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## Domestic Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules

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## The “Domestic” Law Effect of Rules of International Law Within the European Community System of Law and the Question Of the Self-Executing Character Of GATT Rules<sup>†</sup>

The decision of *International Fruit Company et al. v. Commission on the European Communities* forms an important contribution toward a harmonious incorporation of the Community and its legal order in the international law system. Indeed, it confirms:

- (a) that the Community *as such* is committed not only to the rules of international agreements concluded by the Community itself, but also to rules of international law which were binding on all Member States when the EEC Treaty entered into force, *viz.*, to the extent to which the national powers in the matter of the application of the latter rules have been actually transferred to the Community and this transfer has been recognized by third countries;
- (b) that the legal order of the Community in relation to international law forms an open system, in which the rules of international law to which the Community is committed are applied directly by the Court, *viz.*, to the extent to which they lend themselves for such an application.

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<sup>†</sup>This article is based on the Joint Cases 21-24/72, *International Fruit Company and others vs. Produktschap voor Groenten en Fruit*, a judgment of the European Court of Justice of 12 December 1972, 18 Recueil de la Jurisprudence (1972-8), 1219-1242.

The International Fruit Company N.V. and others disputed the lawfulness of a system of import restrictions on dessert apples from third countries applied by the Community (Regulations Nos. 459/70, 565/70, and 686/70) before a Dutch administrative tribunal (*College van Beroep voor het Bedrijfsleven*).

Besides violation of Community law, the argument had also been advanced before this tribunal that the regulations concerned were incompatible with Article XI of the GATT, an article which prohibits the introduction of quantitative restrictions and regulates the exceptions to this prohibition. In this context the following clearly formulated questions were submitted to the European Court by the *College van Beroep* by virtue of Article 177:<sup>1</sup>

1. Does "the validity" of the acts of the Community institutions in Article 177 of the EEC Treaty also cover their validity in the light of international law other than Community law?

2. If the answer to the first question is in the affirmative, are the (EEC) Regulations Nos. 459/70, 565/70, and 686/70 invalid as being incompatible with Article XI of the General Agreement on Tariffs and Trade (GATT)?

3. The question asked by the *College van Beroep* whether "validity" of Community acts in the sense of Article 177 also covers their validity in the light of international law other than Community law is frankly answered in the affirmative by the Court. The reasoning is as follows: since, in the text of this article, there is no evidence of any restriction of the jurisdiction of the Court with regard to the grounds of invalidity, the Court is obliged to inquire whether this validity may have been affected by incompatibility with a rule of international law.

There is a gap between the premise (no restriction at all of the *jurisdiction* of the Court) and the conclusion (*obliged* to inquire). The conclusion presupposes yet another premise: rules of international law as such form part of the Community system of law and consequently must be applied by the European Court. Or in the terms used by *Van Panhuys*: the application of these rules forms part of the mandate of the Court.<sup>2</sup>

The implicit recognition of this principle by the Court is the most important point from this decision, because thus the construction of a closed Community system of law is rejected and any suggestion of a dualist

<sup>1</sup>"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) . . . ."

<sup>2</sup>Relations and interactions between international and national scenes of law, Rec. des Cours 1964 (II), 1-87.

conception, according to which international and Community law are separated by watertight compartments, is disposed of.

The reasoning of the Court, which is logically not quite satisfactory, does not afford any clear indication of the arguments on which it bases its implicit recognition of this principle. It may be repeated that the mere fact of Article 177 not restricting the jurisdiction of the Court in the matter of the grounds of invalidity constitutes an insufficient foundation in this context. The point at issue is to find in Community law, or even in general international law itself, arguments from which it may appear that the application of international law as such forms part of the mandate of the Court.

The Court has always rightly *refused*, notwithstanding the text of Article 177, which does not impose any restrictions on it in this respect, to consider incompatibility with the *national* law of a Member State as a ground of invalidity of these acts, on the strength of arguments derived from the Community system of law.<sup>3</sup> In the same way the *acceptance*—gratifying as it is in itself—of incompatibility with *international* law as a ground of invalidity, calls for a clear argumentation, which should be based on more than the mere inconclusive text of Article 177.

4. The Court makes the possible invalidation of a Community act by a rule of international law dependent on two conditions:

- the community must be bound by this rule;
- in case its invalidity is invoked before a national court, the rule must further be suited to confer on private persons in the Community the right to rely upon it in law (*i.e.* it must be “self-executing”).

The rest of the decision is devoted to the question whether these conditions have been satisfied in the case of Article XI of the GATT.

*The commitment of the Community to the GATT.* The reasoning of the Court on this point consists of two parts. First of all it is established that the Member States could not and would not evade the obligations of the GATT, to which all of them were committed on the date the EEC Treaty entered into force. Next, the Court finds that the Member States, by transferring powers in the field of tariffs and trade policy to the Community, declared their intention to commit it to GATT obligations, and further that this transfer of powers has also been realized in practice within the

<sup>3</sup>*Cf.* the *Internationale Handelsgesellschaft* case, 11/70, CMLRev 1971, 250–263, CMLR 1972, 282–286.

framework of GATT and has been recognized by the other Contracting Parties. On this ground the Court holds that the Community as such, in exercising powers in the matter of the application of the GATT, is committed to the provisions of the latter.

If the conclusion had been to the effect that the Community as such was not committed to GATT obligations, this would not of course have implied that it was free to violate the rules of the GATT. Indeed, in that case Article 234<sup>4</sup> would have applied, according to which the EEC Treaty – and naturally the implementing regulations based on it – does not affect the rights of third countries and the obligations of the Member States toward them existing at the time this Treaty entered into force.<sup>5</sup> The interesting question would then have arisen as to whether private persons can rely on Article 234 before a national court, *i.e.*, the question whether Article 234 is self-executing.

*The self-executing character of GATT provisions.* The question about the self-executing character of GATT provisions has already been discussed in several national court decisions. The Advocate-General of the Court in his submissions refers to the German case law concerning Article III of the GATT, in which the self-executing character is invariably denied, and to two judgments of an opposite tenor of the Italian Court of Appeal, dated 6 July 1968 and 8 June 1972, with regard to the same article.

One cannot, as the Advocate-General does, put aside these Italian judgments solely on the ground of the fact that in Italy the provisions of the GATT have been transformed into national law. As a matter of fact, two questions have to be distinguished. The *first* concerns the way in which rules of international law penetrate into the internal system of law: may they have *domestic law effect* in their quality of rules of international law as such, or only *via* transformation into internal law, *i.e.*, may they or may they not be *directly* applied to domestic courts?

The answer to this question is very important precisely because, in case of transformation into internal law, in the internal hierarchy of law the rule which by origin is one of international law is given the rank due to the transforming measure. This results in its subordination to higher rules of internal law, such as those of the Constitution, and to later rules of internal law of equal rank, the latter on the strength of the adage *lex posterior derogat lege priori*. We have seen that the European Court has implicitly

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<sup>4</sup>"The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. . . ."

<sup>5</sup>*Cf.* Radio Tubes case, 10/61, CMLR 1962, 201.

recognized the principle that international law binding on the Community can be applied *as such* within the internal legal order of the Community (Section 3 above).

The *second* question is what rules of international law qualify for application by the court (and the administration) within the internal system of law: which of the rules are self-executing? The latter question remains relevant, even if these rules are not applied directly, but on the strength of their transformation into internal law.

The judgment of the Hamburg Finanzgericht of 29 October 1969, also cited by the Advocate-General demonstrates this. In his commentary on this judgment in *The American Journal of International Law*, Riesenfeld emphasizes "that the problem of self-executing or non-self-executing nature of treaties also arises in countries where advice and consent to ratification must be given in the form of a statute passed by the whole legislature in the ordinary course. The court held that the approbation (or ratification) law does not in itself attribute direct applicability to the treaty provisions, but that self-executing character means direct applicability of the treaty *ex proprio vigore*, in the national courts of parties."<sup>6</sup> The point is then whether a treaty is self-executing according to its content.

The case law of the most important trade partner of the Community (the United States), too, contains decisions concerning the self-executing or non-self-executing character of GATT provisions. In this country there is uncertainty on the question whether GATT provisions have domestic law effect as such, or only *via* a presidential proclamation. Anyhow, a United States court may none-the-less be confronted with the question whether a particular GATT rule is self-executing.<sup>7</sup> A Californian judgment answers this question in the affirmative with respect to Article III, a New York judgment in the negative.<sup>8</sup>

In the judgment here under discussion the European Court of Justice took the side of the German Finanzgericht and the New York Court. In the context of the spirit, the organization, and the wording of the GATT in

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<sup>6</sup>65 AJIL (1971), 549; see also the summary of the judgment, 628-629. As is known, the "statute" in question in Germany has the effect that the content of the treaty acquires the force of an internal German law.

<sup>7</sup>See JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* (1970), 106-108, and in greater detail the same author, *The GATT and US Domestic Law*, 66 MICHIGAN LAW REVIEW (1967), 280-292.

<sup>8</sup>See JACKSON (1970), 106, Note 9 for this decision as well as some others. In tariff cases the American *customs courts* tend to refer almost invariably to applicable presidential proclamations.

its totality Article XI of the GATT is not considered to be self-executing. One may assent to this conclusion, but the argumentation of the Court does raise some doubts.

Those doubts concern first of all the question as to whether the Court, considering the fact that its inquiry was confined to the text of the GATT *infra*, has not been wrong in leaving out of account a number of important arguments for and against the self-executing character of the GATT (*infra*). In the second place, the question whether the Court, considering the arguments put forward by it, ought not to also have inquired into the application of the GATT in practice, in order to give convincing power to its conclusion as to the non-self-executing character of the Agreement (*infra*).

As usual in matters of direct application of provisions of the EEC Treaty, the Court examines also, in the case of the General Agreement, its "spirit, organization, and wording." The Court considers as decisive the fact that the GATT is characterized by a great flexibility of its provisions. This flexibility concerns in particular the possible exceptions, the permitted protective measures, and the settlement of disputes; this flexibility, according to the Court, appears from Articles XIX, XXII and XXIII of the GATT.

If one takes the rules of the EEC Treaty on these points as standard, the flexibility shown in the GATT is indeed striking. But the EEC Treaty is a very high standard indeed. So high, even, that the Court deduced from the special features of Community law (Costa-ENEL Case)<sup>9</sup> that there is an *obligation* to give domestic law effect to the self-executing provisions of Community law *as such*, irrespective of the standpoint taken in the national system of law with respect to such an effect of rules of international law in general. No one will be inclined to contend that so far-reaching an effect must be given to GATT provisions.

The point at issue here is whether, considering the possibility of internal effect of rules of international law as such within the Community system of law, accepted in principle by the Court, such an effect *can* be given to GATT provisions.

In explanation of its negative answer to this question the Court adduces a number of GATT provisions concerning the settlement of disputes, from which the great flexibility of the GATT must be evident. In the opinion of

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<sup>9</sup>Case 6/64, decision of 15 July 1964, CMLR 1964, 425-456, CMLRev 1964-1965, 197-198.

the Court such flexibility has the effect that Article XI of the Agreement is not suited to confer on private persons in the Community the right to invoke it before a court of law. The example given (Articles XIX, XXII and XXIII) do not appear very convincing.

That the chance of infringement of substantive GATT provisions has been taken into account, that consultative rather than judicial procedures have been provided for, and that in cases of infringement retaliations by affected Contracting Parties are possible need not yet lead to the conclusion that these substantive provisions do not lend themselves for application by domestic courts.<sup>10</sup>

*Jackson's* manual on GATT explicitly devotes attention to the problem of the self-executing or non-self-executing character of GATT provisions. It provides the following summary pro and con, which the Court, in its examination of the spirit, the organization and the wording of the Agreement, should not have ignored. "Although many of the provisions of GATT have the wording of self-executing commitments, and although GATT was drawn from provisions of the ITO Charter that were intended to be self-executing, nevertheless, the GATT is applied only by virtue of the Protocol of Provisional Application or similar protocols of accession.

Consequently it is necessary to examine those protocols to see whether they intended a self-executing effect. An argument can be made that as applied through the protocol, GATT is not self-executing. The language of the protocol is that of commitment to apply GATT, not language of immediate application."<sup>11</sup>

If one strongly emphasizes the great flexibility of the GATT provisions, as the Court does, drawing attention expressly to the principle of negotiations "on the basis of reciprocity and mutual advantage" laid down in the preamble of the Agreement,<sup>12</sup> one really throws doubt upon the strictness of the legal obligation to act in conformity with its substantive provisions.

It is in this sense that another recent American book on GATT, by Kenneth Dam, considers the matter. This author asserts that " 'illegality' is an uncertain and ambiguous concept when applied to GATT." He bases

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<sup>10</sup>The liberalization code of the OEEC contained comparable elements. Nevertheless the president of the Hague court in the Netherlands considered the provisions of this code self-executing; see *Ned. Tijdschr. voor Int'l Recht*, 1959, 195-197.

<sup>11</sup>JACKSON (1970), 106.

<sup>12</sup>The preamble speaks of realization of the objectives "by entering into reciprocal and mutually advantageous arrangements." However, are not most treaties based on this principle?

this assertion on the fact that the provisions concerning the remedies in case of violations of GATT rules are not formulated "in terms of sanctions. Rather the organizing principle is that the General Agreement, and the GATT as a whole, is a system of reciprocal rights and obligations to be maintained in balance."<sup>13</sup>

According to this view, the remedy provisions are aimed not so much at upholding the obligations entered into, but rather at maintaining a balance in mutual advantages, as measured by these obligations. Departures from these obligations therefore have not been stamped in advance as objectionable, but have been regarded as events to be expected and to be fully reckoned with.

In this view, GATT provisions are recommendable guidelines for international policy, rather than a set of clear-cut obligations for the behaviour of the Contracting Parties; or, as *Jackson* expresses it, "norms of aspiration" rather than "norms of obligation."<sup>14</sup> If one reaches this conclusion, it can hardly be disputed that these norms do not lend themselves for application by a domestic court.

However, it is questionable whether *the text* of the General Agreement furnishes sufficient support for considering the above argumentation on the juridical character of GATT rules, applicable also to provisions, such as Article XI. Even *Dam* observes that it holds in particular for tariff concession brought about within the framework of the GATT. With respect to the obligations other than tariff concessions he is more cautious: "*To a certain extent this philosophy carries over, both in language and even more in practice, to GATT obligations other than tariff concessions.*"<sup>15</sup>

One has the impression that it is not so much "the spirit, the organization, and the wording" of the Agreement from which the weak juridical character of these GATT provisions becomes apparent, but that it is especially *the practice* of the application of these GATT provisions, which has led to a weakening of their juridical character. But the Court fails to examine this practice.

It is painful to note that, according to well-informed observers, the weakening of the juridical character of the GATT provisions here pointed out, began to manifest itself especially since the unsatisfactory GATT debates on admissibility under GATT rules of the EEC Treaty, with the

<sup>13</sup>The GATT, Law and International Economic Organization (1970), 352.

<sup>14</sup>JACKSON (1970), 761-762.

<sup>15</sup>DAM, 352, italics by this author.

attendant associations of the overseas countries, at the end of the fifties,<sup>16</sup> and that after that period the continuation and expansion of the association policy by the EEC also made a vigorous contribution to this degeneration.

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<sup>16</sup>JACKSON (1970), 759–760.