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Robert Uerpmann

International Law as an Element of European Constitutional Law:
International Supplementary Constitutions

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Abstract

This paper deals with the attitude of European constitutional law towards international treaty systems. EU law disposes of efficient means to comply with international legal standards: accession, legal succession, autonomous references (e.g. Art. 6 [2] EU), and general principles of law. The Community institutions are, however, quite reluctant to limit their scope of action and to compromise the autonomy of EU law. The ECJ has excluded automatic internal effects of WTO law. Autonomous references and the concept of general principles make the compliance with ECHR standards a matter of EU institutions alone. Even though or perhaps just because the EU is relatively young, it sticks to concepts of sovereignty which European nation states have overcome.

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Prof. Dr. Robert Uerpmann

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I. A CONSTITUTIONAL QUESTION: THE EXPOSURE OF A LEGAL ORDER TO INTERNATIONAL LAW*

An international supplementary constitution is an international treaty system that acts alongside the constitutional order of a community. Christian Tomuschat coined the phrase with regard to German constitutional law in 1977 when he presented a paper to the Association of German Constitutional Law Teachers.¹ There he described the international instruments for the protection of human rights as the main example of supplementary constitutions of the Federal Republic of Germany. In a later article he applied the concept even exclusively to codifications of human rights.² Ernst-Ulrich Petersmann took up the concept in 1989 in order to describe the function of GATT.³ Both Tomuschat and Petersmann employed the German term “völkerrechtliche Nebenverfassungen”. This is best translated as “international supplementary constitutions”.

International supplementary constitutions can fulfil various functions. Sometimes national constitutional law contains gaps, which are closed by reverting to international law. This is especially the case in areas of basic and human rights. Thus the European Convention on the Protection of Human Rights (ECHR) has taken on a gap-filling role in several European countries. For example, the Convention compensates in different ways for deficiencies in the national protection of basic rights in Austria⁴, in the United Kingdom⁵ and also in France⁶. In

* Translated by Kathryn Bly in co-operation with the author and revised by the author.

¹ C. Tomuschat, Der Verfassungsstaat im Geflecht der internationalen Beziehungen, *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (VVDSRL)* 36 (1978), 7 (51 et seq.).

² C. Tomuschat, Die staatsrechtliche Entscheidung für die internationale Offenheit, in: J. Isensee/ P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. VII, 1992, § 172 Clause 73.

³ E. U. Petersmann, Wie kann Handelspolitik konstitutionalisiert werden?, *EA* 1989, 55 (62).

⁴ See H. Tretter, Austria, in: R. Blackburn/J. Polakiewicz (eds.), *Fundamental Rights in Europe*, 2001, 103 et seq.

⁵ See R. Blackburn, United Kingdom, in: Blackburn/Polakiewicz (eds.), see note 4, 935 et seq.

contrast to these countries Germany possesses an almost complete and legally defensible catalogue of basic rights, which are enshrined in the German constitution. Consequently the ECHR's gap-filling function scarcely shows itself in Germany. Here the ECHR takes on a more motivational role for the development of internal law.⁷

International supplementary constitutions are also an expression of "openness of the state" ("offene Staatlichkeit").⁸ The community does not retreat from international influences; rather it fits itself, as a section, into an international community and accepts international constitutional law⁹ as part of its own constitution. The internal constitution is thus no longer restricted to an internal document¹⁰; instead it opens itself up to international specifications. International treaty systems on human rights and the Charter of the United Nations form the hard core of international constitutional law. According to some authors the law of the World Trade Organisation (WTO) also has a constitutional quality¹¹, although others deny this.¹²

⁶ See J. Gundel, Der Status des Völkerrechts in der französischen Rechtsordnung nach der neueren Rechtsprechung des Conseil d'Etat: Von der Öffnung zum Rückzug?, *AVR* 37 (1999), 438 (439 et seq.); see also J. F. Flauss, Auf dem Wege zu einer europäischen Verfassung – Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht aus französischer Sicht, in: *Europarecht*, Beiheft 1/2000, 31 (35 et seq.); C. Grewe, Das Verständnis des Rechtsstaates in Frankreich und in Deutschland, in: H. Jurt/G. Krumeich/T. Würtenberger (eds.), *Wandel von Recht und Rechtsbewusstsein in Frankreich und Deutschland*, 1999, 157 (165 et seq.).

⁷ R. Uerpmann, Völker- und Europarecht im innerstaatlichen Recht, in: C. Grewe/C. Gusy (eds.), *Französisches Staatsdenken*, 2002, 196 (202 et seq.).

⁸ This phrase originates from K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 1964, 33 et seq.

⁹ See R. Uerpmann, Internationales Verfassungsrecht, *JZ* 2001, 565 et seq.

¹⁰ On such a narrow understanding of the concept of a constitution see the C. Möllers' contribution to this project.

¹¹ T. Cottier, A Theory of Direct Effect in Global Law, in: A. von Bogdandy/P. C. Mavroidis/Y. Mény (eds.), *European Integration and International Co-ordination*, 2002, 99 (113); E.-U. Petersmann, Rights and Duties of States and Rights and Duties of Their Citizens, in: U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für R. Bernhardt*, 1995, 1087 et seq.; also T. Cottier, Dispute Settlement in the World Trade Organization, *CML Rev.* 35 (1998), 325 (326); with regard to GATT 1947 see Petersmann, see note 3, 58 et seq.; on the constitutional contents of the Law of the WTO see also Uerpmann, see note 9, 569, 571.

¹² See, for example, M. Nettesheim, Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung, in: C. D. Classen/A. Dittmann, et al. (eds.), *In einem vereinten Europa dem Frieden der Welt zu dienen ..., Liber amicorum T. Oppermann*, 2001, 381 (392 et seq.); see also the critical analysis of Petermann's theory of constitutional functions by M. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, 2001, 161 et seq.; similarly A. von Bogdandy, Law and Politics in the WTO, in: J. A. Frowein/R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* 5 (2001), 609 (655 et seq.).

Whether or not a community incorporates international constitutional law as international supplementary constitutions into its constitutional system implies certain ideas about its position in the world. Tomuschat's theme in 1977 was: "The Constitutional State within the Network of International Relations" ("Der Verfassungsstaat im Geflecht der internationalen Beziehungen").¹³ He was able to base his argument on Klaus Vogel, who in 1964 described the question of the integration of an individual state into the international community as a question of constitutional law.¹⁴ The following paper details how the EC behaves within the network of international relations. A community that wants to emphasise its independence and autonomy will have a reserved attitude towards international law. It will not be inclined to integrate international supplementary constitutions into its own constitution. The situation is different for a community that sees itself as a part of the international community. In this case it is to be expected that the community's constitution will be characterised quite strongly by components of international law.

The ECHR comes primarily into consideration when deliberating about international supplementary constitutions of the European Community. Its guarantees represent a common European standard of basic rights.¹⁵ Meinhard Hilf described it as the "agreed heart of a common European constitutional order" ("konsentierten Kern einer gesamteuropäischen Verfassungsordnung").¹⁶ Even though the EC has not acceded to the ECHR, the Convention is unquestionably of significance to Community law as a reference text on human rights. Originally Community law completely lacked a human rights catalogue. The ECHR was an

¹³ See Tomuschat, see note 1.

¹⁴ Vogel, see note 8, 30.

¹⁵ H. C. Krüger/J. Polakiewicz, Proposals for a Coherent Human Rights Protection System in Europe, *HRLJ* 22 (2001), 1 (3, 8 et seq.; German version: Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa, *EuGRZ* 2001, 92).

¹⁶ M. Hilf, Europäische Union und Europäische Menschenrechtskonvention, in: U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für R. Bernhardt*, 1995, 1193 (1194).

important aid in rectifying this deficiency.¹⁷ In this way the Convention fulfils the gap-filling function of an international supplementary constitution. The treaty system of the WTO shall be examined as a second example of an international supplementary constitution. Its constitutional quality is far less certain¹⁸ but this is not of importance for the present analysis. This paper does not intend an abstract determination of which international treaty systems have a constitutional quality. It is European constitutional law that this project is concerned with. Consequently this paper is about the international treaty systems, which the EU and EC integrate into their own legal regime so that they become parts of European constitutional law. From this point of view the law of the WTO is particularly interesting because it has severely struggled to establish its position in Community law in recent years. However, the Charter of the United Nations can be disregarded. The Charter is part of international constitutional law. Nevertheless it affects Community law only indirectly and only in connection with certain points via the two-tiered mechanism for the adaptation of UN sanctions according to Art. 301 EC and Arts. 11 et seq. EU.¹⁹ Association agreements in accordance with Art. 310 EC also remain to one side. Their aim is to bring non-member states closer to the EU.²⁰ The extension of Community law regulatory content to non-member states is thus to the fore. This is also the case for the agreement on the European Economic Area, which associates the EFTA-countries.²¹ By contrast this paper has as its theme the import of external, foreign regulatory content into the law of the Community.

The aim of the following is to determine whether or not the law of the Community has

¹⁷ See J. Kühling in this volume, as well as Section V below.

¹⁸ See above note 11 et seq.

¹⁹ See T. Stein, *Außerpolitisch motivierte (Wirtschafts-) Sanktionen der Europäischen Union - nach wie vor eine rechtliche Grauzone?*, in: U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für R. Bernhardt*, 1995, 1129 (1136 et seq.).

²⁰ According to the ECJ the non-member State “must, at least to a certain extent, take part in the Community system” (ECJ, Case 12/86, *Demirel*, [1987] ECR 3719, para. 9); see also A. Weber, in: H. v. d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, vol. 5, 5th edition 1997, Art. 238 paragraph 1.

absorbed the ECHR and the law of the WTO into its constitutional order as international supplementary constitutions. For this purpose it must be investigated which mechanisms Community law provides for the incorporation of international law. The classical mechanism of compliance with an international treaty is accession. This will be dealt with first (see II). Nevertheless, this mechanism was used neither with the ECHR nor with GATT 1947. As a result of this the question of further incorporative mechanisms is raised. The contracting states, the European Court of Justice (ECJ) and academics have developed various mechanisms for this purpose. The different mechanisms can be assigned into three basic concepts, which are to be considered consecutively. Following on from accession the concept of legal succession will be dealt with next (see III), then incorporation by means of express reference, as found in Art. 6 (2) EU for the ECHR (see IV), and finally, the concept of general principles of law (see V). The original question will be returned to in a concluding evaluating section on how the Constitution of the EC and EU relates to international supplementary constitutions.

To begin with two terminological comments:

(1.) The relationship between the EC and the EU cannot be and need not be clarified in this paper. The EC acts within the framework of the WTO. Likewise it is the EC that is of prime importance in relation to the ECHR. The EC and Community law will consequently be discussed first and foremost below. However, the reference to human rights incorporated in Art. 6 (2) EU shows that the EU is also concerned. Therefore, the way terms are used will not be quite uniform. Euroatom and the former ECSC need not be considered in this paper.

²¹ See T. Oppermaun, *Europarecht*, 2nd edition 1999, paragraphs 137, 139.

(2.) The big discussions about the internal effect of international law have been conducted with regard to nation states. If the EC now integrates international law into its internal system of laws, the law of the Community, it takes on a role that was previously reserved for the states. The effects of international law within national law and within Community law are accordingly seen as parallel phenomena. If both effects are inferred, the concept of internal law is given priority as the generic term. Nevertheless, it is sometimes difficult to use state-centred vocabulary in this way so that the EC automatically follows. If the language here is about the states and national law it should subsequently always be noted that the EC could also be conceived.

II. ACCESSION

1. WTO

The normal way to make an international treaty binding is via accession. The EC complied with the WTO in this way. The EC is one of the founding members for which the agreements establishing the World Trade Organisation came into force on 1st January 1995.²² Subsequently the parties to the agreements are obliged in international law to keep to the contractual rules. International law leaves the means by which they manage this to the contracting parties. In particular there are no general international law rules to determine whether and how the parties have to incorporate a treaty into their internal law.²³ The parties to a treaty can regulate together whether they require a direct effect within internal law or whether they want to exclude it.²⁴ This corresponds to the freedom of contract, which rules

²² See the notification of the WTO General Secretary according to Art. XIV (3) WTO agreement, WTO-Doc. WT/Let/1/Rev. 2; accessible under <<http://www.wto.org/>>.

²³ ECJ, Case 104/81, *Kupferberg*, [1982] ECR 3641, para. 18

²⁴ Cottier, see note 11, 121; P. E. Holzer, *Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, 1998, 35 et seq.

international relations. In the case of the WTO though this did not occur.²⁵ The decision remained with the individual parties to the treaty.²⁶ Art. 1 (1) (3) TRIPS clarifies this.²⁷ For the EC Art. 300 (7) EC stipulates that the WTO agreements are binding on the institutions of the Community and on the Member States. It is questionable what this means.

a) Art. 300 (7) EC as a starting point

Using the wording of Art. 300 (7) EC as a starting point, it is initially unclear what the legal nature of the binding effect is. The international legal obligation of the EC as such follows directly from the contractual conclusion according to Art. 300 (2) EC. Community law has no influence on this binding effect. Art. 300 (7) EC can, therefore, only signify an obligation of the individual Community institutions, which goes beyond the international obligations of the Community.

The obligation of the institutions under Art. 300 (7) EC is not restricted. The institutions are consequently also bound when they are active as the Community's legislator.²⁸ The internal position of international treaties within the Community arises from this. As a result of the fact that international treaties derive their binding effect from primary law, they rank below primary law within the Community legal order. On the other hand the fact that Art. 300 (7) EC binds the Community's legislator shows that it allocates to international treaties a place above secondary law.²⁹ The treaties, therefore, fit in between primary law and secondary law within the Community legal order.

²⁵ G. M. Berrisch/H.-G. Kamann, WTO-Recht im Gemeinschaftsrecht, *EWS* 2000, 89 (92 et seq.); W. Meng, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, in: U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für R. Bernhardt*, 1995, 1063 (1085); this is also confirmed by ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 34 et seq., 41.

²⁶ A. von Bogdandy/T. Makatsch, Collision, Coexistence, or Cooperation?, in: G. de Búrca/J. Scott (eds.), *The EU and the WTO*, 2001, 131 (143; German version: Kollision, Koexistenz oder Kooperation?, *EuZW* 2000, 261).

²⁷ See also ECJ, Case C-89/99, *Schieving-Nijstad vof et al.*, [2001] ECR I-5851, para. 33 et seq.

²⁸ C. Timmermans, The EU and Public International Law, *European Foreign Affairs Review* 4 (1999), 181 (189).

The internal primacy of international treaties over secondary law is no self-evident truth. In Germany, for example, Art. 59 (2) (1) of the Basic Law allocates international treaties merely the rank of an ordinary federal law.³⁰ If a constitution places international law above ordinary law it takes the freedom to pass laws that do not comply with international law away from the internal legislator.³¹ This is becoming the norm more and more in Europe. Both Art. 55 of the French Constitution and Art. 94 of the Dutch Constitution are examples of this. Amongst the candidates for membership, Art. 91 (2) of the Polish Constitution can be cited. Art. 300 (7) EC also elects for this solution, which is particularly friendly to international law.

This is in principle broadly acknowledged. The academics are not the only ones to derive the primacy for international treaties over secondary Community law from Art. 300 (7) EC.³² The ECJ also recognises this primacy by means of its willingness to review secondary Community legislation according to the standard set by international treaties.³³ Yet, the ECJ hesitates to do so in the sphere of WTO law. The legitimacy of this reserved attitude towards WTO law is still to be tested.

In short, international treaties are binding within the Community legal order and rank between primary and secondary law. However, it has not yet been clarified under which circumstances international treaty norms can regulate the legal relationships of individuals within the Community. This is calculated according to the theory of direct effect.

b) The Theory of Direct Effect

²⁹ A. Epiney, Zur Stellung des Völkerrechts in der EU, *EuZW* 1999, 5 (7).

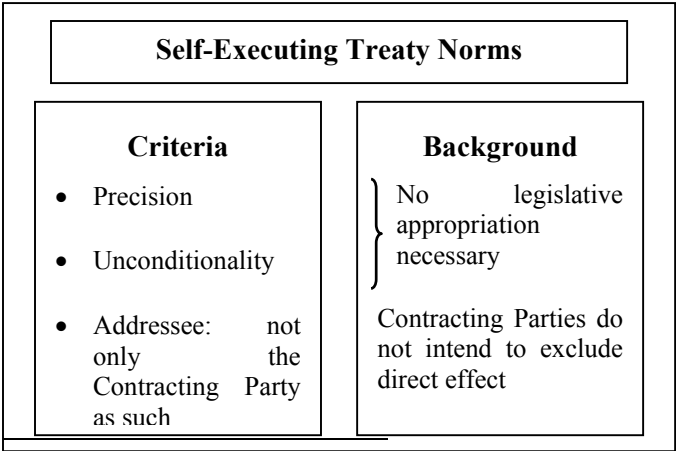
³⁰ O. Rojahn, in: I. v. Münch/P. Kunig (eds.), *Grundgesetz-Kommentar*, vol. 2, 5th edition 2001, Art. 59 paragraph 37.

³¹ C. Tomuschat, in: v. d. Groeben/Thiesing/Ehlermann, see note 20, Art. 228 paragraph 74.

³² See H. Krück, in: J. Schwarze (ed.), *EU-Kommentar*, 2000, Art. 281 paragraph 30; Tomuschat, see note 31, paragraph 74.

³³ ECJ, Case C-377/98, *The Netherlands v. European Parliament and Council*, [2001] ECR I-7079, para. 53 et seq.; see also ECJ, Case C-61/94, *Commission v. Germany*, [1994] ECR I-3989, para. 52, in which the ECJ expressly determined a primacy of international agreements.

Although international law does not regulate its own internal effect, a general concept about its direct internal effect has been developed. This concept is common to many countries.³⁴ Following the leading decisions of the ECJ in the cases of *Haegemann*³⁵ and *Kupferberg*³⁶, the academics of European Law quite predominantly assume that these rules are equally valid within the framework of Art. 300 (7) EC.³⁷ The concept of direct effect is also described as the theory of self-executing treaties.³⁸ One particular shaping of this theory was found in the theory of direct effect of Community law within its Member States. However, the law of the Community constitutes a special development in comparison with general international law.³⁹ It is closer in many respects to internal law rather than international law.⁴⁰ If the internal effect of international law is questioned here, it is consequently of prime importance to look at the general theory of self-executing treaties.



The diagram shows the requirements of direct effect as an overview. Accordingly a self-executing norm is a norm that is adequately certain and

³⁴ For France D. Alland, *Jurisprudence en matière de droit international public*, *RGDIP* 1998, 203 (219 et seq.); for the USA C. M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, *AJIL* 89 (1995), 695 et seq.; for Switzerland Holzer, see note 24, 103 et seq. as well as D. Würger, *Die direkte Anwendbarkeit staatsvertraglicher Normen*, in: T. Cottier/A. Achermand/D. Würger/V. Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht*, 2001, 93 (97 et seq.); for Germany under a comparative perspective G. Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, 1993, 31 et seq.

³⁵ ECJ, Case 181/73, [1974] ECR 449, para 2/6.

³⁶ ECJ, Case 104/81, [1982] ECR 3641, para. 9-27.

³⁷ P. Hilpold, *Die EU im GATT/WTO-System*, 2nd edition 2000, 171; Meng, see note 25, 1067, 1070, 1072; as well as Cottier, see note 11, 104; for the same result see also A. Peters, *The Position of International Law Within the European Community Legal Order*, *GYIL* 40 (1997), 9 (42-45), who however would prefer to avoid the concept of “self-executing” and emphasises in particular the intentions of the contracting parties; a conflicting point of view is apparently taken by J. Sack, *Noch einmal: GATT/WTO und europäisches Rechtssystem*, *EuZW* 1997, 688.

³⁸ On the identity of the concepts Buchs, see note 34, 26 et seq.

³⁹ Hilpold, see note 37, 168-170; Peters, see note 37, 55 et seq.

⁴⁰ P. Eeckhout, *The Domestic Legal Status of the WTO Agreement*, *CML Rev.* 34 (1997), 11 (56).

absolute to be used internally in national courts. In this sense the ECJ examines whether the purpose of the agreement “contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”.⁴¹ The German Federal Administrative Court emphasises the comparability with an internal legal act.⁴² If the international norm requires appropriation through state legislation before it can be applied, it is not a self-executing norm.⁴³ In this situation the international norm allows the state a normative scope, which the national courts cannot execute. The segregation of competences between the political organs of the first and second powers on the one hand and the judiciary on the other hand stands as a background to the theory of direct effect.⁴⁴ Norms are on the whole only self-executing if the courts can interpret and apply them without taking on political functions. An international treaty can, through its formulation, also express that it requires normative implementation. This is to be assumed if an international norm expressly addresses the states as such and requires them to act in a certain way. The answer as to whether a norm has direct effect can, therefore, turn out quite differently for different provisions from one and the same treaty.

Yet, direct effect does not depend on whether a norm confers an individual right.⁴⁵ It is true that the right of action will frequently depend on the assertion of an individual right. It is not necessary, however, that this right arises from the international treaty. For example if an administrative act, which is contrary to international law, intervenes in a constitutional human rights norm, the constitutional norm confers the required right of action.

⁴¹ ECJ, Joined Cases: Cases C-300/98 & 392/98, *Dior et al.*, [2000] ECR I-11307, para. 42, with reference to ECJ, Case 12/86, *Demirel*, [1987] ECR 3719, para. 14; ECJ, Case 162/96, *Racke*, [1998] ECR I-3655, para. 31.

⁴² Entscheidungen des Bundesverwaltungsgerichts, vol. 80, 233 (235) and vol. 87, 11 (13).

⁴³ See Entscheidungen des Bundesverwaltungsgerichts, vol. 87, 11 (13), whereby a need for “further normative completion” excluded direct effect, as well as Art. 91 (1) of the Constitution of the Republic of Poland enacted on 2 April 1997, according to which an international treaty “shall be applied directly, unless its application depends on the enactment of a statute” (*The Constitution of the Republic of Poland/The Constitutional Tribunal Act*, ed. by the Cabinet of the President of the Constitutional Tribunal, Warsaw 2001).

⁴⁴ These aspects are emphasised by Cottier, see note 11, 115 et seq.

If these principles are used in relation to the law of the WTO, directly effective provisions can be found effortlessly.⁴⁶ There is hardly any doubt, for example, that Art. 50 TRIPS, which contains rules on provisional legal protection through the courts, has direct effect.⁴⁷ The norm is directly addressed to the courts. It does not need a further normative appropriation. Each court can remedy possible doubts about the content of WTO law by means of legal interpretation. Other rules, such as the ban on non-tariff trade barriers according to Art. XI GATT and the exceptions that are laid down in Art. XX GATT, are much less precise. Von Bogdandy has referred to the legal uncertainty, which could arise for market participants in the application of such complex rules.⁴⁸ However, these rules also allow the individual states no scope for appropriation. According to the WTO Dispute Settlement Understanding any state can initiate a procedure with the assertion that another state has violated its GATT obligations. In this case a panel and, should the situation arise, the appellate body decide whether GATT has actually been violated. The panel and appellate body are not political institutions. Rather they decide using a court-like procedure. If the panel and appellate body are in a position to make a legally formed decision, the same must be true for the state courts. Piet Eeckhout indicates that it could be asking too much of the national courts if they must apply WTO law directly.⁴⁹ However, the courts are frequently required to apply complex law. In Europe the ECJ is the court most concerned with the application of WTO law. Even more

⁴⁵ Buchs, see note 34, 40, 88 et seq.; Vázquez, see note 34, 719 et seq.; Würger, see note 34, 109 et seq.

⁴⁶ See also S. Mauderer, *Der Wandel vom GATT zur WTO und die Auswirkungen auf die Europäische Gemeinschaft*, 2001, 117; A. Ott, *GATT und WTO im Gemeinschaftsrecht*, 1997, 223 et seq.; E.-U. Petersmann, *Darf die EG das Völkerrecht ignorieren?*, *EuZW* 1997, 325 (327); idem, *GATT/WTO-Recht: Duplik*, *EuZW* 1997, 651 (652 et seq.).

⁴⁷ The German Federal Government in its memorandum concerning the ratification of the WTO agreements also assumes that at least some sections of TRIPS have direct effect (Printed matter of the Federal Parliament [Bundestags-Drucksache] 12/7655 [new], 345); with specific regard to the direct effect of the TRIPS agreement see also R. Duggal, *Die unmittelbare Anwendbarkeit der Konventionen des internationalen Urheberrechts am Beispiel des TRIPs-Übereinkommens*, *IPRax* 2002, 101 (104-107).

⁴⁸ A. von Bogdandy, *Legal Equality, Legal Certainty, and Subsidiarity in Transnational Economic Law*, in: A. von Bogdandy/P. C. Mavroides/Y. Mény (eds.), *European Integration and International Co-ordination*, 2002, 13-37 (29 et seq.; German version: *Rechtsgleichheit, Rechtssicherheit und Subsidiarität im transnationalen Wirtschaftsrecht*, *EuZW* 2001, 357).

so than the other courts, the ECJ should be in a position to adapt to working with the legal system of the WTO in an adequate way.

Of course it is often difficult to determine how judicial instances will finally interpret and apply a norm of WTO law. Divergences between decisions of the different national courts⁵⁰ or between national decisions and later decisions within the WTO Dispute Settlement Procedure⁵¹ might often arise, if the national courts were to directly apply WTO law. However, this problem is not limited merely to WTO law.⁵² National constitutional law is often uncertain to a degree in that constitutional court decisions are frequently unpredictable. It is no oddity for decisions of the constitutional courts to deviate from earlier decisions of the lower courts. Other international treaties also allow considerable scope for interpretation. This is aimed principally at the European Convention for the Protection of Human Rights. The danger that judgements of the European Court of Human Rights differ from earlier national decisions on the ECHR has been well known for a long time. Nevertheless more and more countries are deciding to integrate the ECHR into their internal law as a yardstick for judicial review.⁵³

Markus Krajewski considers it to be an essential difference between the ECHR and the WTO that the law of the WTO contains no mechanisms to regulate conflicts between decisions within the framework of WTO dispute settlement and decisions of national courts. As a result of this deficiency, he claims that it ought to be concluded that the contracting states wanted to exclude the direct effect of WTO law. In contrast the ECHR regulates the relationship of the

⁴⁹ Eeckhout, see note 40, 50.

⁵⁰ This is emphasised by C. Schmid, Immer wieder Bananen: Der Status des GATT/WTO-Systems im Gemeinschaftsrecht, *NJW* 1998, 190 (195); see also H. G. Krenzler, in: E. Grabitz/M. Hilf (eds.), *Das Recht der Europäischen Union*, vol. III, E 1 (1999 version), para. 85; H.-D. Kuschel, Die EG-Bananenmarktordnung vor deutschen Gerichten, *EuZW* 1995, 689 (690).

⁵¹ This is emphasised by Krajewski, see note 12, 65; P. Royla, WTO-Recht – EG-Recht: Kollision, Justiziabilität, Implementation, *EuR* 2001, 495 (500) even concludes that the establishment of international sanction mechanisms is not consistent with the concept of direct effect.

⁵² Meng, see note 25, 1086.

jurisdictions with the so-called local remedies rule as laid down in Art. 35 (1) ECHR.⁵⁴ This argument is not completely convincing. Art. 35 (1) ECHR does not avoid diverging decisions. Rather the rule guarantees that the European Court of Human Rights (ECtHR) can essentially only judge cases in which national courts have unquestionably denied an infringement of the law. Whenever the ECtHR then detects an infringement this results in conflict with national decisions. Under these circumstances, it cannot be concluded from the silence of WTO law that the Member States of the WTO wanted to exclude the direct effect of WTO law in the interest of avoiding conflicts. Rather this silence abides by the conclusion that the law of the WTO has not decided the question of its internal effect.⁵⁵

Von Bogdandy wishes to explain the differences in the internal effect of WTO law on the one hand and of human rights norms on the other hand apparently with the special structural features of human rights.⁵⁶ However, the theory of direct effect applies to all types of treaties. It even has effect on some treaties for which there are no international judicial institutions that could achieve a certain standardisation.⁵⁷ Rules in double taxation agreements are being used internally just as frequently as the international rules about international mutual legal assistance.⁵⁸ The fact that frequently merely a judgement in the WTO Dispute Settlement Procedure can authoritatively determine the use of WTO law in a concrete case is, therefore, no reason against the direct internal effect of WTO law.

Von Bogdandy argues that the problem of divergent judicial decisions is one of legal

⁵³ See Krüger/Polakiewicz, note 15, 2.

⁵⁴ Krajewski, see note 12, 63 et seq., 270.

⁵⁵ See note 25.

⁵⁶ Von Bogdandy, see note 48, 31-33; the considerations of Cottier, see note 11, 117 et seq., indicate the same school of thought.

⁵⁷ Buchs, see note 34, 105 et seq.

⁵⁸ *Ibid.*, 108 et seq.

equality.⁵⁹ In view of strict legal analysis this is open to doubt. There is no equality principle, which would oblige the courts of different countries to interpret the same legal text in the same way. The uniformity in the application of laws across country borders is certainly a legitimate matter of concern both politically and legally. Provided that uniformity in the application of laws cannot be established, it actually appears to be beneficial if legal equality at least consists of standardised legal texts even if the interpretations in individual cases deviate from each other. An argument against the direct effect of uniform legal texts cannot be derived from this.

Something similar applies for the language problem, which is mentioned by von Bogdandy.⁶⁰ It can indeed be a problem if an individual must observe rules that are only produced in a foreign language. However, this difficulty arises not only for international commercial law but also for all multilateral treaties. It seems to be less problematic in international commercial law than elsewhere because many of the firms affected have to operate using the world's business language, English, in any case. Finally, the countries who acceded to the agreement may publish a translation as an aid in the country's own language in their Official Journal, just as the EC has done.

The ECJ cites the fact that the law of the WTO allows the Member States a broad scope for negotiations as an argument against direct effect.⁶¹ In particular Art. 22 (2) of the Dispute Settlement Understanding (DSU) provides that if a member cannot remedy a violation that has been determined by the Dispute Settlement Body within a reasonable period of time, it

⁵⁹ Von Bogdandy, see note 48, 30 et seq.

⁶⁰ Ibid., 30.

⁶¹ ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 36; cautious agreement from M. Hilf/F. Schorkopf, WTO und EG: Rechtskonflikte vor den EuGH?, *EuR* 2000, 74 (85 et seq., 90); similarly Schmid, see note 50, 195.

ought to negotiate and subsequently agree on compensation with the state concerned.⁶² The ECJ gives no theoretical foundation for its argument. The theory of direct effect brings the criterion of a lack of unconditionality into consideration. A norm may only have direct internal effect if its requirements are unconditional.⁶³ If the EC were free to decide whether it should follow rules of the WTO or instead supply compensation, this would result in the rules of the WTO actually lacking unconditional application.⁶⁴ Such an understanding of WTO law is, however, hardly tenable.⁶⁵ Art. XVI (4) of the WTO agreement underlines the obligation of adhering to the law of the WTO. Art. 22 (1) (2) DSU confirms that a member is always ultimately obliged to harmonise its law with its obligations that arise from the WTO agreements.⁶⁶ Consequently the argument of the ECJ appears to be untenable.

Von Bogdandy appeals to a deciding point when he refers to the relationship between law and politics in his criticism of direct effect.⁶⁷ He explains that the courts usually apply rules, which could be altered at any time by a democratically responsible legislature. The WTO lacks such a legislative assembly. The democratic deficit that has been ascertained here is real.⁶⁸ However, this concerns the entirety of classical international law and does not limit itself to the level of internal effect. If von Bogdandy is followed the problem arises that the countries have entered into international commitments that they can only alter with the consent of all of the contracting states. Whoever wishes to solve this problem by denying the internal effect of international obligations, ultimately questions international law itself.

⁶² ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 39; Hilpold, see note 37, 272-277 also argues this.

⁶³ See notes 41 et seq.

⁶⁴ To this effect see J. Sack, *Von der Geschlossenheit und den Spannungsfeldern in einer Weltordnung des Rechts*, *EuZW* 1997, 650.

⁶⁵ J. Pauwelyn, *Enforcement and Countermeasures in the WTO*, *AJIL* 94 (2000), 335 (341 et seq.).

⁶⁶ Berrisch/Kamann, see note 25, 92; Eeckhout, see note 40, 54 et seq.; Mauderer, see note 46, 133, 160-162; Petersmann, see note 46, 653; W. Schroeder/P. Schonard, *Die Effektivität des WTO-Streitbeilegungssystems*, *RIW* 2001, 658 (659-662).

⁶⁷ Von Bogdandy, see note 48, 33.

⁶⁸ See also von Bogdandy, note 12, 614 et seq.; Cottier, see note 11, 115; J. H. Jackson, *Status of Treaties in*

A final argument of von Bogdandy also questions the international obligations as such of the EC in the context of the WTO. He considers there to be two ways to achieve the liberalisation of world trade that is intended by WTO law: either products from abroad should be imported even if they do not meet internal standards, or the product standards worldwide must be harmonised. Von Bogdandy rejects the second possibility because the WTO is not an integrated organisation that is geared towards harmonisation.⁶⁹ He judges the first possibility to be inadmissible reverse discrimination.⁷⁰ If this is taken seriously it questions not only the direct internal effect of the corresponding WTO rules but also WTO law itself. Those who engage themselves in the reduction of non-tariff trade barriers, just as the members of the WTO did, must choose between harmonisation and reverse discrimination. The way in which the members proceed is up to them. Reverse discrimination does not represent a legal problem of equality. The general principle of equality forbids discrimination without a sufficient reason. Those who intend to liberalise world trade must reduce non-tariff trade barriers and admit foreign goods even if they do not meet with their own national standards. If the participating states take on corresponding international obligations they would then have a sufficient reason for reverse discrimination.⁷¹

Therefore, if the binding nature of WTO law is accepted and Art. 300 (7) EC is seen in the

Domestic Legal Systems, *AJIL* 86 (1992), 310 (330 et seq.); Krajewski, see note 12, 223-225.

⁶⁹ Von Bogdandy, see note 48, 29; see also idem, note 12, 659 et seq.; however, for a harmonising and integrating function of WTO law see Cottier, note 11, 100.

⁷⁰ Von Bogdandy, see note 48, 36.

⁷¹ Within the European framework it has long been discussed whether an EU citizen may be better off than the internal residents. Here the discrimination of internal residents is increasingly considered with criticism (see A. Epiney, *Umgekehrte Diskriminierungen*, 1995, 426 et seq.; C. Hammerl, *Inländerdiskriminierung*, 1999, 176 et seq.; also the C. Grabenwarter's contribution to this project, see his paper at III 5 d). However, it is also acknowledged within the European framework that good reasons can justify reverse discrimination in individual cases (Epiney, loc. cit., 464 et seq.; C. Starck, in: H. v. Mangoldt/F. Klein/C. Starck (eds.), *Das Bonner Grundgesetz*, vol. 1, 4th edition 1999, Art. 3 paragraph 213). Worldwide the markets to which WTO law applies are much further away from each other than the markets of countries within the strongly integrated Single European Market. They allow reverse discrimination to be relatively easily justified just because the law of the WTO does not integrate the markets.

light of the theory of self-executing treaties there is no reason to deny direct internal effect to most parts of WTO law.

c) Limitation of the Internal Effect by means of the Principle of Reciprocity

The ECJ continues to reject the internal effect of WTO law. Since its decision in the case of *Portugal v. Council* it supports this view substantially with the argument of a lack of reciprocity.⁷² Indeed, the important trade partners of the EC likewise grant WTO law no internal effect.⁷³

This argument is not convincing within the context of international law. If another country violates WTO law the EC can initiate dispute settlement proceedings and, should the situation arise, suspend its own obligations in a precisely regulated procedure according to Art. 22 DSU. Such a suspension of international law can also be carried out internally. The doctrine of direct effect is no obstacle to this. If a rule is suspended in international law the parallel internal effect does not apply either.⁷⁴ However, outside of the special procedures of the DSU the EC cannot make its own legal compliance with international law dependent on the faithfulness of other states to international law.⁷⁵

Admittedly, the internal effect of WTO law is not established by international law anyway.⁷⁶

Internal law is crucial. Here reciprocity can be raised perfectly as a requirement for direct

⁷² ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 42-47; confirmed by ECJ, Joined Cases: Cases C-300/98 & 392/98, *Dior et al.*, [2000] ECR I-11307, para. 44; ECJ, Case C-307/99, *OGT Fruchthandels-gesellschaft*, [2001] ECR I-3159, para. 24 et seq.; in agreement Hilf/Schorkopf, see note 61, 84 et seq., 90; as well as Hilpold, see note 37, 262-271.

⁷³ This is verified, as well as made relative by T. von Danwitz, *Der EuGH und das Wirtschaftsvölkerrecht*, *JZ* 2001, 721 (726-728).

⁷⁴ Meng, see note 25, 1076 et seq.

⁷⁵ Mauderer, see note 46, 180 et seq.; Schroeder/Schonard, see note 66, 660 et seq.

⁷⁶ See note 25.

effect, as verified by Art. 55 of the French Constitution.⁷⁷ Nevertheless the French example shows that the pre-condition of reciprocity is problematic. French courts increasingly restrict the application sphere of this pre-condition.⁷⁸ If the international treaty itself provides for a dispute settlement and implementation mechanism, the reservation of reciprocity as a form of pressure could be refrained from.⁷⁹ If this were to be followed the WTO dispute settlement mechanism would exclude the reservation of reciprocity even in French Law. Above all though Community law lacks a rule that would correspond to Art. 55 of the French Constitution. Art. 300 (7) EC does not recognise a proviso of reciprocity.⁸⁰ Certainly Art. 300 (7) EC does not offer any indication that reciprocity is required only from a specific type of agreement. This is, however, what the ECJ does.⁸¹ The argument's inconsistency is further illustrated by the fact that the ECJ does not apply the reciprocity argument to association agreements⁸², although Art. 310 EC expressly demands reciprocal rights and obligations for this type of agreement.

Some academics object that direct effect would deprive the Community of a means of political pressure in negotiations with other states.⁸³ According to Helen Keller's analysis such a reasoning is based on a politico-diplomatic understanding of international law. Although the legal character of international norms is not completely denied, compliance with international law becomes ultimately a question of political choice.⁸⁴ In this school of thought the ECJ does not feel entitled to divest the legislative and executive Community institutions of the scope,

⁷⁷ See also von Danwitz, see note 73, 726; further Buchs, see note 34, 101-104 where she draws a parallel to American case law.

⁷⁸ D. Alland, *Le droit international „sous“ la Constitution de la Ve République*, *RDP* 1998, 1649 (1664-1666); J. Gundel, *Der Status des Völkerrechts in der französischen Rechtsordnung*, *AVR* 37 (1999), 438 (460 et seq.).

⁷⁹ Alland, see note 78, 1665.

⁸⁰ Von Danwitz, see note 73, 726.

⁸¹ Berrisch/Kamann, see note 25, 93.

⁸² ECJ, Case 87/75, *Bresciani*, [1976] ECR 129, para. 22/23; ECJ, Case C-469/93, *Chiquita Italia*, [1995] ECR I-4533, para. 31-35.

⁸³ To this effect see S. Peers, *Fundamental Right or Political Whim?*, in: De Búrca/Scott, see note 26, 111 (122 et seq.); Sack, see note 64, 651.

which the corresponding institutions of trading partners of the Community have at their disposal.⁸⁵ The loss of this form of political pressure is, nevertheless, inherent in the theory of direct effect. If a constitution arranges direct effect within the state it decides in favour of a comprehensive observance of international law. It does this without making its own faithfulness to international law dependent on the behaviour of other states. This decision is particularly friendly towards international law. Many national constitutional orders and also Art. 300 (7) EC have made this decision. The case law of the ECJ indicates that this friendliness towards international law is not sought after politically.⁸⁶ Typically, Art. 300 (7) EC is not once referred to by the ECJ.⁸⁷

From the silence regarding Art. 300 (7) EC it may be possible to infer that the ECJ does not construct its arguments around substantial law. The ECJ might prefer instead to use procedural arguments. The wording of the ECJ in stating that the WTO agreements “are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”, may also speak in favour of this.⁸⁸ If this statement is understood procedurally the ECJ does not doubt that the Community institutions are substantially bound by WTO law. Rather the scope of review of the ECJ is limited so that the substantial obligation cannot be updated procedurally. However, this procedural approach is not satisfactory either. It merely shifts the problem from the substantial law level to the procedural level. The scope of review of the ECJ is in principle just as broad as the substantial obligations laid down in Community law. Dealing with public international law in

⁸⁴ H. Keller, *Rezeption des Völkerrechts*, 2003, 700.

⁸⁵ ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 46.

⁸⁶ For analysis of the political dimension see Mauderer, note 46, 170-177, 179 et seq.; the economical and political context is examined by Hilpold, see note 37, 212-252.

⁸⁷ This is also emphasised by Berrisch/Kamann, see note 25, 91 as well as C. Schmid, Ein enttäuschender Rückzug, Anmerkungen zum „Bananenbeschluss“ des BVerfG, *NVwZ* 2001, 249 (256).

⁸⁸ ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 47.

*International Fruit Company*⁸⁹ and in *Racke*⁹⁰, the ECJ confirmed that its jurisdiction cannot be limited by the grounds on which the legality of a Community act is contested. Even more, neither Art. 230 (2) EC nor Art. 234 (1) (b) EC permit any distinction in the scope of judicial review depending on the type of international treaty at issue.

d) Limitation of the Internal Effect through the Council of the European Union

Some authors discuss whether the Council of Ministers has excluded the internal effect of the WTO agreements by using its decision of approval.⁹¹ According to the eleventh and last recital in the preamble of the decision “by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State Courts.”

It is recognised that the contracting parties have the authority to limit or exclude the internal effect of an agreement by means of a provision that is enacted at international level.⁹² This qualifies the principle that the internal effect of a treaty is a question for internal law and complies with the freedom of contract in international law. The decision of the Council of the European Union is, however, a purely internal act, which produces no effect in the sphere of international law.⁹³ At international law level the EC accepted the WTO agreements on 30 December 1994. According to the notification issued by the Director-General of the WTO⁹⁴ it did so without reservation or other additional declarations.⁹⁵

⁸⁹ ECJ, Joined Cases: Cases 21 to 24/72, [1972] ECR 1219 para. 5 et seq.

⁹⁰ ECJ, Case 162/96, [1998] ECR I-3655, para. 26 et seq.

⁹¹ Council Decision 94/800/EC concerning the conclusion of the agreements reached in the Uruguay Round multilateral negotiations, OJ No L 336, 1.

⁹² Von Danwitz, see note 73, 725; Tomuschat, see note 31, paragraph 69.

⁹³ According to its Art. 1 (3), Council Decision 94/800/EC, see note 91, only contains the Community law authorisation to grant the subsequent declaration of accession under international law; see also von Danwitz, see note 73, 725.

⁹⁴ See note 22.

⁹⁵ Moreover, a unilateral declaration ought not to be sufficient anyway. According to draft guideline No. 1.4.5 of

Because of this the question arises as to whether the Council of the European Union can take the internal effect away from a treaty through an act that belongs to Community law alone.⁹⁶ This is a question of primary EC law. Art. 300 (2) EC grants the Council of the European Union the authority to decide on the international obligations of the Community. The Council can adopt a treaty, reject it or limit its scope by a reservation under public international law. In so far as the Council accepts the international obligation, Art. 300 (7) EC, however, arranges its internal effect.⁹⁷ At this level the Council has no freedom. In fact international law leaves the determination of the internal effect up to the respective contracting party⁹⁸, i.e. the EC in this situation. In Community law, however, the question is regulated at primary law level in Art. 300 (7) EC and is subsequently binding for the Council of the European Union.⁹⁹ Werner Meng refers to the contrast with German law.¹⁰⁰ In Germany the order of internal application of a ratified treaty (“Rechtsanwendungsbefehl”) is not contained in the constitution itself, rather in the assenting law, which the German federal legislator enacts according to Art. 59 (2) (1) of the Basic Law. In this way the German legislator is theoretically capable of excluding the internal effect. In Community law, nevertheless, primary law enacts the order of internal application. The EC Treaty is in this respect friendlier towards international law than the German Basic Law.¹⁰¹ Under these circumstances the above mentioned consideration of the preamble in the decision of accession of the Council of the European Union qualifies only

the International Law Commission on Reservations to Treaties of 2001 (UN-Doc. A/56/10, 455 [459]) such a declaration would not be a reservation rather merely an informative statement.

⁹⁶ Confirmatory of this Tomuschat, see note 31, para. 66, 71.

⁹⁷ R. Arnold, in: M. A. Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts*, vol. 2, K I (1994 version), para. 61; von Danwitz, see note 73, 726; W. Schroeder/M. Selmayr, Die EG, das GATT und die Vollzugslehre, *JZ* 1998, 344 (348). Von Bogdandy, Rechtsgleichheit, Rechtssicherheit und Subsidiarität im transnationalen Wirtschaftsrecht, *EuZW* 2001, 357 (361) stresses that the Council of the European Union toned down the wording in the preamble of its later Decision of approval 1999/61/EC concerning the conclusion of the results of the World Trade Organisation negotiations on financial services, OJ No L 20, 38.

⁹⁸ Tomuschat, see note 31, para. 71; see also note 25 above.

⁹⁹ Krajewski, see note 12, 69 et seq.; Meng, see note 25, 1070, 1072; Mauderer, see note 46, 193; a conflicting point of view is apparently taken by Tomuschat, see note 31, para. 71.

¹⁰⁰ Meng, see note 25, 1070, 1072; as well Mauderer, see note 46, 192.

¹⁰¹ On the specific friendliness of Art. 300 (7) EC towards international law also Hilpold, see note 37, 187 et seq.

as a mere expression of opinion.¹⁰² If the ECJ cites the recital of the preamble in *Portugal v. Council*¹⁰³ as confirmation of its argumentation, this is consequently a political justification of its decision according to Thomas von Danwitz.¹⁰⁴

e) Internal Effect without Direct Effect

In view of the persistence with which the ECJ denies WTO law direct effect it is of special importance to consider those internal effects, which can befit the international treaties to which the EC accedes without direct effect. Some German authors deal with these effects under the concept of internal validity (“interne Geltung”). According to these authors a treaty becomes automatically internally valid as soon as it has been incorporated into the domestic legal order. This internal validity does not depend on a treaty’s self-executing nature. Therefore, a treaty may be valid within Community law even if it produces no direct effect.¹⁰⁵ Even though this is true the concept of internal validity seems to be too narrow to cover all cases of internal effect. For instance consistent interpretation of domestic law with international law is possible even if the international norm is only internationally binding but does not come into force internally. The mere interest to avoid a responsibility under international law can be a sufficient motive for an interpretation of internal law that concurs with international law.¹⁰⁶ French academics list the various forms of internal effect under the generic term of *invocabilité*.¹⁰⁷ Von Danwitz translates this concept as “cause to sue” (“Einklagbarkeit”).¹⁰⁸ However, this could restrict its understanding too much to the perspective of procedural law. That is why internal effect should be spoken of here in a way that is as neutral as possible.

¹⁰² For this result also von Bogdandy, see note 48, 24.

¹⁰³ ECJ, Case C-149/96, [1999] ECR I-8395, para. 48.

¹⁰⁴ Von Danwitz, see note 73, 724; similarly Mauderer, see note 46, 136 et seq.

¹⁰⁵ See for example Schroeder/Selmayr, note 97, 345 et seq.

¹⁰⁶ Uerpmann, see note 7, 200.

As a means of avoiding getting bogged down in the precedents of the ECJ some authors refer to the previously mentioned interpretation that complies with international law.¹⁰⁹ According to this theory internal law should be construed as far as possible in conformity with international law (“völkerrechtsfreundliche Auslegung”). The ECJ initially cautiously approached this method in *Werner*¹¹⁰ and *Leifer*¹¹¹ and confirmed it in *Hermès*.¹¹² This method has the potential to become a highly effective means of avoiding conflicts between International and European law and of integrating international standards into the European legal order. Yet, its success depends on whether the norms of Community law open up a corresponding scope for interpretation. In this the Community’s legislator remains master of the internal effect of WTO law.¹¹³

In addition such rules that do not have direct effect could also function as yardsticks for internal law.¹¹⁴ This is recognisable from the relationship between Community law and national law. An EC directive, which is not directly effective as a result of its contents, is, nevertheless, able to put contradictory internal law out of application.¹¹⁵ WTO law also ought to be able to annul a contradictory EC regulation by means of its internal validity according to Schroeder/Selmayr even if it is not directly effective.¹¹⁶ The concept is coherent. As Jan Klabbers observes, legality and direct effect are logically unrelated.¹¹⁷ The ECJ recognised it

¹⁰⁷ Alland, see note 34, 234 et seq.

¹⁰⁸ Von Danwitz, see note 73, 722.

¹⁰⁹ Berrisch/Kamann, see note 25, 95; von Bogdandy/Makatsch, see note 26, 147; Cottier, see note 11, 109-111; Hilf/Schorkopf, see note 61, 88; G. A. Zonnekeyn, The Status for WTO law in the EC Legal Order, *JWT* 34/3 (2000), 111 (124 et seq.).

¹¹⁰ ECJ, Case C-70/94, [1995] ECR I-3189, para. 23.

¹¹¹ ECJ, Case C-83/94, [1995] ECR I-3231, para. 24.

¹¹² ECJ, Case C-53/96, *Hermès*, [1998] ECR I-3603, para. 28; confirmed in ECJ, Joined Cases: Cases C-300/98 and 392/98, *Dior et al.*, [2000] ECR I-11307, para. 47.

¹¹³ Cottier, see note 11, 122, states that the “prerogative of democratic legislation“ is observed.

¹¹⁴ Epiney, see note 29, 11.

¹¹⁵ Alland, see note 34, 234-237.

¹¹⁶ Schroeder/Selmayr, see note 97, 345.

¹¹⁷ J. Klabbers, International Law in Community Law: The Law and Politics of Direct Effect, *Yearbook of*

with regard to the Convention on Biological Diversity of 5 June 1992.¹¹⁸ Yet, in WTO law the Court has not proceeded in this way. According to *Fediol* and *Nakajima* the Court recognises WTO law only in exceptional cases as a yardstick for Community law. This occurs when Community law either implements a particular obligation that was entered into within the framework of the WTO¹¹⁹ or refers expressly to specific provisions of WTO law.^{120, 121} Von Bogdandy points out that the internal effect here depends on a retractable act of the EU institutions so that the institutions do not bind themselves.¹²² WTO law, which is internationally binding on the EC, would, therefore, only have an internal effect in so far as and so long as the Community institutions wanted this.

f) Monism and Dualism revisited

The relationship between international law and internal law has been traditionally described in terms of monism and dualism. Art. 300 (7) EC has been said to express a monist view.¹²³ This is only partially true. A strictly monist concept would imply that international law takes automatically precedence over all norms of internal law including constitutional law. By contrast, the legal scope of international law within Community law is determined by a norm of European Law and there is hardly any doubt about the internal primacy of primary EU law.¹²⁴ Starting from French constitutional law, which is said to stand in a monist tradition¹²⁵,

European Law 21 (2002), 263 (291).

¹¹⁸ ECJ, Case C-377/98, *The Netherlands v. European Parliament and Council*, [2001] ECR I-7079, para. 53 et seq.

¹¹⁹ ECJ, Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069, para. 27-31.

¹²⁰ ECJ, Case 70/87, *Fediol v. Commission*, [1989] ECR 1781, para. 19 et seq.; along these lines see also ECJ, Case C-377/98, *The Netherlands v. European Parliament and Council*, [2001] ECR I-7079, para. 55.

¹²¹ This is confirmed in ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, para. 49.

¹²² Von Bogdandy, see note 48, 26.

¹²³ V. Constantinesco/D. Simon, *Quelques problèmes des relations extérieures des Communautés européennes*, *RTDE* 11 (1975), 432 (440-443); P. Pescatore, *Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen*, in: R. Bernhardt, W. K. Geck, G. Jaenicke, H. Steinberger (eds.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler*, 1983, 661 (680-687).

¹²⁴ See above under II 1 a.

¹²⁵ Nguyen Quoc Dinh/Patrick Daillier/Alain Pellet, *Droit international public*, 6th edition 1999, para. 148.

Denis Alland remarks that all constitutional concepts on the integration of international law are in essence dualist ones. What varies from one constitutional order to the other is the degree of monist influence.¹²⁶ These observations are also true for EU law.

The well established reading of Art. 300 (7) EC is inclined to monism as it automatically integrates international treaties into the European legal order and gives them a rank above secondary law. Dealing with WTO law, the ECJ does not follow this line. Rather the *Fediol* and *Nakajima* case law turns out to be strongly inspired by dualism. It denies WTO law an automatic effect within the European legal order. The internal effect of WTO law depends on a specific Community act, which may be freely retracted by the relevant Community institutions.¹²⁷ This is not compatible with the traditional understanding of Art. 300 (7) EC.

The disturbing lack of doctrinal coherence may be solved in different ways. The ECJ could give up *Portugal v. Council* and align its WTO case law according to the general doctrine of direct effect. As the Court does not seem inclined to go in this direction, another option would be to revise the established interpretation of Art. 300 (7) EC. Its wording is sufficiently open in order to permit a different reading.¹²⁸ Such a revision cannot be limited to WTO law but it must take into account public international law as a whole. This does not exclude distinctions to be made between different types of international treaties. A new doctrine of direct effect could be limited to certain types of treaties. Some of the criteria proposed by Armin von Bogdandy, which have been discussed above, may help to build up such a new doctrine. The relationship of law and politics and the question of democratic legitimacy are of special importance in this context.¹²⁹ This work cannot be undertaken here.

¹²⁶ Alland, see note 34, 220.

¹²⁷ See note 122.

¹²⁸ See Klabbers, note 117, 270 et seq.

¹²⁹ See note 67.

What has to be retained for the purpose of this chapter is the shift from monism to dualism. Whereas the Community legal order was thought to stand in a monist tradition, the ECJ chooses a strongly dualist approach with regard to WTO law. In this school of thought the autonomy of the EU legal order takes precedence over its integration into an overarching international legal order.

2. ECHR

The EC has not as yet acceded to the ECHR. Therefore, it could be unnecessary to examine the mechanism of accession with regard to the ECHR. Nevertheless the ECHR is indisputably a central reference text for the protection of fundamental rights in Europe and also in the European Union. At the same time the European Court of Human Rights (ECtHR) as protector of the ECHR occupies the position of the highest and ultimate guarantor of human rights in the states of the Council of Europe more and more. The European Union is the only important European public authority that stands outside this system. This could make an accession imminent.¹³⁰ Hence, an analysis of the reasons that are against the accession promises further information about the attitude of the EC towards international law.

The first obstacles arise from international law. The ECHR is only open to accession by members of the Council of Europe¹³¹ and only states can join the Council of Europe.¹³² In order to make the accession of the EC possible an additional protocol to the ECHR or an amendment of the Charter of the Council of Europe is, therefore, required. Although this

¹³⁰ See Krüger/Polakiewicz, note 15, 3 et seq. for an emphatic view on this.

¹³¹ Art. 59 (1) ECHR; see also Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, 2000, 46-50.

¹³² Art. 4 of the Charter of the Council of Europe.

would be costly¹³³, it would be practicable. It is striking that the EC and its Member States have as yet made few efforts in this direction.

From the point of view of Community law it is doubtful whether the EC Treaty confers the competence to accede. It is well known that the ECJ has denied this.¹³⁴ The Member States could have reacted to this without any problem by embedding the necessary competence expressly in the treaty at a revision conference¹³⁵ as Finland suggested in September 2000.¹³⁶ The majority¹³⁷ attitude of denial of such an amendment to the Treaty which prevailed until recently¹³⁸ may have had two reasons. The ECHR was created as a system to regulate state power. A community that accedes to this system would become increasingly similar to a state.¹³⁹ The position as guarantor for civil rights and freedoms, from which a state derives part of its legitimacy, would then equally benefit the EC. The significance of Member States would decrease. According to Sebastian Winkler it is especially because of this effect of integration that some of the Member States disapproved of accession to the ECHR.¹⁴⁰ The alternative reason points in the opposite direction. A participant, who must be responsible before an international court, loses part of its self-righteousness. In the case of the ECtHR the intervention is especially serious because this court does not merely judge relations between states. The ECtHR is also of prime importance in internal occurrences. For states, which as born subjects of international law are sovereign, it has been settled for a long time that the subjection to an international jurisdiction is compatible with its sovereignty. Extensive ideas

¹³³ Krüger/Polakiewicz, see note 15, 13.

¹³⁴ ECJ, Opinion 2/94, [1996] ECR I-1759, para. 36.

¹³⁵ See S. Alber/U. Widmaier, Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung, *EuGRZ* 2000, 497 (505 et seq.).

¹³⁶ The Finnish suggestion of 22 September 2000 is printed in: *HRLJ* 21 (2000), 487.

¹³⁷ For the different interest positions among the Member States Winkler, see note 131, 115 et seq.; f.

¹³⁸ For latest developments see L. Wildhaber, A constitutional future for the European Court of Human Rights, *HRLJ* 23 (2002), 161 (165) as well as the proposition of Working Group II of the European Convention to introduce a constitutional authorisation which would enable the Union to accede to the ECHR, Report CONV 354/02, 11. The Praesidium of the Convention took up the proposal in Draft Art. 5 (2), CONV 528/03, 3.

¹³⁹ Winkler, see note 131, 118 et seq.

of absolute sovereignty have been overhauled. The EC as a non-state subject of international law has never been granted sovereignty anyway. Nevertheless it does not appear to be out of the question that opposition to an ECHR accession is based on the fear that subjection to the jurisdiction of the ECtHR could impair the independence of the Community. This idea will be followed further.

If an amendment of primary law is not yet in sight, the question remains whether the necessary competence for an accession to the ECHR is actually lacking *de lege lata*. According to the opinion of the ECJ Art. 308 EC is not sufficient as a foundation for the competence because an accession would have “equally fundamental institutional implications for the Community and for the Member States” and, therefore, “would be of constitutional significance”.¹⁴¹ This has been interpreted as implying that the ECJ fears above all subjection to the ECtHR.¹⁴² Krüger/Polakiewicz object that Community law does not exclude the establishment of an external judicial power as the first opinion of the ECJ on the European Economic Area and the ECJ opinion concerning accession to the WTO showed.¹⁴³ Although the assessments are very different, they do agree on the starting point that the relationship of both European jurisdictions to each other constitutes the main problem.¹⁴⁴ In essence the independence of the ECJ as the highest protector of Community law is at stake.

¹⁴⁰ Ibid., 116.

¹⁴¹ ECJ, Opinion 2/94, [1996] ECR I-1759, para. 35.

¹⁴² See Mathieu, L’adhésion de la Communauté à la CEDH, *RMC* 1998, 31 (34); to this effect see also G. Ress, Menschenrechte, Europäisches Gemeinschaftsrecht und nationales Verfassungsrecht, in: Herbert Haller/C. Kopetzki et al. (eds.), *Staat und Recht. Festschrift für G. Winkler*, 1997, 897 (919); J. H. H. Weiler/S. C. Fries, A Human Rights Policy for the European Community and Union: The Question of Competences, in: P. Alston (ed.), *The EU and Human Rights*, 1999, 147 (160) talk about the “hallowed position” of the ECJ in this context; Winkler, see note 131, 129, questions this motive.

¹⁴³ Krüger/Polakiewicz, see note 15, 10; on the permissibility of an external jurisdiction see also Winkler, note 131, 77-84.

¹⁴⁴ As stated by M. Ruffert in a note to Opinion 2/94, see note 141, *JZ* 1996, 624 (626).

III. LEGAL SUCCESSION BY VIRTUE OF FUNCTIONAL SUCCESSION

1. Legal Succession in International Law

a) GATT 1947

A further mechanism that could make international law binding on the EC is the concept of legal succession. By taking over certain functions from its Member States the EC could participate in their obligations under international law. This possibility has been discussed above all in connection with GATT 1947. Schroeder/Selmayr talk of a “functional succession” (“Funktionsnachfolge”) that has established obligations of the EC in international law.¹⁴⁵ Tomuschat describes what has happened as “functional legal succession” (“funktionelle Rechtsnachfolge”).¹⁴⁶

Public international law contains rules on the succession of states. Such a succession is not present, however, with the EC.¹⁴⁷ The rules of state succession find application if the territorial sovereignty of an area is passed from one state to another.¹⁴⁸ In the case of the EC it has not come to this. The EC is not a state. It has not ousted its Member States as territorial sovereignties, rather merely taken over certain of their functions. This substitution of Member States by the EC may be described as a functional succession. It could be considered whether such a functional succession also allows for the obligations of international law to be transferred. Yet, up to now such a functional succession has been recognised neither by international treaties nor by international customary law as a reason for a legal succession. Also the role that the EC has played in GATT 1947 hardly results in this being rated as a

¹⁴⁵ Schroeder/Selmayr, see note 97, 344.

¹⁴⁶ C. Tomuschat, in: v. d. Groeben/Thiesing/Ehlermann, see note 20, Art. 210 paragraph 52; see also paragraph 64: “Sukzessionsvorgang”.

¹⁴⁷ G. M. Berrisch, *Der völkerrechtliche Status der Europäischen Wirtschaftsgemeinschaft im GATT*, 1992, 93 et seq.

precedent. The EC was actually integrated into GATT 1947 as a member state under international law. However, consent to this existed amongst all of the participants.¹⁴⁹ Consequently the position of the EC within GATT 1947 could be explained by the concept of implied accession.¹⁵⁰

Since the foundation of the WTO, which the EC formally joined in 1994, questions of the legal succession in GATT 1947 have played no real role anyway. The mechanism of legal succession by virtue of functional succession, however, remains interesting as a legal option for other cases. A succession of the EC in the duties that arise from the Geneva Convention on Refugees of 1951 and the accompanying Protocol of 1967 may be considered with regard to the planned harmonisation of the law on asylum. Under international law the Geneva Convention binds only the EU Member States as yet but not the EC. Nevertheless, the question of succession also has only a limited meaning here because Art. 63 (1) (1) EC makes the Geneva Convention on Refugees substantially binding under Community law.¹⁵¹ Even more interesting is a possible legal succession of the EC in the duties that arise out of the ECHR.

b) ECHR

Also with regard to the ECHR mechanisms have been discussed which can be assigned more or less to the concept of functional succession. They are based on the basic idea that it would not be acceptable if the Member States deprived individuals of the guaranteed protection of human rights via the ECHR by transferring important state functions to the EC.

¹⁴⁸ A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd edition 1984, paragraph 972.

¹⁴⁹ ECJ, Joined Cases: Cases 21 to 24/72, *International Fruit Company NV and others*, [1972] ECR 1219, para. 16 et seq.

¹⁵⁰ R. Bernhardt, Die Europäische Gemeinschaft als neuer Rechtsträger im Geflecht der traditionellen zwischenstaatlichen Beziehungen, *EuR* 1983, 199 (205); Ott, see note 46, 117-119; for details on the possible

(1) The Member States' Responsibility to Guarantee the Observance of Human Rights by the European Community

In *M & Co. v. Germany*¹⁵² the European Commission of Human Rights proposed a means to achieve the general respect of human rights. According to the Commission's decision the ECHR accepts that the Member States in striving for co-operation and integration create supranational organisations. At the same time the ECHR States will only do justice to their own responsibility for human rights if they guarantee that the supranational organisation observes a human rights standard that corresponds to the ECHR. This extension is similar to the so-called *Solange* case law of the German Federal Constitutional Court concerning the relationship between EC law and German constitutional law.¹⁵³ According to this it is incumbent on the German Constitutional Court not only to guarantee the protection of fundamental rights from the German authority of state but also to guarantee the comprehensive protection of fundamental rights in Germany.¹⁵⁴ Thus EC law would also be measured against the German Basic Law. This requirement of effectiveness and control is, however, withdrawn as long as the EC guarantees a protection of fundamental rights, which is structurally comparable to that of the Basic Law.¹⁵⁵ The European Commission of Human Rights argues in a similar way with regard to the applicability of the ECHR.

Strictly speaking, however, this is not concerned with legal succession by virtue of functional succession. The states alone remain obligated. They are required to ensure that the EC grants the protection of fundamental rights. The legal sources and texts on which this protection is

contractual and contract-like interpretations Berrisch, see note 147, 212 et seq.

¹⁵¹ See below under IV.

¹⁵² EComHR, *M & Co.*, Decisions and Reports 64, 138 (145) = *ZaöRV* 50 (1990), 865 (867); confirmed by EComHR, *K. E. Heinz*, Decisions and Reports 76-A, 125 (127 et seq.).

¹⁵³ This parallel is also depicted by Hilf, see note 16, 1198.

¹⁵⁴ Entscheidungen des Bundesverfassungsgerichts, vol. 89, 155 (174 et seq.) – *Maastricht*.

¹⁵⁵ Entscheidungen des Bundesverfassungsgerichts, vol. 102, 147 (162 et seq.) – “*Common organisation of the market of bananas*” – in connection with Entscheidungen des Bundesverfassungsgerichts, vol. 73, 339 (374 et

based remain open.

(2) Legal Succession in a narrower sense

A legal succession in a narrower sense is discussed in a similar way in connection with the ECHR as with GATT 1947.¹⁵⁶ According to Hilf it is quite clear that the Member States can only transfer national jurisdiction by simultaneously passing on the related legal obligations.¹⁵⁷ As maintained by this concept the national jurisdiction that the Member States transferred to the EC carries with it the obligation to adhere to human rights. This is a type of servitude (“Hypothek”).¹⁵⁸ It is difficult to explain this in legal theory. First of all, the image referred to contradicts the general view that the EC exercises original jurisdiction and not a bunch of Member State jurisdictions.¹⁵⁹ The creation of a new jurisdiction, however, does not necessarily stand in the way of a legal succession. In the case of dismemberment, of fusion or of secession, the rules on state succession also apply to a new, original jurisdiction, which is bound by the obligations of the predecessor state. More importantly, the temporal sequence of the ECHR is not as clear as that of GATT 1947. Although the ECHR is older than the EC, the ECHR only came into force in France in 1974, a long time after the EC Treaty. This means that in this respect no legal succession could occur at any rate until 1974. In opposition to a legal succession in 1974 it can be claimed that the transfer of sovereign rights to the EC had already taken place by this point. In 1974 there was a lack of a functional transition, which could have triggered a legal succession. Just as difficult to establish would have been how the EC should have been bound by additional protocols to the ECHR, which chronologically

seq.) – “*Solange II*”.

¹⁵⁶ The initial instigating text on this was P. Pescatore, *La Cour de justice des Communautés européennes et la Convention européenne des Droits de l’Homme*, in: F. Matscher/H. Petzold (eds.), *Protecting human rights: the European dimension. Studies in honour of G. J. Wiarda*, 1988, 441 (450 et seq.); as an overview see Winkler, see note 131, 29-32.

¹⁵⁷ Hilf, see note 16, 1197.

¹⁵⁸ A. Bleckmann, *Die Bindung der Europäischen Gemeinschaft an die Europäische Menschenrechtskonvention*, 1986, 113-116; similarly Pescatore, see note 156, 450.

¹⁵⁹ *Entscheidungen des Bundesverfassungsgerichts*, vol. 37, 271 (280) - “*Solange I*”; C. Tomuschat, in: *Bonner Kommentar*, Art. 24 paragraph 15, 2nd edition 1981.

follow the conclusion of the EC founding treaties. The well-established concepts of the international succession of states would require considerable further development for this.

Moreover, Rodriguez Iglesias objected to a legal succession by stating that the EC could not be treated as an equal with contracting parties without their agreement.¹⁶⁰ Indeed, international law in principle exempts treaties that establish membership to an international organisation from the succession of states.¹⁶¹ It is in accordance with this that the advocates of a legal succession limit this mostly to the substantial guarantees of the ECHR.¹⁶² Subjection to the control mechanism that includes the possibility of individual applications to the ECtHR is reserved for the accession of the EC to the ECHR.

(3) Direct Responsibility of EC Member States

The direct responsibility of EC Member States is another idea that has been increasingly discussed recently. According to this it should not be possible for the contracting states of the ECHR to evade their responsibility for human rights through the establishment of an international organisation as a form of inter-state co-operation.¹⁶³ The Member States of the EC are, therefore, held fully responsible to the ECHR for the conduct of the EC institutions. This mechanism does not imply a legal succession in the strict sense. The Member States do not pass any of their duties to the EC. Rather the conduct of the Community institutions is attributed to the Member States. Even if this mechanism appears radical the underlying theoretical concept is simple. The EC is no longer seen as an independent subject of

¹⁶⁰ G. C. Rodriguez Iglesias, Zur Stellung der Europäischen Menschenrechtskonvention im europäischen Gemeinschaftsrecht, in: U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Bernhardt*, 1995, 1269 (1274).

¹⁶¹ V. Epping, in: K. Ipsen (ed.), *Völkerrecht*, 4th edition 1999, § 31 clause 22.

¹⁶² Bleckmann, see note 158, 81; also Hilf, see note 16, 1197 et seq., speaks merely of the material binding effect; for a different view Pescatore, see note 156, 453.

¹⁶³ C. Grabenwarter, *Europäisches und nationales Verfassungsrecht, VVDStRL* 60 (2001), 290 (329-331); the considerations of Ress, see note 142, 920 et seq., 932, follow the same trend.

international law from the perspective of the ECHR.¹⁶⁴ As soon as the EC does not apply as a responsible entity in international law anymore the conduct of the Community institutions is attributed to the Member States, which founded the EC and which support it. The EC's "veil of legal personality" is lifted.¹⁶⁵ Academics have drawn a parallel to indirect state administration.¹⁶⁶ If a state transfers national jurisdiction to sub-state entities, international law ascribes the conduct of the entities to the state as its own.¹⁶⁷ A similar mechanism is used with regard to the EC. So long as the EC itself has not acceded to the ECHR, the conduct of the Community institutions can be ascribed to the Member States from the point of view of the ECHR.

The ECtHR has not as yet ventured to take these steps. In the *Matthews* judgement of 1999 it explained that the transfer of competences to an international organisation, such as the EC, does not liberate the Member States from their responsibility under the ECHR.¹⁶⁸ At the same time, however, the Court emphasised that legally relevant acts of the Community institutions could not form the subject matter of a procedure before the ECtHR.¹⁶⁹ In the end the decision did not depend on this question because the responsibility of the United Kingdom arose from its approval of a decision of the Member States meeting in the Council and of the Treaty of Maastricht.¹⁷⁰

¹⁶⁴ Winkler, see note 131, 170.

¹⁶⁵ A similar concept was applied by the ICJ in the context of diplomatic protection; ICJ, *Barcelona Traction*, Rep. 1970, 3, para. 56.

¹⁶⁶ Winkler, see note 131, 170; see further Bleckmann, note 158, 93.

¹⁶⁷ See also Draft Arts. 4 and 5 on Responsibility of States for internationally wrongful acts adopted by the International Law Commission in 2001, UN-Doc. A/56/10, 43 (44).

¹⁶⁸ ECHR, *Matthews v. United Kingdom*, Rep. 1999-I, 251, para. 32.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, para. 33; Application No. 56672/00, *Senator Lines v. 15 EU Member States*, in which the question of member state responsibility for legally relevant acts of the EC was directly raised, has not yet been decided; see on this theme also the applicant's memorial to the Court, *HRLJ* 21 (2000), 112 (116-118).

It may be objected that it would be unpractical if individual or all¹⁷¹ EU Member States are held responsible for the conduct of the EC, which they can scarcely control. Such considerations of practicability can, however, hardly determine the legal extent of human rights protection. Besides the problems can be solved. For instance it might be possible for the EC Member States to allow themselves to be represented by a delegate of the EC in cases where acts of the EC are challenged. Should the ECtHR actually follow the route of attributing EC acts completely to the Member States, this would also exert a considerable pressure to clear up the legal position by means of a formal accession of the EC to the ECHR.

2. Legal Succession under Community Law

The current level of development of international law may not yet be ready to accept the idea of functional succession and to derive from it a legal succession of the EC to the international ECHR obligations of the Member States. However, a legal succession under Community law may still be considered. This mechanism would likewise lead to the EC institutions being bound by the ECHR. Yet, the obligation would no longer be one of international law. Rather the EC institutions would only be bound under Community law. Rudolf Bernhardt thinks along these lines when he speaks of the phenomenon that the EC is materially bound to treaty rules without being a contracting party itself. He explains this by the principle that Community law must be interpreted and applied in accordance with the international commitments of the Member States.¹⁷² The starting point of such considerations is Art. 307 EC. Art. 307 (1) EC expresses the self-evident truth that accession to the EC did not affect the obligations under the ECHR that most Member States had previously taken over. As seen

¹⁷¹ On the question of whether all Member States may be jointly claimed against see Winkler, see note 131, 180 et seq.

¹⁷² Bernhardt, see note 150, 214.

above¹⁷³ these obligations can be understood in such a way that the Member States are also responsible for ensuring that the conduct of the EC conforms with the ECHR.¹⁷⁴ Possible incompatibilities between the ECHR and the EC Treaty can be remedied in accordance with Art. 307 (2) EC. An amendment or even termination of the ECHR in favour of the EC Treaty is not at issue.¹⁷⁵ The only means of solution is, therefore, to oblige the EC institutions to follow the ECHR in Community law so that it does not come to a Member State responsibility in international law.¹⁷⁶

The concept of a legal succession under Community law permits the obligations of the Member States to bind the institutions of the EC in Community law. It does this without needing to further develop the international rules on legal succession and without having to rely on the involvement of non-member states, as would be the case with the accession of the EC to the ECHR. At the same time the autonomy of the Community remains unaffected because the EC is not obligated in international law. However, this mechanism may turn out to be superfluous. It is not needed if the observance of the ECHR by the EC institutions can be guaranteed by an alternative means. Subsequently Art 6 (2) EU comes into consideration.

IV. EXPRESS INCORPORATION IN PRIMARY LAW – IN PARTICULAR ART. 6 (2) EU

A third way of incorporating international law into Community law is by the use of primary

¹⁷³ See note 152 et seq. and note 163 et seq.

¹⁷⁴ To the same effect see also Bleckmann, note 158, 87.

¹⁷⁵ Winkler, see note 131, 146 et seq., describes the suggestion of terminating the ECHR as “absurd”.

¹⁷⁶ To the same effect also Grabenwarter, see note 163, 331, who wants to interpret Art. 6 (2) EU in this sense. Winkler, see note 131, 147 et seq., goes even further. According to him Art. 307 (2) EC requires the accession of the EC to the ECHR because this would be the only way to establish a right of complaint against the EC under Arts. 33, 34 ECHR. However, this does not follow because the ECHR does not require a submission of the EC to the jurisdiction of the ECtHR. As explained in III 1 b it is already doubtful whether the ECHR applies to EC acts. Even if this is approved of, the competence of the ECtHR is safeguarded by putting the responsibility for EC acts on the Member States.

law references to international law. The most important example of this is Art. 6 (2) EU with regard to the ECHR. On examination of Art. 6 (2) EU it should first of all be noted that the mechanism is a purely European one. European Union law grants a text of international law the function of a yardstick without establishing an international obligation. Art. 6 (2) EU, therefore, facilitates the reception of international law standards without creating external obligations or subjecting the Community or the Union to the jurisdiction of an organ that is outside the Union. Art. 6 (2) EU consequently preserves the independence of the EC and its institutions.

Apart from this the scope of Art. 6 (2) EU is unclear. Some would like to see Art. 6 (2) EU make the ECHR binding at least within the Community. Hilf talks of “a substantial obligation” in this context.¹⁷⁷ He emphasises that Art. 6 (2) EU does not refer generally to international human rights norms, rather specifically to the ECHR. He also stresses that the article mentions first the ECHR as an independent guarantee and only afterwards the constitutional traditions of the Member States.¹⁷⁸ Others, however, emphasise once more the independence of Community law. Thus the Court of First Instance (CFI) states that the ECHR is “not itself part of Community law”; the ECJ and CFI merely allow themselves “to draw inspiration from the guidelines” that the ECHR provides.¹⁷⁹ This leads German authors to the conclusion that the ECHR is not a source of law for the EC rather merely a source of legal knowledge (“Rechtserkenntnisquelle”).¹⁸⁰

Eckhard Pache assesses the ruling of the CFI by stating that it avoids the danger of an external

¹⁷⁷ Hilf, see note 16, 1206 et seq.: “materielle Bindung”.

¹⁷⁸ Ibid., 1205 et seq.

¹⁷⁹ CFI, Case T-347/94, *Mayr-Melnhof v. Commission*, [1998] ECR II-1751, para. 311 et seq.; CFI, Case T-112/98, *Mannesmannröhrenwerke AG v. Commission*, [2001] ECR II-729, para. 59 et seq.

¹⁸⁰ T. Kingreen, in: C. Callies/M. Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd edition 2002, Art. 6 paragraphs 35, 40; R. Streinz, *Europarecht*, 5th edition 2001, paragraph 361; see also J. Kühling, in this

domination of EC human rights protection by the ECtHR.¹⁸¹ As an observation this may be true.¹⁸² However, this raises the question of why control by the ECtHR should be considered to be a dangerous domination. It is not astonishing that Alber/Widmaier think in the opposite direction and consider a future provision in primary law, which could make the ECJ's observance of the case law of the ECtHR compulsory.¹⁸³ If all EU Member States have voluntarily subjected themselves to control by the ECtHR the same should not be too alarming for the EC anyhow.

The Charter of Fundamental Rights of the European Union shows once more the ambivalent attitude of the Community and the Union towards the ECHR as an international supplementary constitution. The basic decision to formulate a specific EU text on fundamental rights instead of incorporating international human rights texts formally into Community law corresponds with efforts to safeguard and emphasise the independence of Community law. As regards contents the references of the Charter of Fundamental Rights to the ECHR go further than Art. 6 (2) EU. Art. 52 (3) (1) of the Charter arranges the synchronisation of Charter guarantees with parallel guarantees of the ECHR.¹⁸⁴ Moreover, Art. 53 of the Charter declares the ECHR to be the European minimum standard in connection with other guarantees of fundamental and human rights.¹⁸⁵ However, this incorporation of the ECHR into Community law remains merely an agenda so long as the Charter of Fundamental Rights lacks a legal binding nature.

An essentially stronger incorporation at primary law level can be found in Art. 63 (1) (1) EC.

volume at II 1 b.

¹⁸¹ E. Pache, in a note to Case T-112/98, see note 179, *EuZW* 2001, 351.

¹⁸² See also CFI, Joined Cases: Cases T-305/94 et al., *Limburgse Vinyl Maatschappij et al. v. Commission*, [1999] ECR II-931, para. 420, where the CFI emphasises the independence from the case law of the ECtHR.

¹⁸³ Alber/Widmaier, see note 135, 507 et seq.

¹⁸⁴ With regard to the consequences of this article see also C. Grabenwarter, *Die Charta der Grundrechte für die*

The Treaty of Amsterdam added this rather concealed provision. It gives the European legislator the task of harmonising the law on asylum. At the same time it binds the legislator to the Geneva Convention on Refugees of 1951, to its Protocol of 1967 and also to other relevant treaties. Here an international treaty system is integrated at primary law level into Community law. Whilst Art. 6 (2) EU merely requires a more or less narrow orientation towards the ECHR, Art. 63 (1) (1) EC demands behaviour “in accordance with” international law. The Geneva Convention thus becomes a direct standard of decision. It is not just a source of legal knowledge. Rather it becomes a source of law by virtue of primary Community law references to it. This achieves practical meaning, however, only in the context of harmonisation of asylum law by Community legislation, which would have to comply with the Convention.

V. GENERAL PRINCIPLES OF LAW

A final approach to incorporating international law into Community law is the use of general principles of law. The ECJ had already started to use the ECHR as an expression of general principles of law well before Art. 6 (2) EU was adopted. According to some authors Art. 6 (2) EU simply confirmed this jurisprudence.¹⁸⁶ The gaps in the written legal order of the Community are the starting point for this concept. As European integration reached a certain level an irrefutable need arose to guarantee fundamental rights protection against acts of the Community institutions. Fundamental rights had to be derived from other sources because there was a lack of these rights in written Community law. The use of general principles of law seemed practical. The ECHR, which guarantees a common European standard of

Europäische Union, *DVBl.* 2001, 1 (2).

¹⁸⁵ Grabenwarter, see note 184, 11.

¹⁸⁶ D. Kugelmann, *Grundrechte in Europa*, 1997, 25; Streinz, see note 180, paragraph 358; also Rodriguez

fundamental rights¹⁸⁷, was employed as a reference text.

The ECJ nonetheless avoided making the ECHR directly binding.¹⁸⁸ The Convention is not the point of reference rather the unwritten legal principles are. These are inferred from common constitutional tradition. German academics have described this method as one of comparing and evaluating systems of law (“wertende Rechtsvergleichung”).¹⁸⁹ According to earlier leading decisions of the ECJ international agreements on human rights could provide “guidelines” for the unwritten principles of constitutional law.¹⁹⁰ Later the ECJ emphasised the “particular significance” of the ECHR.¹⁹¹ As a result of this the independence of Community law evolution remains guaranteed despite the dominant function of the ECHR. Jürgen Schwarze¹⁹² talks of a “Reservoir” that the ECJ draws from.

The incorporation mechanism of general principles of law thus identifies itself not only by its great flexibility but also by the fact that it leaves the independence of the Community untouched. Obligations in international law are not established. The extent to which the standards of international law are gradually taken over within the Community depends on the Community institutions alone. The case law of the ECJ is of prime importance. The analysis, which is suggested in this paper from an external perspective that is shaped by international law, agrees with that which Jürgen Kühling emphasises in his contribution to this project¹⁹³ from the viewpoint of EU fundamental rights protection.

Iglesias, see note 160, 1281.

¹⁸⁷ See note 15 et seq.

¹⁸⁸ Kingreen, see note 180, Art. 6 paragraph 35; J. Kühling, *Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht*, 1999, 55.

¹⁸⁹ See Kingreen, note 180, Art. 6 paragraph 39; H.-W. Rengeling, *Grundrechtsschutz in der Europäischen Gemeinschaft*, 1993, 224 et seq.; J. Schwarze, in: Schwarze (ed.), see note 32, Art. 220 EGV paragraph 16.

¹⁹⁰ ECJ, Case 4/73, *Nold v. Commission*, [1974] ECR 491, para. 13; ECJ, Case 44/79, *Hauer*, [1979] ECR 3727, para. 15.

¹⁹¹ ECJ, Joined Cases: Cases C-97-99/87, *Dow Chemical Ibérica et al. v. Commission*, [1989] ECR 3165, para. 10; see also ECJ, Case C-299/95, *Kremzow*, [1997] ECR I-2629, para. 14: “special significance”.

¹⁹² See note 189.

VI. ASSESSMENT

At the beginning of this paper it was asked how the constitution of the EC and the EU behaves towards international supplementary constitutions. The forthcoming results allow two interpretations that do not rule each other out. One explanatory approach concerns the rule of law within the Community. The other concerns the position of the Community in the world.

Because of the restrictive attitude of the ECJ towards WTO law it is frequently declared that the Court does not wish to restrict the scope of action of the Council of Ministers and the European Commission.¹⁹⁴ Behind this is an understanding of the separation of powers, which exempts the exercise of external powers from judicial control.¹⁹⁵ Josef Drexl describes this as a tension between judicial control on the one hand and adherence to the freedom to disregard the treaty on the other hand.¹⁹⁶ He comes out in favour of judicial control as a result of policy-orientated reasons.¹⁹⁷ Legal contemplation of European constitutional law leads to the same result. In national law the idea that external powers may be exempt from judicial control has been increasingly abandoned.¹⁹⁸ In France the significance of international law in the judicial application of law in recent years has considerably increased.¹⁹⁹ German courts have repeatedly emphasised that it is one of the tasks of national courts to avoid situations that could lead to an international responsibility of the state.²⁰⁰ Legal control of external powers is also laid down in the EC Treaty on the one hand in Art. 300 (7) and on the other hand in the

¹⁹³ See his paper under II 1 c.

¹⁹⁴ Berrisch/Kamann, see note 25, 94; von Danwitz, see note 73, 728 et seq.; and also Petersmann, see note 46, 327 are critical of this; along these lines although less critical Hilf/Schorkopf, see note 61, 89.

¹⁹⁵ To this effect see also the analysis of Peters, note 37, 59 et seq.

¹⁹⁶ J. Drexl, *Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsordnung*, in: B. Großfeld/R. Sack et al. (eds.), *Festschrift für W. Fikentscher*, 1998, 822 (836).

¹⁹⁷ Drexl, see note 196, 839 et seq. and 845 et seq.

¹⁹⁸ See also von Danwitz, see note 73, 728.

¹⁹⁹ Grewe, see note 6, 165 et seq.

²⁰⁰ *Entscheidungen des Bundesverfassungsgerichts*, vol. 58, 1 (34) and vol. 59, 63 (89) - *EUROCONTROL*;

rules on judicial control in Arts. 220 et seq. The Community institutions appear to have not yet achieved this state of legal development.

The restrictive attitude towards international law also concerns the EC's position in the world. Naturally, the EC is a member of the international community and it is one of the important actors in the context of the WTO. The ECHR guarantees a common European standard for fundamental rights. It is obvious that the EC and the EU cannot in principle evade this standard. Nevertheless the EC consistently follows a route, which maintains as far as possible its independence from the international community and international law obligations. The EC has at its disposal mechanisms to efficiently incorporate the human rights standards of the ECHR into Community law as required. At first there was the concept of the general principles of law, which is now supplemented by the autonomous reference in Art. 6 (2) EU. The EC has, however, always avoided international obligations, which could have restricted its scope. An accession to the ECHR is not yet foreseen and the idea of a legal succession in international law has until now only been proposed by a few authors. The situation is similar with the WTO. The EC has formally acceded to this system in international law. The almost inevitable consequence of granting WTO law an extensive internal effect via Art. 300 (7) EC has, however, not been set up by the crucial institutions. As formulated by Berrisch/Kamann the ECJ decided in favour of the protection of the Community's sovereignty within the WTO.²⁰¹ A committee report of the European Parliament from 1997 toes exactly this line. It calls for the Community to provide for a "sovereignty shield" in the course of treaty

Entscheidungen des Bundesgerichtshofs in Strafsachen, vol. 45, 321 (339).

²⁰¹ Berrisch/Kamann, see note 25, 92: "Bewahrung der gemeinschaftlichen Souveränität innerhalb der WTO"; von Danwitz, see note 73, 729, comments on the adherence to the WTO Agreements by stating that behind the façade of the concluded agreements the legally unbridled sovereign power of the Community institutions still prevails ("Hinter der Fassade der geschlossenen Abkommen herrscht ... immer noch die rechtlich ungezügelter Hoheitsmacht der Gemeinschaftsinstitutionen.").

amendments.²⁰²

Thus the image of a European Community arises that preserves an idea of sovereignty, which modern European states overcame a long time ago. Many states are prepared to confer on international law an internal effect that noticeably restricts the scope of the state institutions. The constitutional courts of European states lost their roles as sole supreme protectors of fundamental rights long ago. The ECtHR stands next to and above them.²⁰³ It seems odd that the European Community, which has never been regarded as a sovereign state, should have greater difficulty in subjecting itself to international obligations. Perhaps however an explanatory approach lies just here. Nation states such as Germany or France do not seriously jeopardise their identity if they subject themselves to international obligations and revoke their claim to autonomous legislation and application of the law. The situation is different with the EC. The EC is a relatively young construction that essentially understands itself to be a Community founded on law (“Rechtsgemeinschaft”). If Community law loses its autonomy, this could endanger the Community’s identity.

The Community’s aspiration for autonomy, therefore, appears to be an attempt to achieve and strengthen an identity of its own. The identity deficit of the EU and the EC is well known.²⁰⁴ The EU Treaty considers this in the context of the Common Foreign and Security Policy (CFSP). In the tenth preamble recital the EU Treaty describes the CFSP as a means of reinforcing the European identity and its independence. It is remarkable that identity and independence are expressly associated with each other here. Art. 2 (1) EU takes up the theme

²⁰² European Parliament, Committee on Legal Affairs and Citizen’s Rights, *Report on the Relationships between International Law, Community law and the Constitutional Law of the Member States* adopted on 24 September 1997 (rapporteur: S. Alber), A4-0278/97, PE 220.225/fin, 14.

²⁰³ With regard to this parallel also Alber/Widmaier, see note 135, 506; Krüger/Polakiewicz, see note 15, 8 et seq.

²⁰⁴ See W. Graf Vitzthum, *Die Identität Europas*, *EuR* 2002, 1 (5 et seq.) as well as U. Haltern’s contribution to

of the preamble recital in its second sub-paragraph. It declares the assertion of identity on an international level to be an objective of the European Union. Art. 2 (1) EU conceives the Union as a political actor on the international scene. This effort of European integration is intended to strengthen the European identity. A second strategy touches upon the emphasis of independence: marking differences and autonomy can also establish identity. The ECJ proceeded in this second way as long ago as 1964 in *Costa v. E.N.E.L.* Here the Court extracted Community law as an autonomous legal order from the legal orders of the Member States.²⁰⁵ The ambivalent attitude of the Community towards international supplementary constitutions maintains the same strategy. The Community institutions endeavour to make the legal order of the Community independent from international law. This aspiration for autonomy seems to a certain extent outdated since the nation states are increasingly prepared to withdraw prevailing ideas of sovereignty and to open their national constitutional orders to international influences. The counter adherence of the Community to this is explicable in that it has not yet found its permanent place in the international community.

According to this analysis the order that is examined in this project appears as a constitutional order *in statu nascendi*. It cannot do without international supplementary constitutions. However, as long as the European constitutional order has not established itself it will endeavour to play down the significance of international supplementary constitutions and to place its own claims to autonomy in the foreground.

this project.

²⁰⁵ ECJ, Case 6/64, *Costa*, [1964] ECR 585.