 288(2)) of the Treaty as a manifestation of a basic principle of state liability common to the laws of Member States.<sup>14</sup> If the Court were to consider following this approach, which would involve drawing a certain parallelism between Article 288(2) of the Treaty and Member State liability, in a case dealing with Member State liability in external relations, the comments of Advocate-General Darmon in the case of *Maclaine Watson v. Council and Commission*<sup>15</sup> may provide some assistance.

<sup>8</sup> Judgment of 30 April 1974, in case 181/73, *Haegeman v. Belgium*, [1974] ECR 459.

<sup>9</sup> *Haegeman*, *supra* note 8, [1974] ECR 460, paras 5 and 6.

<sup>10</sup> *Costa v. Enel*, *supra* note 5, [1964] ECR 593.

<sup>11</sup> See Article 5(1) of the Treaty.

<sup>12</sup> Louis, 'La primauté, une valeur relative?', [1995] CDE 25. For the distinction between 'powers' and 'competences' see, I. Macleod, I. D. Henry and S. Hyett, *The External Relations of the European Communities* (1996) 38.

<sup>13</sup> Judgment of 5 March 1996, in joined cases 46 and 48/93, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1145.

<sup>14</sup> Although this special approach could appear to be different, the Court makes it clear that here too Member State liability serves the primacy of Community law. See *Brasserie du Pêcheur and Factortame III*, *supra* note 13 [1996] ECR I-1145, para. 36.

<sup>15</sup> 1 June 1989, in case 241/87, *Maclaine Watson v. Council and Commission*, [1990] ECR I-1808-1813. (The case was removed from the register of the Court after an out-of-court settlement between the parties.) See also judgment of 27 April 1978, in case 90/77, *Stimming v. Commission*, [1978] ECR 1004; judgment of 28 October 1982, in case 52/81, *Faust v. Commission*, [1982] ECR 3756; judgment of 10

In analysing whether such actions for damages were admissible in the Member States and the USA, Advocate-General Darmon remarked that:

it would be a manifest overstatement to suggest that the inadmissibility of actions for damages in respect of acts by the State in the field of international relations is one of the 'principles common to the laws of the Member-States'.<sup>16</sup>

Indeed, after reviewing relevant case-law and, in particular, opinion 1/75<sup>17</sup> declaring that 'the principle of *ex post facto* review has been unreservedly upheld by the Court', Advocate-General Darmon concluded that accepting Member State liability in the field of external relations would be the only way to reconcile the Court's past jurisprudence.<sup>18</sup>

Thus, by declaring that there is no principle common to the Member States which excludes liability for actions in the field of international relations, and by drawing on its own Article 300(2) jurisprudence, it may be possible for the Court to extend the principle of Member State liability to the field of external affairs. In this manner, the Court could in principle request from a Member State the very liability it imposes on the Community.

### 3 The Basic Condition: A Breach of Community Law by a Member State

Guidance in determining the extent to which different types of international agreements, pure<sup>19</sup> or mixed,<sup>20</sup> will be characterized as Community law, and as such give rise to potential issues of Member State liability, may be found in the Court's jurisprudence arising out of its jurisdiction to give preliminary rulings on matters concerning Community law under Article 234 of the Treaty.

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June 1985, in case 118/83, *CMC v. Commission*, [1985] ECR 2337; judgment of 7 November 1985, in case 53/84, *Adams v. Commission*, [1985] ECR 3595; judgment of 24 June 1986, in case 267/82, *Clemessy v. Commission*, [1986] ECR 1914; judgment of 29 September 1987, in case 81/86, *De Boer Buizen v. Council and Commission*, [1987] ECR 3689 and judgment of 6 July 1995, in case T-572/93, *Odigitria v. Council and Commission*, [1995] ECR II-2045.

<sup>16</sup> Opinion of Advocate-General Darmon, *Maclaine Watson*, *supra* note 15, [1990] ECR I-1813, para. 95.

<sup>17</sup> Opinion 1/75 of 11 November 1975, *Understanding on a Local Cost Standard*, [1975] ECR 1355.

<sup>18</sup> Opinion of Advocate-General Darmon, *Maclaine Watson*, *supra* note 15, [1990] ECR I-1813–1815, para. 97, 101–107.

<sup>19</sup> A pure agreement is an agreement solely based on Community competences (see also Macleod, Henry and Hyett, *supra* note 12, at 142–144).

<sup>20</sup> A mixed agreement is an agreement based on Community and Member State competences (see also Macleod, Henry and Hyett, *supra* note 12, at 142–144). In this context agreements to which the Member States are parties because of mere political considerations are left aside.

## A Pure Community Agreements

The question of whether a pure Community agreement<sup>21</sup> forms part of Community law was first faced by the Court in the case of *Kupferberg*,<sup>22</sup> which concerned the Free Trade Agreement between the Community and Portugal.

Addressing the issue of whether it had jurisdiction to give a preliminary ruling, the Court firstly recalled the Community's competence to enter such agreements:

The Treaty ... has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-Member countries and international organisations.<sup>23</sup>

The Court then examined the status of such agreements, finding that in accordance with Article 228(2) (today Article 300(7))<sup>24</sup> of the Treaty they 'are binding on the institutions of the Community and on Member-States,'<sup>25</sup> and therefore must be complied with.<sup>26</sup>

The Court stressed that:

In ensuring the respect for commitments arising from an agreement concluded by the Community institutions the Member-States fulfil an obligation not only in relation to the non-Member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court ... stated in its judgement in [the] *Haegeman* case, form an integral part of the Community legal system.<sup>27</sup>

Thus, as a product of the exercise of the Community's sole and exclusive competence, a pure Community agreement forms an integral part of the Community's legal system. It follows that a breach of such an agreement fulfils the basic condition for Member State liability.

## B Mixed Agreements

The issue of whether a mixed agreement may be regarded as Community law arose in the *Haegeman* case,<sup>28</sup> where the Court was asked to give a preliminary ruling on the provisions of the Association Agreement between the European Community and Greece. Reading Article 228 with Article 238 (today Articles 300 and 310) of the Treaty, the Court noted that it is for the Council to conclude international agreements. This, coupled with the Court's power to review the acts of the institutions of the Community under Article 177(1)(b) (today article 239(1)(b)), led it to hold that:

the provisions of the Agreement, from the coming into force thereof, form an integral part of

<sup>21</sup> Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals — A Critique', 3 *EJIL* (1992) 76.

<sup>22</sup> Judgment of 26 November 1982, in case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3659.

<sup>23</sup> *Ibid*, at para.11.

<sup>24</sup> With the Treaty of Maastricht, Article 228(7).

<sup>25</sup> *Kupferberg*, *supra* note 22, [1982] ECR 3662, para.11.

<sup>26</sup> *Ibid*, at para.11.

<sup>27</sup> *Ibid*, at para.12.

<sup>28</sup> *Haegeman*, *supra* note 8, [1974] ECR 447.

Community law. Within the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of the Agreement.<sup>29</sup>

In drawing this conclusion, it is important to note that the provisions which the Court was asked to rule upon were clearly concerned with Community matters for which the Court's jurisdiction was not open to question. The Agreement did, however, contain other provisions based on competences of Member States. Significantly, the Court ignored this fact and ruled that the provisions of the Agreement as a whole formed part of Community law. In doing so, it did not clarify whether its claim to jurisdiction on the basis of Article 234(1)(b) included those parts of the agreement based on the competence of Member States.

Ten years later, the Court was faced with a similar issue in the case of *Demirel*.<sup>30</sup> In this case, both the German and British governments denied that the Court was competent to interpret the provisions of an Association Agreement between the European Community and Turkey, and particularly, its Protocol concerning the free movement of workers. The arguments used by both governments are summarized by the Court as follows:

[T]he German Government and the United Kingdom take the view that in the case of 'mixed' agreements such as the Agreement and the Protocol at issue here, the Court's interpretative jurisdiction does not extend to provisions where Member-States have entered into commitments with regard to Turkey in the exercise of their own powers which is the case with the provisions on freedom of movement of workers.<sup>31</sup>

These arguments may be viewed as declaring that the Court should not extend its interpretative jurisdiction to provisions not forming part of Community law. However, the Court rejects the Member States' arguments as not pertinent in this case.<sup>32</sup>

Recalling the purpose of association agreements to create 'special, privileged links with a non-Member country', which 'must, at least to a certain extent' allow the associated country to take part in the Community system, the Court concluded that Article 238 (today Article 310) must necessarily empower the Community to 'guarantee commitments towards non-Member countries in all the fields covered by the Treaty'. As the free movement of workers is a field covered by the Treaty,<sup>33</sup> the Court concluded that it therefore had jurisdiction.

That the special nature of association agreements coupled with Article 310 of the Treaty gives the Community competence to conclude association agreements has also

<sup>29</sup> *Ibid*, paras 5 and 6.

<sup>30</sup> Judgment of 30 September 1987, in case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

<sup>31</sup> *Ibid*, at para. 8.

<sup>32</sup> *Ibid*, at para. 9.

<sup>33</sup> Articles 39 *et seq.*

been noted by Vedder.<sup>34</sup> However, this says little about whether such competence is exclusive or shared. According to Nolte<sup>35</sup> and Neuwahl,<sup>36</sup> the competence to enter into association agreements is concurrent.

The Court's acceptance of jurisdiction over matters where there may be shared competence in the above two cases calls into question the classical approach to competences adopted by the Court in the *ERTA* case.<sup>37</sup>

The classical approach states that if there is relevant Community competence, it is necessarily exclusive. To this extent, Community and Member State competences can be divided by a 'vertical' line, which may be moved in order to enlarge the exclusive competences of the Community. Under this characterization, potential implied Community powers are irrelevant to the position of the line, unless they can be associated with the actual exercise of internal competences, in which case potential implied powers become areas of actual exclusive competence, thereby moving the line.

In a new approach to Community competence, the Treaty, which defines Community competences in external relations, must be assessed in its full potentiality.<sup>38</sup> According to the *ERTA* logic, the exercise of an internal competence defines the limits of an external exclusive competence in the same field. This makes it possible to argue that Community competence may already exist in a particular external field even before the internal competence has been exercised.<sup>39</sup> Member States may continue to exercise their external competence in that particular field claimed by the Community, provided they respect the exercise of the external Community competence.<sup>40</sup> To this extent, a 'horizontal' line may replace the 'vertical' line in order to indicate that non-exclusive Community competences may run side by side with those of the Member States.

<sup>34</sup> Vedder, 'Ausländerrecht für türkische Arbeitnehmer — Die Demirel-Entscheidung des EuGH, das Bundesverfassungsgericht und die Folge', 1 (1988) *Europarecht* 54.

<sup>35</sup> Nolte, 'Freizügigkeit nach dem Assoziationsvertrag EWG-Türkei: Auslegungskompetenz, unmittelbare Anwendbarkeit und Familiennachzug', (1987) *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 760.

<sup>36</sup> Neuwahl, 'Freedom of Movement for Workers under the EEC-Treaty Association Agreement', (1988) *ELR* 360.

<sup>37</sup> Judgment of 31 March 1971, in case 22/70, *Commission v. Council*, [1971] ECR 263.

<sup>38</sup> Cf. also *ibid.*, at para. 15: 'To determine ... the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.'

<sup>39</sup> Even in cases where the Treaty expressly provides that the existence of Community competence does not prejudice the competence of the Member States to conclude agreements, Community competence exists from the beginning (see Macleod, Henry and Hyett, *supra* note 12, at 64). E.g., Article 181 of the Treaty ('Development co-operation').

<sup>40</sup> Cf. Simon, *supra* note 3, at 86, para. 74: '[I] semble que la Cour exige l'exercice préalable de la compétence interne, non pas pour reconnaître à la Communauté un titre de compétence externe, mais seulement pour que puissent être établis l'exclusivité de cette compétence et le dessaisissement corrélatif des Etats membres.'

Contributing to this new approach, Neuwahl does not categorically rule out that the Court's statements could be read as meaning the Community has exclusive competence in this field.<sup>41</sup> This position is in some way also supported by Weiler.<sup>42</sup> He points to the fact that the Court in the *Demirel* case, in summarizing the arguments of the opposing governments, speaks of 'the Member-States [entering] into commitments ... in the exercise of their own power which is the case of the provisions on freedom of movement for workers'. However, it nevertheless rejects the contention that the Agreement lies outside Community competence, declaring 'that is precisely not the case in this instance'.<sup>43</sup> According to Weiler, this reasoning is 'subtle but significant'.<sup>44</sup> It allows the Court not only to refuse the absence of Community powers in this area, but also to deny the possibility that this is an area of concurrent competence.<sup>45</sup> In establishing its jurisdiction, the Court 'did not only assert the existence of Community competence in this area, but also actual exercise of such competence by the Community rather than by the Member-States'.<sup>46</sup>

Although Weiler's argument leads to the conclusion that the Member States are excluded from the field in question, it is striking that he avoids speaking of exclusivity. He formulates the exclusion of the Member States in a very prudent way, which is in no sense inferior to the 'subtlety' of the Court's formulation on which he bases his argument. One is left to wonder, however, whether Weiler's view in fact reflects the notion that Community competence in all fields which can be the object of an association agreement must necessarily and categorically be exclusive.

The *Demirel* case is interesting because it raises the possibility of approaching the definition of relevant Community competences in two different ways. The approach chosen by the Court was the broader one, whereby the internal objectives of the Treaty are used to justify Community competence over external affairs in areas normally subject to Member State competence. This creates significantly greater scope for a 'mixed' agreement to be characterized as being part of Community law, whereas the classical approach narrows this scope.

The problem of whether the Court has jurisdiction over provisions of a 'mixed' agreement concluded by the Community and Member States was recently raised in the *Hermès* case,<sup>47</sup> where the Court was asked to interpret Article 50 of the TRIPs Agreement, which requires judicial authorities of contracting parties to authorize 'provisional measures' to protect the interests of proprietors of trademark rights.

Recalling the Court's reasoning in Opinion 1/94<sup>48</sup> declaring that the competence to conclude the TRIPs Agreement was shared between the Community and Member

<sup>41</sup> Neuwahl, *supra* note 36, at 365.

<sup>42</sup> Weiler, *supra* note 21, at 75.

<sup>43</sup> *Demirel*, *supra* note 30, [1987] ECR 3751, para. 9.

<sup>44</sup> Weiler, *supra* note 21, at 75.

<sup>45</sup> *Ibid.*, at 75.

<sup>46</sup> *Ibid.*, at 76.

<sup>47</sup> Opinion of Advocate-General Tesouro of 13 November 1996, in case 53/96, *Hermès v. FHT*, [1998] ECR I-3610, para. 8.

<sup>48</sup> Opinion 1/94, of 15 November 1994, *WTO: GATS and TRIPs*, [1994] ECR I-5267.



States, Advocate-General Tesauro noted that the Community had not as yet exercised its powers in the field on provisional measures internally, except in Regulation No. 3842/86, which laid down measures to prohibit the release for free circulation of counterfeit goods.<sup>49</sup> The competence to conclude for Article 50 therefore remains vested in the Member States. However, he adds that an exclusive competence of the Community to conclude the agreement as a whole is potentially possible.<sup>50</sup>

The Court itself introduces the question of its jurisdiction by mentioning the governments of The Netherlands, France and the United Kingdom, which negate on the same grounds as those put forward by the Advocate General, the existence of any relevant Community competence in the field of provisional measures.<sup>51</sup> However, it decides in favour of the existence of its jurisdiction.

It is apparent that the Court made this finding on the strength of two facts. First, the absence of any express allocation of obligations between the Member States and the Community when concluding and ratifying the WTO Agreement;<sup>52</sup> and secondly, the existence of Community Regulation 40/94 on the safeguarding of trademarks through 'provisional, including protective measures'.<sup>53</sup>

Interestingly, the Court did not *expressly* rely on the Regulation as a means of showing that the Community had in fact exercised its competence in this field, thereby giving the Court its jurisdiction.<sup>54</sup> The Regulation was instead used as the instrument linking national determinations of 'provisional' measures under national laws, as required by Article 50, with those required under the Regulation, which also implemented Article 50, and therefore also had to be interpreted according to the provision. In this regard, the Court found that:

it is clearly in the Community interest that, in order to forestall future differences of interpretation, [Article 50] should be interpreted uniformly, whatever the circumstances in which it applies.<sup>55</sup>

Thus, it may be argued that the need to secure uniformity in interpretation of a 'mixed' agreement was held by the Court to give it jurisdiction in the present circumstances. However, because of the ambiguity inherent in the way the Court develops its judgment one may nevertheless wonder whether it bases its jurisdiction on a Community competence already underlying Article 50. In this light, the *Hermès* case provides little clear guidance on when a 'mixed' agreement will 'form an integral part of Community law'.<sup>56</sup>

<sup>49</sup> Opinion of Advocate-General Tesauro, *Hermès*, *supra* note 47, [1998] ECR I-3612, para. 11.

<sup>50</sup> Opinion of Advocate-General Tesauro, *Hermès*, *supra* note 47, [1998] ECR I-3613, para. 11 and 12.

<sup>51</sup> Judgment of 16 June 1998, in case 53/96, *Hermès v. FHT*, [1998] ECR I-3646, paras 22 and 23.

<sup>52</sup> *Ibid*, at para. 24.

<sup>53</sup> *Ibid*, at para. 27.

<sup>54</sup> But cf., *ibid*, at para. 21: the Court here *prima facie* seems to oppose the mere existence of Article 99 of the Regulation to the arguments of the governments.

<sup>55</sup> *Hermès v. FHT*, *supra* note 51, [1998] ECR I-3648, para. 32.

<sup>56</sup> Cf. *Haegeman*, *supra* note 8, [1974] ECR 460, para. 5.

## 4 The Other Conditions

As a next step, it is necessary to analyse the additional conditions that may apply when transposing Member State liability into the context of external relations arising out of the Court's liability jurisprudence.

However, before turning to this analysis, it is important to note the rationale underlying the conditions for Member State liability as outlined by the Court. In this regard, the Court's reasoning is informed by Article 288 of the Treaty, which sets out the conditions needing to be satisfied in order to hold the Community liable for breaches of Community law. The Court states vigorously:

the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.<sup>57</sup>

The reason for the Court's choice of approach, known as the doctrine<sup>58</sup> of '*Strukturelle Kongruenz*' or '*parallélisme nécessaire*', is explained by Advocate-General Mischo in the *Francovich* case: engagement of Member State liability is to be avoided where it would be impossible to engage the Community's liability.<sup>59</sup> This parallelism reflects the Court's efforts to develop an overall coherent Community law liability regime, a point that must guide our analysis.

### A The Intention to Confer Rights on Individuals

The first condition, expressly imposed by the Court, is that 'the rule of law infringed must be intended to confer rights on individuals'.<sup>60</sup> The question necessarily follows: Under what conditions is an agreement or parts of it 'intended to confer rights on individuals'?

To answer this question, one must be aware of the function of the condition. In his opinion on the *Dillenkofer* case, Advocate-General Tesauro explained that such condition 'is concerned with *identifying the legal position of the individuals*, the infringement of which may give rise to compensation'.<sup>61</sup>

The existing jurisprudence dealing with provisions having 'direct effect' illustrates that such provisions are obviously intended to confer rights on individuals.<sup>62</sup> In other

<sup>57</sup> *Brasserie du Pêcheur and Factortame III*, *supra* note 13, [1996] ECR I-1147, para. 42.

<sup>58</sup> Simon, 'La responsabilité de l'Etat saisie par le droit communautaire', [1996] *AJDA* 495.

<sup>59</sup> Opinion of Advocate-General Mischo, *Francovich*, *supra* note 5, [1991] ECR I-5395, para. 71.

<sup>60</sup> E.g. *Brasserie du Pêcheur and Factortame III*, *supra* note 13, [1996] ECR I-1149, para. 51.

<sup>61</sup> Opinion of Advocate-General Tesauro of 28 November 1995, in joined cases 178, 179/94 and 188–190/94, *Dillenkofer and Others v. Germany*, [1996] ECR I-4855, para. 11; emphasis added. Compare also Simon, *supra* note 7, at 238.

<sup>62</sup> *Brasserie du Pêcheur and Factortame III*, *supra* note 13, [1996] ECR I-1150, para. 54, concerning Articles 30 and 52 (today Articles 28 and 43) of the Treaty; judgment of 23 May 1995, in case 5/94, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, [1996] ECR I-2613, para. 27, concerning Article 34 (today Article 29) of the Treaty.

words, the very notion of 'direct effect' means that such provisions confer rights on individuals. As far as international agreements are concerned, it follows that if a provision is found to have 'direct effect', it can be concluded that it is also intended to confer rights on individuals.

But what if the provisions of an agreement lack 'direct effect'? In the *Francovich* case the Court dealt with a directive whose provisions did not have 'direct effect'. However, it nevertheless implicitly accepted that this first condition was fulfilled, because:

The result required by that Directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims.<sup>63</sup>

Thus, in finding that the particular law in question could be relied upon by individuals, the decisive element for the Court was the Directive's objective to compel Member States into establishing 'a right to a guarantee of payment of their unpaid wage claims'<sup>64</sup> to individuals.<sup>65</sup> Given this finding, can it be argued that the same rationale could apply *mutatis mutandis* to provisions of an international agreement lacking 'direct effect'? Certainly, if the same conditions giving rise to Member State liability for breaches of a directive in the *Francovich* case arose in relation to an international agreement, such a position may indeed be legitimate. However, what exactly are these conditions?

First of all, the objective of the international agreement must compel the contracting parties to adopt legislative measures granting rights to individuals. If the agreement does not have that objective, then it is clear from the outset that the condition under discussion here could not be fulfilled.

The second element to be considered stems from the nature of directives, which, being addressed to Member States,<sup>66</sup> clearly compel them to implement specific objectives and requirements. International agreements which, either in their entirety or in certain respects, form an integral part of Community law, would possess such a nature only when they require Member States to give effect to Community sections<sup>67</sup> of the agreement through domestic implementation. In this regard, the *Kupferberg* and *Demirel* cases reveal that 'according to the state of Community law', the adoption of a 'measure needed'<sup>68</sup> to implement an international agreement may be left to Member States. Indeed by implementing international agreements Member States would only be acting in accordance with Article 300(7) of the Treaty and would 'fulfil an

<sup>63</sup> *Francovich*, *supra* note 1, [1991] ECR I-5416, para. 44.

<sup>64</sup> *Ibid.*

<sup>65</sup> Cf. also Pardon and Dalcq, 'La responsabilité des Etats membres envers les particuliers en cas de manquements au droit communautaire', [1996] *JTDE* 196.

<sup>66</sup> T. C. Hartley, *The Foundations of European Community law* (1994), at 210; Simon, *supra* note 3, at 204, para. 216.

<sup>67</sup> It must be remembered that if it is a pure agreement, this will comprise the agreement as a whole; if it is a mixed agreement this will comprise those parts, which are (also) covered by Community competence; however, their extent will vary according to the importance given to the potentially exclusive competences of the Community.

<sup>68</sup> Cf. *Kupferberg*, *supra* note 22, [1982] ECR 3662, para. 12 and *Demirel*, *supra* note 30, [1987] ECR 3751, para. 10.

obligation ... in relation to the Community which has assumed responsibility for the due performance of the agreement'.<sup>69</sup> In this light, the situation of Member States in relation to their implementation of international agreements with provisions which do not have 'direct effect' is essentially the same as that which compels them to implement directives 'intended to confer rights on individuals' — namely, they are under an obligation to adopt legislative measures granting those rights, precisely as a result of the Community nature of the law.

It can thus be concluded that the first condition for Member State liability to exist in the context of international agreements, namely, that an agreement be 'intended to confer rights on individuals' may be fulfilled whether 'direct effect' exists or not. In the case that an international agreement has 'direct effect', it is clear that this condition is satisfied by definition. However, where an agreement does not have 'direct effect' the condition will only be fulfilled whenever the provisions in question place Member States in a situation of having to implement Community law in a manner equivalent to that required in relation to Member States' implementation of directives.

### **B *The Sufficiently Serious Breach***

The second condition required to show Member State liability is that the breach complained of 'must be sufficiently serious'.<sup>70</sup> In determining the relevant degree of seriousness needed to trigger Member State liability, the Court has been informed by the extent to which Community law leaves the means of its implementation to the discretion of Member States.<sup>71</sup> The idea is that the wider the discretion left to Member States, the more serious must be the breach. Member States will have a wide discretion if Community law leaves them legislative choices.<sup>72</sup> In this event, a breach of Community law will only be sufficiently serious if 'a Member State has manifestly and gravely disregarded the limits on its discretion'<sup>73</sup> or, 'the limits on the exercise of its powers'.<sup>74</sup> In contrast, when no legislative choice is left to the Member States, 'the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach'.<sup>75</sup>

On the basis of these rules, an international agreement can also be considered as giving a wide discretion to Member States whenever it leaves legislative choices as to

<sup>69</sup> *Kupferberg*, *supra* note 22, [1982] ECR 3662, para. 13.

<sup>70</sup> Cf. *Brasserie du Pêcheur* and *Factortame III*, *supra* note 13, [1996] ECR I-1149, para. 51 and *Hedley Lomas*, *supra* note 62, [1996] ECR I-2613, para. 25; see also judgment of 26 March 1996, in case 392/93, *R. v. H. M. Treasury ex parte British Telecommunications*, [1996] ECR I-1668, para. 39; judgment of 8 October 1996, in joined cases 178, 179/94 and 188–190/94, *Dillenkofer and Others v. Germany*, [1996] ECR I-4879, para. 21; judgment of 17 October 1996, in joined cases 283/94, 291 and 292/94, *Denkavit International and Others v. Bundesamt für Finanzen*, [1996] ECR I-5101, para. 48.

<sup>71</sup> Cf. Opinion of Advocate-General Léger, *Hedley Lomas*, *supra* note 7, [1996] ECR I-2593, para. 169.

<sup>72</sup> *E contrario Hedley Lomas*, *supra* note 62, [1996] ECR I-2613, para. 28; *British Telecommunications*, *supra* note 70, [1996] ECR I-1668, para. 43.

<sup>73</sup> *Brasserie du Pêcheur* and *Factortame III*, *supra* note 13, [1996] ECR I-1150, para. 55.

<sup>74</sup> E.g. *Brasserie du Pêcheur* and *Factortame III*, *supra* note 13, [1996] ECR I-1148, para. 45 and *British Telecommunications*, *supra* note 70, [1996] ECR I-1668, para. 43.

<sup>75</sup> *Hedley Lomas*, *supra* note 62, [1996] ECR I-2613, para. 28.

its implementation. This is the case when an agreement lacks 'direct effect', but is nevertheless intended to confer rights on individuals. In such cases, there may be a legislative choice concerning the means of achieving this objective. As described above, the Member States may be involved in implementation of the Community parts<sup>76</sup> of such an agreement. They may find themselves in a situation comparable to the transposition of a directive.

In the *British Telecommunications* and the *Denkavit* cases the Court analysed the alleged incorrect transposition of a directive by a Member State. In both cases, however, the Court concluded that the limits of discretion which the Member States clearly enjoyed were not 'manifestly and gravely disregarded'.<sup>77</sup> In this light, it is possible to imagine that a Member State could also implement an international agreement, providing a wide discretion, in a manner inconsistent with its requirements. Following the Court's jurisprudence, it is likely that in such a case the Court would have to assess the extent of the Member State's discretion and check whether its limits were 'manifestly and gravely disregarded'.

Conversely, an international agreement may also leave little discretion, or indeed no discretion at all, when no or few legislative choices are given. This could be the case, for example, in relation to Community parts of an agreement 'intended to confer rights on individuals' where no legislative intervention is warranted. In other words, if they have 'direct effect'.<sup>78</sup> Applying the jurisprudence of the Court to such cases would result in a situation whereby 'a mere infringement'<sup>79</sup> of such parts by a Member State 'may be sufficient to establish the existence of a sufficiently serious breach'.<sup>80</sup>

However, in this context, it is important to note the joined cases of *Brasserie du Pêcheur* and *Factortame III*. Although the Court considered that Articles 30 and 52 (today Articles 28 and 43) of the Treaty, provisions undoubtedly having 'direct effect', were breached in these cases, it nevertheless investigated whether the Member States had manifestly and gravely disregarded the limits of their discretion.<sup>81</sup> Does this call into question what has been said before? In this context, the Court's finding that Member States involved held a wide discretion, notwithstanding the 'direct effect' of the particular provisions being examined, can be criticized.<sup>82</sup> The rules laid down in Articles 28 and 43 of the Treaty, namely the prohibition to discriminate on grounds of nationality, are clearly mandatory. The only basis upon which they may be inapplicable is through a reservation as to specific justifications. Thus, in the absence of a justification, the rules apply in full. The Court was thus incorrect in speaking of an actual legislative discretion left to the Member States.

<sup>76</sup> See *supra* note 67.

<sup>77</sup> *British Telecommunications*, *supra* note 70, [1996] ECR I-1669, para. 45 and *Denkavit*, *supra* note 70, [1996] ECR I-5102, para. 53.

<sup>78</sup> Rigaux, 'Chronique 5. — L'arrêt «Brasserie du pêcheur — Factortame III»: Le roi peut mal faire en droit communautaire', *Europe*, mai 1996, at 6.

<sup>79</sup> E.g. when the Member State takes an administrative decision based on the agreement or refuses to do so.

<sup>80</sup> *Hedley Lomas*, *supra* note 62, [1996] ECR I-2613, para. 28.

<sup>81</sup> *Brasserie du Pêcheur* and *Factortame III*, *supra* note 13, [1996] ECR I-1151, paras 59 and 61.

<sup>82</sup> Rigaux, *supra* note 78, at 6.

In relation to the Court's jurisprudence on what amounts to a 'sufficiently serious breach' for the purposes of finding Member State liability for breaches of directives, there is another type of case to consider. The Court stated in the *Dillenkofer* case that the non-transposition of a directive, which has the objective of granting to individuals rights 'whose contents are identifiable',<sup>83</sup> by a Member State 'constitutes *per se* a serious breach of Community law'.<sup>84</sup> This can be explained by the fact that Member States are obliged to transpose directives. It is only in relation to the possible means open to achieving the result required by the directive that Member States enjoy discretion.

Applying the same reasoning to international agreements, it can be argued that Member States, in being obligated to implement Community parts of an agreement in accordance with Article 300(7) of the Treaty, equally enjoy no discretion with regard to their duty to act. Thus, if the contents of the rights which the international agreement is intended to grant are also identifiable, it seems reasonable to transpose the Court's reasoning to find a sufficiently serious breach.

### C *The Causal Link*

A further condition required by the Court is 'the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties'.<sup>85</sup>

The requirement of a direct causal link is a classical condition in liability regimes. It is therefore not surprising to find it in Community law. This condition would definitely have to be fulfilled for a Member State to be held liable for the breach of an agreement that forms an integral part of Community law. According to the Court,<sup>86</sup> the causality must be determined by the national courts. However, in setting down the requirement of direct causality, the Court defines here a minimal framework which national judges must respect.<sup>87</sup>

The same reasoning applies to the determination of the damage sustained by the individual and all the procedural requirements. In this regard, the Court has held that they 'must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation'.<sup>88</sup>

The approach of defining in relation to these matters only the most basic requirements while leaving the rest to the national judges is also likely to be adopted by the Court in the event of a breach of an international agreement by a Member State.

<sup>83</sup> *Dillenkofer*, *supra* note 70, [1996] ECR I-4880, para. 29.

<sup>84</sup> *Ibid.*, at para. 29.

<sup>85</sup> E.g. *Francovich*, *supra* note 1, [1991] ECR I-5415, para. 40.

<sup>86</sup> *Hedley Lomas*, *supra* note 62, [1996] ECR I-2614, para. 30.

<sup>87</sup> *Pardon and Dalcq*, *supra* note 65, p. 200 and *Simon*, *supra* note 58, at 499.

<sup>88</sup> E.g. *Francovich*, *supra* note 1, [1991] ECR I-5416, para. 43.

## D *Conditions Sui Generis?*

The question arises whether there may exist certain special conditions to prove Member State liability for a breach of an international agreement. As the Court applies the principle of 'parallelism' between Member State liability and liability of the Community in developing the conditions for Member State liability, one may wonder whether one condition might be that Member State liability may only be found in situations in which liability of the Community (Article 235 in conjunction with Article 288(2) of the Treaty) is not *a priori* excluded. In order to assess the validity of this position, it is necessary to examine the potential for Member States to be held liable in situations where Community liability would be excluded.

In this context, the *IDA* case<sup>89</sup> points to an interesting set of problems. The Court established in this case that Germany had not been complying with the International Dairy Arrangement (IDA), an agreement under GATT concluded by the Community. According to Advocate-General Tesauro, the German measures at issue in this case were contrary to the IDA, but consistent with secondary Community law. However, in this case, it was the Community law itself that was already in breach of the IDA.<sup>90</sup> He recalled that GATT rules could not be relied on to challenge the validity of Community legislation, leaving therefore 'a broad discretion [to the Community institutions] as regards the content and effects of obligations entered into in that regard'. Nevertheless, he concluded:

that such an approach cannot go so far as to entail that a Member State can be censured for having complied with the Regulation and not with the IDA. Indeed, it cannot be accepted that such a discrepancy between Community legislation and the IDA is of no significance.<sup>91</sup>

However, the Court came to a different conclusion. It found that the German authorities were obliged to interpret the regulation in conformity with the Agreement and, as they had failed to do so, Germany had not fulfilled its obligations under the Treaty.<sup>92</sup>

Inspired by this case, one could imagine a situation in which a Member State takes measures which do not comply with an agreement binding on the Community.<sup>93</sup> This may basically engage Member State liability. However, these measures could be compliant with a normative act of secondary Community law, e.g. a regulation, itself contrary to the agreement. If that agreement lacked direct effect, which the Court has

<sup>89</sup> Judgment of 10 September 1996, in case 61/94, *Commission v. Germany*, [1996] ECR I-4006; see Govaere, 'The Reception of the WTO Agreement in the European Union: The Legacy of GATT', in P. Demaret, J.-F. Bellis and G. Garcia Jimenez, *Regionalism and Multilateralism after the Uruguay Round* (1997) 713.

<sup>90</sup> Opinion of Advocate-General Tesauro of 7 May 1996, in case 61/94, *Commission v. Germany*, [1996] ECR I-4001, para. 19.

<sup>91</sup> *Ibid.*, at para. 24.

<sup>92</sup> *Commission v. Germany*, *supra* note 90, [1996] ECR I-4020, para. 52.

<sup>93</sup> Cf. judgment of 12 December 1972, in joined cases 21–24/72, *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1226, para. 7.

stated is categorically the case with the GATT,<sup>94</sup> so that an individual cannot rely on it in order to invalidate secondary Community law, the liability of the Community itself may be put into question.<sup>95</sup>

As noted, the principle of Member State liability is based on the primacy of Community law, and not on the requirement that Community law have a ‘direct effect’. But what about the liability of the Community, does it depend on ‘direct effect’? If it does depend on the ‘direct effect’ doctrine, does it necessarily follow from the ‘*parallélisme nécessaire*’, i.e. the congruency between Member State liability and that of the Community, that the existence of Member State liability for a breach of an international agreement should also rely on that agreement’s potential to have a ‘direct effect’?

The Community’s liability for measures taken in the field of economic policy has been described by the Court in the following manner:

the Community does not incur non-contractual liability for damages suffered by individuals as a consequence of that action. ... unless a sufficiently flagrant violation of a *superior rule of law for the protection of the individual* has occurred.<sup>96</sup>

In the *Odigitria v. Council* case, the Court of First Instance accepted this condition as also being relevant to determining Community liability in the field of external relations.<sup>97</sup> The question thus arises whether this condition tying Community liability to a violation of ‘a superior rule for the protection of individuals’ requires that that rule has ‘direct effect’.

Some insight into this question may be found in the *Bayerische HNL* case. According to Advocate-General Capotorti, a rule ‘for the protection of the individual must necessarily be one “conferring rights” as is the case for the prohibition on

<sup>94</sup> *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, *supra* note 93, [1972] ECR 1228, para. 27. However, if the Community intends to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, the individual can rely on them (judgment of 22 June 1989, in case 70/87, *Fediol v. Commission*, [1989] ECR 1830 and 1831, paras 19–22; judgment of 7 May 1991, in case 69/89, *Nakajima v. Council*, [1991] ECR I-2178, paras 29–31).

<sup>95</sup> However, in such a case the individual who has suffered the damage may not directly turn towards the Community who might bear some responsibility (cf. Schockweiler, ‘La responsabilité de l’autorité nationale en cas de violation du droit communautaire’, [1992] *RTDE* 29–35). Article 288 of the Treaty is subsidiary to national remedies.

<sup>96</sup> Judgment of 2 December 1971, in case 5/71, *Zuckerfabrik Schöppenstedt*, [1971] ECR 985, para. 11; emphasis added. See also judgment of 13 November 1973, in joined cases 63 to 69/72, *Werhahn v. Council*, [1973] ECR 1248, para. 10; judgment of 14 May 1975, in case 74/74, *CNTA v. Commission*, [1975] ECR 546, para. 16; judgment of 8 June 1977, in case 97/76, *Merkur v. Commission*, [1977] ECR 1076 and 1080, paras 2 and 11; judgment of 4 October 1979, in case 238/78, *Ireks-Arkady v. Council and Commission*, [1979] ECR 2972, para. 9; judgment of 5 December 1979, in joined cases 116 and 124/77, *Amylum v. Council and Commission*, [1979] ECR 3560, para. 13; judgment of 15 September 1982, in case 106/81, *Kind v. EEC*, [1982] ECR 2917, para. 12; judgment of 6 June 1990, in case 119/88, *Aerpo and Others v. Commission*, [1990] ECR I-2210, para. 15. Concerning the ‘*Schutznormtheorie*’ see Constantinesco, ‘Recours en indemnité’, [1973] *JDI* 537.

<sup>97</sup> *Odigitria v. Council and Commission*, *supra* note 15, [1995] ECR II-2041, para. 34.



discrimination in Article 40 of the Treaty at stake'.<sup>98</sup> This amounts indeed to 'direct effect'. The Court, however, simply holds that the prohibition on discrimination in Article 40 (today Article 34) of the Treaty is 'designed for the protection of the individual',<sup>99</sup> without specifying whether this means 'direct effect' or not.

Despite being 'smoothly' applied for some time,<sup>100</sup> the condition that Community liability be dependent on a breach of 'a superior law for the protection of the individual' was given a more stringent interpretation in the recent case of *Vreugdenhil*. The Court in this case declared that the 'the system of division of powers', argued to be a superior rule,<sup>101</sup> only has the aim of ensuring an appropriate institutional balance and not the protection of individuals.<sup>102</sup> Constantinesco explains this statement as meaning that for a breach to trigger Community liability, it is not sufficient that the infringed rule be superior. It must also grant a subjective right.<sup>103</sup> In this context, it is important to note that rights can only be subjective if the rule on which they are based has 'direct effect'.<sup>104</sup>

The *Stimming v. Commission* case<sup>105</sup> is of special interest as far as external relations are concerned because it deals with a regulation and the GATT. In this case an importer of 'prepared meat' claimed compensation for damages which he had allegedly suffered as a result of the adoption of a regulation raising the levies on such imports without requiring transitional measures. The applicant argued that the regulation infringed the GATT. However, because the applicant did not specify which GATT rules he was referring to,<sup>106</sup> the Court did not discuss the argument and dismissed the application in its entirety.<sup>107</sup> It is noteworthy that Advocate-General Mayras, in briefly taking up the applicant's claim, doubted that an individual could bring an action in the case of a regulation which infringed GATT rules.<sup>108</sup> In this regard, the Advocate-General's doubts concerned the potential of the GATT as a whole to confer such rights upon individuals — or the inability of the GATT to have 'direct effect'. Thus, according to Advocate-General Mayras, an action for damages against the Community based on infringement of an agreement will only be possible where the provisions of that agreement have 'direct effect'.

<sup>98</sup> Opinion of Advocate-General Capotorti of 1 March 1978, in joined cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL v. Commission*, [1978] ECR 1230–1232.

<sup>99</sup> Judgment of 25 May 1978, in joined cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL v. Commission*, [1978] ECR 1224, para. 5.

<sup>100</sup> Cf. Fines, 'Responsabilité extracontractuelle', *La semaine juridique* (1993) II 22093 290.

<sup>101</sup> Simon, *supra* note 3, at 407, note 1.

<sup>102</sup> Judgment of 13 March 1992, in case 282/90, *Vreugdenhil v. Commission*, [1992] ECR I-1985, para. 20.

<sup>103</sup> Constantinesco, *supra* note 96, at 406.

<sup>104</sup> Cf. F. Terré, *Introduction générale au droit* (2nd ed., 1994), at 137, para. 147: '[Les droits subjectifs sont des] prérogatives que le droit ... reconnaît à un individu ou à un groupe d'individus et dont ceux-ci peuvent se prévaloir dans leurs relations avec les autres.'

<sup>105</sup> *Stimming v. Commission*, *supra* note 15, [1978] ECR 1004.

<sup>106</sup> *Ibid.*, at para. 12.

<sup>107</sup> *Ibid.*, at para. 15.

<sup>108</sup> Opinion of Advocate-General Mayras of 14.03.1978, in case 90/77, *Stimming v. Commission*, [1978] ECR 1016.

Maresceau<sup>109</sup> argues that the ‘principles common to the laws of the Member States’ must be taken into consideration when determining the conditions for liability. As the Member States are likely to accept state liability in their internal legal order only in the case that an international agreement has ‘direct effect’, the Court should, in accordance with Article 215(2) (today Article 288(2)) of the Treaty, declare it as a condition for the existence of Member State liability. (The author here assumes that the liability condition of ‘direct effect’ is a ‘common principle’ within the meaning of Article 288(2).)

Gilsdorf and Oliver<sup>110</sup> state that a breach of an international agreement may attract Community liability only if the relevant provisions have ‘direct effect’, a position which must be determined according to general rules. In this regard, the authors point to the *conditio sine qua non* for the existence of any link between individuals and an agreement concluded by a state — the need for an agreement to be self-executing.<sup>111</sup> Applying this classical view, they argue that in order for the Community to be held liable, an individual can only rely on provisions of an agreement if they have ‘direct effect’.

Thus despite there being no definitive answer to the question of whether Community liability for breaches of international agreements will arise only in cases where an agreement can be shown to have a ‘direct effect’, the weight of the Court’s jurisprudence and academic writing on the matter appears to support this contention.

If one accepts that Community liability for a breach of an international agreement can be triggered when the provisions in question have a ‘direct effect’, which must be denied is the case with the GATT, it is possible to envisage a situation where Member State liability arises when Community liability cannot.<sup>112</sup> In other words, whenever an agreement or its provisions lack ‘direct effect’, Member States may be found liable for a breach of its provisions as Member State liability is independent of the ‘direct effect’. However, relying on the existence of ‘direct effect’, such a case could not trigger Community liability — a result that clearly interrupts the principle of *‘parallélisme nécessaire’*.<sup>113</sup>

This discrepancy may be approached in one of two ways, either narrowly or broadly upholding the principle of *‘parallélisme nécessaire’*. A strict application of *‘parallélisme nécessaire’* would require positing a condition *sui generis* which denies a lack of Member State liability whenever, in the absence of ‘direct effect’, the Community cannot also be held liable. This means extending the condition of ‘direct effect’ to

<sup>109</sup> Maresceau, ‘The GATT in the Case-Law of the European Court of Justice’, in M. Hilf, F. G. Jakobs, E.-U. Petersmann (eds), *The European Community and GATT* (1986) 118.

<sup>110</sup> Gilsdorf and Oliver, ‘Haftung der Gemeinschaft und ihrer Bediensteten — Artikel 215’, in H. von der Groeben, J. Thiesing, C.-D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* vol. 5 (5th ed., 1997) 238, at para. 36.

<sup>111</sup> Cf. J. Rideau, ‘Observations — Droit international et droit communautaire’, [1973] *CDE* 479.

<sup>112</sup> E.g. one could imagine that an importer suffered damages due to a national measure which conflicts with an agreement under GATT but which complies with a regulation, itself contrary to that agreement.

<sup>113</sup> In the logic of this *‘parallélisme nécessaire’* cf. also judgment of 27 September 1988, in joined cases 106–120/87, *Asteris v. Greece*, [1988] ECR 5515.

Member State liability. It must be noted that this solution goes against the jurisprudence of the Court, which holds that Member State liability is independent of 'direct effect'.<sup>114</sup> Moreover, this solution would lead to a situation where there would be two categories of agreements forming an integral part of Community law: agreements whose primacy is defended because they possess 'direct effect', and those whose primacy would remain vulnerable because of a lack of 'direct effect'. The GATT would generally belong to this second category if the present jurisprudence on that agreement were maintained in the future.

The second approach requires a less strict application of the principle of '*parallélisme nécessaire*', allowing Member State liability to exist even when Community liability cannot. The advantage of this solution would be that the agreement's primacy in terms of its integral part of Community law would not be called into question. However, at least to a certain extent, the coherence of the liability regime in the Community would have to be sacrificed. Thus it is apparent that neither approach is fully capable of dealing with the discrepancy.

## 5 Conclusion

This article has attempted to show that the principle of Member State liability may be extended to the field of external relations by virtue of the fact that international agreements concluded by the Community form an integral part of Community law from the time of their entry into force.

However, Community law can only exist where the Community is competent to create it. As far as mixed agreements are concerned, much depends on the importance one is willing to give to those Community competences which are only potentially exclusive. If it is said that only those exclusive Community competences which have been actualized are relevant, necessarily fewer parts of a mixed agreement can be identified as Community law than would be the case if it were accepted that potentially exclusive Community competences must also be taken into account.

The extension of Member State liability to the field of external relations is also rendered difficult by the application of the principle of '*parallélisme nécessaire*', i.e. the need declared by the Court for congruency to exist between Community and Member State liability. A strict application of this principle would see Member State liability for a breach of an international agreement being precluded whenever that agreement lacked 'direct effect', as is the case with Community liability. A more flexible application of the principle would leave the possibility open to hold Member States liable when Community liability is precluded.

Which approach to '*parallélisme nécessaire*' the Court might choose remains an open question. One could argue that holding Member States liable in external relations could contribute to the observance by Member States of agreements concluded by the Community. This would help to avoid the Community's international liability being engaged because of a Member State action infringing such an agreement.

<sup>114</sup> *Brasserie du Pêcheur* and *Factortame III*, *supra* note 13, [1996] ECR I-1142, paras 20, 22 and 23.

Finally, it must be noted that the possibility of holding Member States liable for a breach of an international agreement may have far-reaching consequences on Member States' and the Community's relations with other contracting parties. An extension of Member State liability to remedy breaches of international agreements would give other contracting parties a forum to assess European compliance with international obligations and as such provide helpful guidance on the potential success of engaging Member States or the Community in international dispute resolution. Presumably, such transparency would rather weaken the position of the Member States and the Community in the international arena. One may thus wonder to what extent the Court might take into account considerations of this type in the process of defining its judicial policy on Member State liability in external relations.