

# International Agreements as an Integral Part of EU Law: *Haegeman*

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## Full case name and information

Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, delivered 30 April 1974.

## Keywords

International agreements – International law – Direct applicability – Direct effect – Mixed Agreements – Competence of the European Union – Council Decision

## 1. Introduction

The title of this contribution reflects the sentence that has made the *Haegeman* case famous: ‘The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law’.<sup>1</sup> These days, after a revival of the debate on the EU’s ‘autonomy’<sup>2</sup> that was fuelled

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<sup>1</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraph 5. In the original language, paragraph 5 reads like this: ‘que les dispositions de l’accord forment partie intégrante, à partir de l’entrée en vigueur de celui-ci, de l’ordre juridique Communautaire’.

<sup>2</sup> See for some of the arguments Tamás Molnár, ‘Revisiting the External Dimension of the Autonomy of EU Law: Is There Anything New Under the Sun?’ (2016) 57 *Hungarian Journal of Legal Studies* 178, 179; Cristina Contartese, ‘The Autonomy of the EU Legal Order in the CJEU’s External Relations Case-Law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’ (2017) 54 *Common Market Law Review* 1627.

in particular by the *Kadi* cases<sup>3</sup> as well as by *Opinion 2/13*<sup>4</sup> and, more recently, *Opinion 1/17*,<sup>5</sup> the question of the relationship between EU law and international law is still high on the agenda.<sup>6</sup> It is believed that to make certain key principles of EU law (including primacy and direct effect) work, the EU needs to stress its autonomy vis-à-vis international law, in particular when deciding on the validity and the interpretation of its own rules.<sup>7</sup> At the same time, as an international actor, there is a need for the EU to live up to the rules that make up the international legal order and to implement these rules whenever they bind the Union.<sup>8</sup>

In the beginning of the 1970s the perhaps logical starting point was that the EU as a non-state entity was not automatically bound by international law. This notion may first of all have followed from the famous case law in which the Court only a decade ago had argued ‘that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights’,<sup>9</sup> and that ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system’.<sup>10</sup> The separation between EU law and international law may also have been based on the dualism that many Member States were (and still are) familiar with: international law can only be part of a domestic legal order once it has been incorporated into that legal order. The EU, like states, has a choice regarding the status of international law in its own legal order. That sentiment was worded by Schermers eight years after *Haegeman*, ‘When the Community participates in the international legal order it necessarily operates in a similar way as would a State. There is no other option. When the Community accepts international treaties, it will execute them in the same manner as States execute treaties. This means that it interprets its own obligations and that it may or may not grant to its citizens the rights to invoke those treaties in court.’<sup>11</sup> As we will see, this is indeed what the Court did. Nevertheless, with reference to *Haegeman* and subsequent case law, the legal order of the Union is often identified as ‘monist’ in its relation to public international law: international law that binds the Union is believed to be (automatically) valid within the Union’s legal

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<sup>3</sup> Joined cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*, ECLI:EU:C:2008:461. The notion of ‘autonomy’ was a central element in the discussion between the CJEU and the General Court in the *Kadi* saga when the latter argued: ‘the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law ...’; Case T-85/09, *Kadi v Commission*, ECLI:EU:T:2010:418, paragraph 119 (Chapter XX in this Volume).

<sup>4</sup> *Opinion 2/13* of the Court, ECLI:EU:C:2014:2454. Cf. Bruno De Witte, ‘The Relative Autonomy of the European Union’s Fundamental Rights Regime’ (2019) 88 *Nordic Journal of International Law* 1, 4 (Chapter XX in this Volume).

<sup>5</sup> *Opinion 1/17* of the Court; ECLI:EU:C:2019:341. See for a good analysis Maria Fanou, ‘The CETA ICS and the Autonomy of the EU Legal Order in *Opinion 1/17* – A Compass for the Future’, *Cambridge Yearbook of European Legal Studies*, 2020 (Chapter XX in this Volume).

<sup>6</sup> See recently, for instance, Violeta Moreno-Lax and Paul Gragl (eds), ‘EU Law and Public International Law: Co-Implication, Embeddedness And Interdependency’, 35 *Yearbook of European Law* 1, December 2016, special section; and Sacha Garben and Inge Govaere (eds), *The Interface between International and EU Law* (Hart Publishers 2019). See for a plea for a continued dialogue between the two legal sub-disciplines: Ramses A Wessel, ‘Studying International and European Law: Confronting Perspectives and Combining Interests’, in the latter volume, 73-97.

<sup>7</sup> Cf. Marise Cremona, Anne Thies and Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Oxford: Hart Publishing, 2017).

<sup>8</sup> See Articles 3(5) and 21 TEU in particular.

<sup>9</sup> Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1 (emphasis added).

<sup>10</sup> Case C-6/64 *Costa v ENEL*, ECLI:EU:C:1964:66 (emphasis added).

<sup>11</sup> Henry G Schermers, ‘The Direct Application of Treaties with Third States: Note Concerning the Polydor and Pabst Cases’ (1982), 19 *Common Market Law Review* 4, 563, 566.

order.<sup>12</sup> Yet, the question is whether *Haegeman* is about the relationship between EU law and international law in that general fashion. As we will see, the question the Court had to answer was about the status in the EU's legal order of provisions of international agreements to which the Union is a party and the argumentation of the Court is much more subtle than the line that made the case famous.

While *Haegeman* is considered to be one of the classic and leading cases that would be reviewed in all journals and most probably even lead to specific workshops if it would have been delivered today, it is striking that there was far less academic attention for the judgment in 1974. It is difficult to find case notes or other specific analyses originating from that period. This may partly be explained by the general absence of an 'external relations law community' that would immediately turn #Haegeman into a trending topic on Twitter, but perhaps also by the fact that the impact of the judgment became apparent only later, and in the context of subsequent cases such as *Demirel*,<sup>13</sup> and, in particular, *Kupferberg*.<sup>14</sup>

## 2. Facts

'La société de personnes à responsabilité limitée R. and V. Haegeman' was a wine-importing company based in Brussels. On 19 December 1971, they had already started a direct action against a refusal by the Commission to grant them an exemption from payment of a charge applied to wine imports from Greece into Belgium (*Haegeman I*).<sup>15</sup> One of the arguments was that the charge was applied to contracts made before the entry into force of Regulation 816/70 'laying down additional provisions for the common organisation of the market in wine'.<sup>16</sup> *Haegeman*, *inter alia*, referred to the 'Athens Agreement' that would also feature prominently in the second case. In *Haegeman I*, the Court dismissed the application. It held, *inter alia*, that the request for reimbursement of the disputed charge was a matter to be decided by the competent national authorities.

This triggered *Haegeman II*, the case under review here. On 16 May 1972, *Haegeman* commenced proceedings against the Belgian State, in the person of the Minister for Economic Affairs, claiming reimbursement of the amount of countervailing charges paid for the import of Greek wines into the territory of the Belgium-Luxembourg Economic Union since 1 June 1970. They claimed that Regulation No 816/70 infringed Article 2 of Protocol No 14 mentioned in the final act of the Athens Agreement, and also Articles 37, 41 and 43 of that Agreement. The 'Athens Agreement' was in fact the 1961 Association Agreement between the European Community and (by then third state)

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<sup>12</sup> Cf. various contributions to Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011).

<sup>13</sup> Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400 (Chapter XX in this Volume). Cf. Ilona Cheyne, 'Haegeman, Demirel and their Progeny', in Alan Dashwood and Christophe Hillion, *The General Law of E.C. External Relations* (CUP 2000).

<sup>14</sup> Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362 (Chapter XX in this Volume).

<sup>15</sup> Case 96-71, *R. & V. Haegeman v Commission of the European Communities*, ECLI:EU:C:1972:88.

<sup>16</sup> L 99. Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine, *Official Journal of the European Communities*, 5 May 1970, 1-19 (DE, FR, IT, NL). No longer in force, Date of end of validity: 01/04/1979.

Greece.<sup>17</sup> Despite its title, it was a mixed agreement, that was signed in on behalf of the Heads of State of the Community's then six Member States<sup>18</sup> and the Council of the European Economic Community (*'d'une part'*) and the King of Greece (*'d'autre part'*). The Agreement thus followed a pattern that we are still familiar with in relation to mixed agreements: the EU and its Member States are presented as 'one party'.<sup>19</sup>

The *Tribunal de première instance* of Brussels, thus found itself confronted with the question of whether Regulation No 816/70 was indeed infringing certain provisions of the Athens Agreement, as claimed by Haegeman. The Tribunal submitted four questions to the Court in Luxembourg to get this clarified. The arguments presented by Haegeman boil down to pointing out that the Athens Agreement does not allow for a differentiation between wines imported from Greece and from Italy, Germany and France. As no charges apply to the latter wines, they should also not apply to wines imported from Greece. More generally, Haegeman argued that the new system established by Regulation No 816/70 should be read and interpreted in the context of the Athens Agreement.

Parties to current cases before the Court, as well as the Court itself, will look at the procedural schedule with some envy. The preliminary question by the Belgian Court was registered at the Court of Justice on 7 November 1973. Haegeman, the Belgian State and the Commission presented their oral observations at the hearing on 12 March 1974. The Advocate-General delivered his opinion on 4 April 1974. The Court's judgment was delivered on 30 April 1974, at 10:00 o'clock. Within six months the entire procedure was concluded.<sup>20</sup>

### 3. The Court

The sentence that made *Haegeman* famous ('The provisions of the Agreement [...] form an integral part of Community law'<sup>21</sup>) is in fact part of the Court's deliberations on its jurisdiction and not of the substantive part of the judgment.<sup>22</sup> The Court had to make that point to establish its jurisdiction as it could only give preliminary rulings concerning 'the interpretation of acts of the institutions of the Community' as Article 177 TEC (now Article 267 TFEU) provided.<sup>23</sup> As the Athens Agreement was concluded by the Council, '[t]his Agreement is *therefore*, in so far as concerns the Community, an act of one of the institutions of the Community'.<sup>24</sup> By using the Council Decision as a link, the Court opened the possibility of asking preliminary questions about the interpretation of

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<sup>17</sup> L 26. Council Decision (63/106/EEC) on the conclusion of the Agreement establishing an Association between the European Economic Community and Greece, *Official Journal of the European Communities*, 18 February 1963, 293–293 (DE, FR, IT, NL). No longer in force, Date of end of validity: 01/01/1981.

<sup>18</sup> At the time of the *Haegeman* procedure, the Athens Agreement was still binding upon the original six Member States only as the new Member States that joined the Union on 1 January 1973 would become bound by virtue of an Additional Protocol that was in course of negotiation.

<sup>19</sup> See further Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements in EU Law Revisited* (Hart Publishing 2010); as well as Guillaume Van der Loo and Ramses A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017), 54 *Common Market Law Review* 735.

<sup>20</sup> The complete case file (257 pages, *en français*) is available from the Archives of the Court at the EUI in Florence.

<sup>21</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraph 5.

<sup>22</sup> Judges in this case were: Lecourt (President), Donner, Sørensen, Monaco (Rapporteur), Mertens de Wilmars, Pescatore, Kutscher, Ó Dálaigh, and Mackenzie Stuart.

<sup>23</sup> This was mentioned as point (b) in Article 177 TEC, which also referred to '(a) the interpretation of this Treaty' and '(c) the interpretation of the statutes of bodies established by an act of the Council where those statutes so provide.'

<sup>24</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraphs 3 and 4 (emphasis added).

international agreements: ‘Within the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this Agreement’.<sup>25</sup>

At the beginning of the month of the judgment, on 2 April 1974, Advocate-General Warner<sup>26</sup> had issued his Opinion. Much more clearly than these days, the Opinion of the AG was formulated as a letter to the judges (in this case, starting with ‘My Lords,’ and addressing them as ‘Your Lordships’ throughout the text). Also, the Opinion was annexed to the judgment. In relation to the main focus of this case note, it is important to note that the AG argued that the Court’s jurisdiction does not extend to rule on the interpretation of international agreements. We need to quote the respective (not numbered) paragraph in full:

‘In general, of course, as has been laid down in a number of Judgments of the Court, it is, in references under Article 177 of the EEC Treaty, for the national Court or Tribunal making the reference to be the judge of the relevance of the questions referred and this Court has no jurisdiction to enquire into their relevance. But this general principle is subject, I apprehend, to at least one exception, which is applicable here. This exception springs from the fact that the jurisdiction of the Court under Article 177 is to rule on the interpretation of the Treaty and on the validity and interpretation of acts of the Community Institutions. The Court has under Article 177 no direct jurisdiction to rule on the interpretation of such an instrument as the Agreement of Association with Greece: its jurisdiction to interpret that instrument arises only, I apprehend, where its interpretation is relevant to the question of the validity of an act of a Community Institution or to the question of the interpretation to be given to such an act. It follows in my opinion that, in the present case, the questions asked by the Tribunal de premiere instance of Brussels are admissible only in so far as they are related to the question of the validity and effect of Regulation No 816/70 and of the Community legislation implementing it.’

So, in the eyes of the AG, interpretation of international agreements is allowed only where that interpretation is relevant to assess the validity of a legal act, such as, in this case, Regulation No 816/70 and possibly implementing legislation. Indeed, this is quite a different starting point than saying that international agreements are an *integral* part of EU law. For the Court, this statement by the AG may have formed a reason to clearly mention the Council Decision on the basis of which the international agreement was concluded. This then led the Court to conclude that ‘This Agreement is *therefore* [...] an act of one of the institutions of the Community’.<sup>27</sup> So, because the Agreement was adopted on the basis of a Council Decision, the Agreement itself can be seen as an act of the Council. There are two provisos to which we will return later: 1. ‘in so far as the Agreement concerns the Community’; and 2. ‘within the meaning of subparagraph (b) of the first paragraph of Article 177’.<sup>28</sup>

In the remaining paragraphs of the judgment, the Court provides answers to the questions raised by the Belgian court. This substantive part falls outside the scope of the present contribution. Suffice it to say that it is doubtful whether the Haegeman team opened a bottle of their finest Greek wine on the evening of that Tuesday in late April 1974.

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<sup>25</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraph 6.

<sup>26</sup> Sir Jean-Pierre Warner (24 September 1924 – 1 February 2005) served as the first British Advocate-General of the European Court of Justice after Britain’s entry into the European Community.

<sup>27</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraph 4; emphasis added.

<sup>28</sup> Case 180/73, *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, paragraph 4.

## 4. The importance of the case

### 4.1. International law binding on the EU

The main contribution of the case is that it settled the status of international agreements in the EU's legal order. This 'automatic treaty incorporation' would imply that international agreements 'could be interpreted and applied as if they were enacted as Community law',<sup>29</sup> and that 'such Agreements are in principle capable of possessing [the] two central distinguishing attributes of EU law: direct effect and supremacy.'<sup>30</sup> The question has been raised why the Court did not simply refer to Article 228(2) TEC (currently Article 216(2) TFEU)<sup>31</sup> – which at the time already read that 'Agreements concluded under these conditions [the procedure in paragraph 1] shall be binding on the institutions of the Community and on Member States'<sup>32</sup> – perhaps, and if needed, in combination with Article 164 TEC (currently Article 19 TEU).<sup>33</sup> The answer probably is that the focus of this part of the case was on finding a way to deal with international agreements in the context of a preliminary procedure that happened to be linked to 'acts of the institutions' only. The Court indeed clearly limited the scope of its statement by adding the phrase 'within the meaning of subparagraph (b) of the first paragraph of Article 177.' Furthermore, the AG had argued that interpretation of international agreements merely existed when this would be relevant to the validity or interpretation of an act of a Union institution. And, finally, the treaty provision that agreements are binding on the Union and its Member States could also be interpreted as a mere repetition of the *pacta sunt servanda* rule in international treaty law,<sup>34</sup> and does not necessarily define the internal status of international agreements (both in terms of validity and of primacy and direct effect). By stating that international agreements are an integral part of Union law, the Court's main intention may therefore have been to view them as acts of the institutions, allowing EU citizens and other market participants to have them play a role in assessing the legality of both EU and domestic measures. This is indeed quite a step,<sup>35</sup> but one that almost seems to have been taken accidentally, in the context of a procedural issue. The presentation of an international agreement as an act of an institution rather than as an act of the Union is perhaps acceptable collateral damage.

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<sup>29</sup> Ilona Cheyne, 'Haegeman, Demirel and their Progeny', in Alan Dashwood and Christophe Hillion, *The General Law of E.C. External Relations* (CUP 2000), at 23.

<sup>30</sup> See Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP 2013), at 63-64.

<sup>31</sup> *Ibid.* at 66-67.

<sup>32</sup> The current text in Article 216(2) TFEU is very similar: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

<sup>33</sup> Article 164 TEC read: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'. This sentence can still be found in current Article 19 TEU. The Court did in fact refer to Article 164 TEC in its next case on international agreements, Case 87/75 *Bresciani*, ECLI:EU:C:1976:18 (Chapter XX in this Volume); and returned more in detail to this issue in Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362 (Chapter XX in this Volume).

<sup>34</sup> Article 26 of the Vienna Convention on the Law of Treaties provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>35</sup> Cf. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP 2013), at 65: 'It was in embryonic form the external relations counterpart of *Van Gend en Loos* [...]'.

Yet, not all international agreements are an integral part of EU law. Obviously, it is important to (1) establish whether the Union is a party, and (2) whether it is really an international agreement.

As to the first point, a little over a year earlier, in *International Fruit Company*,<sup>36</sup> the Court had established that the EU is in principle bound by international law and that it ‘is obliged to examine whether [the] validity may be affected by reason of the fact that [measures adopted by the institutions] are contrary to a rule of international law.’<sup>37</sup> Yet, as the Court pointed out, ‘[b]efore the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision.’<sup>38</sup> It is somewhat peculiar that in *Haegeman* the Court does not at all refer back to this case and to these more general starting points. On the basis of subsequent case law, we now know that – even if the Union is a party to the agreement – the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this.<sup>39</sup> And, where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise.<sup>40</sup> While in *International Fruit Company*, the Court had famously introduced an examination of ‘the spirit, general scheme and terms’ of the agreement in question,<sup>41</sup> to establish whether it could be invoked by individuals, in *Haegeman* it did not use this test and merely focused on the status of the international agreement as an ‘act of the institutions’ to establish that the agreement was formally concluded on the basis of the applicable procedures. While the Court thus suddenly seemed less interested in ‘the spirit, general scheme and terms’ and generously seemed to welcome all international agreements as an integral part of Union law, later case law – starting with *Bresciani*<sup>42</sup> – brought the *International Fruit* test back in and clarified that the mere adoption by the Union institutions of an international agreement would not be enough to establish direct applicability.<sup>43</sup>

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<sup>36</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115 (see Chapter XX in this Volume).

<sup>37</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paragraph 6.

<sup>38</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paragraph 7.

<sup>39</sup> See also Joined Cases C-120/06 & C-121/06 *FIAMM and Others v Council and Commission*, ECLI:EU:C:2008:476, paragraph 110.

<sup>40</sup> As for instance repeated in Case C-344/04 *R, ex parte IATA v Department for Transport*, ECLI:EU:C:2006:10, para 39; and Case C-308/06 *Intertanko and Others*, ECLI:EU:C:2008:312, paragraph 45 (Chapter XX in this Volume). While this would generally rule out WTO agreements, in Case C-66/18, *Commission v Hungary (Higher education)*, ECLI:EU:C:2020:792, the Court underlined its jurisdiction to hear and determine complaints alleging infringements of WTO law (in that instance, the GATS), in the context of infringement proceedings.

<sup>41</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115 (see Chapter XX in this Volume), par. 20.

<sup>42</sup> Case 87/75, *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, ECLI:EU:C:1976:18 (see Chapter XX in this Volume).

<sup>43</sup> Cf. Ilona Cheyne, ‘Haegeman, Demirel and their Progeny’, in Alan Dashwood and Christophe Hillion, *The General Law of E.C. External Relations* (CUP 2000), at 24. See on the discussion at the time also Gerhard Bebr ‘Agreements Concluded by the Community and Their Possible Direct Effect’ (1983), 20 *Common Market Law Review* 35; Völker,

Furthermore, in *Kupferberg*,<sup>44</sup> the Court did not use the term ‘Community law’, but argued that international agreements are a part of the ‘Community legal system’, which put a comparison with legal acts of the institutions into perspective and pointed to a broader range of legal effects.<sup>45</sup>

The *Haegeman* test to establish whether the Union is bound by an international agreement nevertheless remains essential. While this may indeed be easy to establish on the basis of a Council act, *International Fruit* revealed that it is also possible for the Union to be bound once it has assumed, and thus transferred to it, the powers previously exercised by the Member States that fall within the international agreement in question. While this was the situation in relation to the GATT,<sup>46</sup> it was, for instance, not the case for the Chicago Convention on air transport and the Court held that regarding this particular agreement the powers previously exercised by the Member States had not been assumed in their entirety by the European Union, and that the latter is thus not bound by it.<sup>47</sup> This led to the conclusion that the provisions of that particular agreement could *not* be said to form an integral part of EU law.

The second point concerns the question of the nature of the international agreement. Are informal arrangements which the Union or its institutions entered into also to be regarded as forming an integral part of EU law? There is a clear proliferation of these informal arrangements, that are generally characterised by the fact that they are not concluded on the basis of Articles 216/218 TFEU.<sup>48</sup> These ‘soft law instruments’ in EU external relations may bear various labels, including Joint Communications, Joint Letters, Strategies, Arrangements, Progress Reports, Programmes or Memoranda of Understanding. Several reasons are mentioned in the literature that account for the use of soft arrangements in EU external relations, such as ‘the need to increase the efficiency of external action, to allow greater smoothness in negotiation and conclusion of the instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments. In addition, non-binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. ...’<sup>49</sup> The claim that an arrangement is not meant to ‘create legal rights or obligations under international law’ does not always imply that it falls completely outside EU law.<sup>50</sup> These arrangements may form the interpretative context for legal agreements and may even commit the Union through the development of customary law or as unilateral declarations. While arguing that

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‘The Direct Effect of International Agreements in the Community’s Legal Order’ (1983) 1 *Legal Issues of European Integration* 131;

<sup>44</sup> Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362 (Chapter XX in this Volume).

<sup>45</sup> Cf. Ilona Cheyne, ‘Haegeman, Demirel and their Progeny’, in Alan Dashwood and Christophe Hillion, *The General Law of E.C. External Relations* (CUP 2000), at 26.

<sup>46</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115 (see Chapter XX in this Volume).

<sup>47</sup> Case C-366/10, *Air Transport Association of America and Others*, ECLI:EU:C:2011:864 (Chapter XX in this Volume). This case also nicely summarizes all criteria.

<sup>48</sup> See more extensively Ramses A Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2020), *West European Politics*.

<sup>49</sup> Paula García Andrade, ‘The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments’ (2016) 1 *European Papers* 115, 116.

<sup>50</sup> See for instance Case C-660/13, *Council v. Commission* (Swiss MoU), ECLI:EU:C:2016:616 (Chapter XX in this Volume).

they also form an ‘integral part of EU law’ might not always be easy, there are reasons not to overstate the difference between ‘hard’ and ‘soft’ agreements. In practice, the conclusion of political commitments does not differ too much from the conclusion of international agreements: in many cases, the Commission (or in the case of CFSP MoUs’ the High Representative) will negotiate and sign the document, where the actual conclusion is in the hands of the Council. Reasons not to formally call an instrument an ‘international agreement’ are often political and sometimes the procedure of Article 218 is simply followed.<sup>51</sup> Further case law will have to clarify the status of informal arrangements in the EU legal order.

#### 4.2. A hierarchy of norms?

*Haegeman* is often mentioned in debates on the relationship between international and EU law. Its most common function is to argue that international law is part of EU law. It is indeed the sentence in paragraph 5 on the ‘integral part’ that established the current VIP status of this judgment. While the judgment itself merely concerns the *interpretation* of an international agreement and is far less clear about its *status* in the EU legal order, let alone that it concerns international law in general, text books often use this sentence to explain the hierarchy between norms:<sup>52</sup>

1. The EU Treaties
2. International law binding upon the EU
3. Secondary EU law

While the Court in *International Fruit*<sup>53</sup> had related the validity of EU measures to their conformity with international law (see above) and later on frequently dealt with this question and indeed concluded that international law ranks between primary and secondary law,<sup>54</sup> *Haegeman* as such was much more restrictive. First of all, it merely clarified that international agreements (or, in fact, the provisions of a particular agreement) were to be seen as belonging to EU law, at least for the purposes of the preliminary procedure. Secondly, it did thus merely address written law, leaving clarifications on customary law<sup>55</sup> or on the status of secondary international law created in the framework of international agreements, such as Association Council decisions,<sup>56</sup> or on decisions taken by other

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<sup>51</sup> Ramses A Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2020), *West European Politics*.

<sup>52</sup> See more extensively, Chapter 5 on ‘The EU and International Law’, in Ramses A Wessel and Joris Larik (eds), *EU External Relations Law: Cases and Materials* (Hart Publishing 2020).

<sup>53</sup> Joined cases C-21-24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115 (see Chapter XX in this Volume).

<sup>54</sup> See for instance: Case C-179/97 *Spain v Commission*, ECLI:EU:C:1999:109; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz*, ECLI:EU:C:1998:293, para 45 (Chapter XX in this Volume)

<sup>55</sup> Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* ECLI:EU:C:1998:293, para 45 (Chapter XX in this Volume); Case T-115/94 *Opel Austria GmbH v Council*, ECLI:EU:T:1997:3 (Chapter XX in this Volume); as well as Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others*, ECLI:EU:C:1996:312 (Chapter XX in this Volume).

<sup>56</sup> See for instance: Case C-192/89 *Sevince v Staatssecretaris van Justitie* ECLI:EU:C:1990:322 (Chapter XX in this Volume).

international organisations,<sup>57</sup> to later judgments. A conclusion that *Haegeman* clarified the status of international law in the Union's legal order can therefore only be drawn in hindsight and only in combination with earlier and subsequent case law.

Also, while the mentioned hierarchy may work quite well internally, it raises problems in relation to obligations which both the Member States and the EU may have *vis-à-vis* third states and international organisations under international law. When international agreements form an integral part of EU law and their provisions have to be in conformity with primary Union law, this may result in problems to live up to international obligations. In *Kadi*, the CJEU was challenged to reconcile UN Security Council obligations with the protection of fundamental rights as part of the general principles of law to be ensured by the Court.<sup>58</sup> In this case the Court held that the obligations imposed by an international agreement (in this case the UN Charter) could not have the effect of prejudicing the constitutional principles of the EU Treaty. Thus, it confirmed the hierarchy scheme presented above, but it could only do so by separating international obligations from internal implementation measures.<sup>59</sup>

#### 4.3. A distinction between the Union and its Member States

In *Haegeman*, the Court stated that international agreements are to be seen as acts of the institutions 'in so far as the Agreement concerns the Community'. This statement had to do with the fact that the international agreement in question was a mixed agreement. As we have seen, both the Community and its Member States were parties to the 'Athens Agreement'. With our more extensive understanding of mixed agreements today,<sup>60</sup> the statement by the Court also raises some questions. The idea that an international agreement can only be seen as an act of the institutions in so far it concerns the Union was most certainly related to the division of competences, and was connected to the question of whether the preliminary references procedure was applicable. While this may have been understandable looking at the Court's line of argumentation, it stands in stark contrast to the claim that *the* (not 'some') provisions of international agreements are an integral part of Union law. What does this mean for mixed agreements? Did the Court aim to imply that parts of mixed agreements cannot be seen as acts of the institutions? With a view to the Council Decisions on the conclusion of mixed agreements, that would not make sense. Apart from listing provisions that can already provisionally be applied, those decisions typically make no distinction between areas falling under Union or Member State competences. Would this be different, then an interpretation or a review

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<sup>57</sup> See, for instance, C-399/12, *Germany v Council (IOV)*, EU:C:2014:289 (Chapter XX in this Volume). See also Ramses A. Wessel and Steven Blockmans, 'The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union', in Piet Eeckhout and Manuel Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016), 223-248.

<sup>58</sup> Joined cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*, ECLI:EU:C:2008:461. (Chapter XX in this Volume).

<sup>59</sup> See further Chapter XX in this Volume.

<sup>60</sup> See for a recent analysis Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill/Nijhoff 2020); as well as Guillaume Van der Loo and Ramses A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017), 54 *Common Market Law Review* 735.

by the Court of provisions clearly covered by Member State competences would be excluded; and that is not the case in practice.

As briefly mentioned above, in *Kupferberg*,<sup>61</sup> the Court used the ‘integral part’ argument in a more holistic manner by pointing to Member State obligations to allow the Union to live up to its international obligations. Rather than trying to limit the agreement to whatever ‘concerns the Community’, it pointed to collective responsibilities:

‘In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in Case 181/73 *Haegeman* [1974] ECR 449, form an integral part of the Community legal system.’<sup>62</sup>

So, eight years after *Haegeman*, and in the very first reference to this case [check], the Court took the phrase out of context and used it for a different purpose. In providing this ‘ex post justification for *Haegeman*’,<sup>63</sup> the Court went beyond the *pacta sunt servanda* rule, and underlined the obligations Member States have in relation to agreements concluded by the Union.<sup>64</sup>

## 5. Conclusion

The value of *Haegeman* is still visible today. The case has been referred to in subsequent judgments 35 times (including orders and Opinions of the Court) and in AG Opinions 52 times; and even today the most famous phrase is often repeated: ‘Since an international agreement concluded by the European Union is an integral part of EU law [...]’.<sup>65</sup> Yet, over the years, the conditions under which the Court originally made this statement faded out and this sentence has indeed started a life of its own.<sup>66</sup> It is important though to keep the original context of the phrase in mind. In *Haegeman*, the Court needed to establish its jurisdiction and subsequent case law made clear that the justiciability of international agreements does not follow automatically. This does not at all affect the importance of the case. The very notion that international law that is binding on the European Union is part of the Unions legal system, rightfully turned *Haegeman* into an integral part of EU external relations case law.

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<sup>61</sup> Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362 (Chapter XX in this Volume).

<sup>62</sup> Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362, paragraph 13.

<sup>63</sup> Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP 2013), at 67.

<sup>64</sup> Something that was even then already reflected in Article 228(2) TEC (Article 216(2) TFEU).

<sup>65</sup> As is the case in the most recent references in Case C-897/19, *Ruska Federacija v I.N.*, ECLI:EU:C:2020:262, paragraph 49; as well as Case C-66/18, *Commission v Hungary (Higher education)*, ECLI:EU:C:2020:792, paragraph 69.

<sup>66</sup> It is not uncommon for law to develop on the basis of a repetition of earlier statements to strengthen or even modify their content. See Wouter Werner, ‘Godot was Always There: Repetition and the Formation of Customary Law’, *Global Cooperation Research Papers*, Oct 2019, Duisburg: Käte Hamburger Kolleg / Centre for Global Cooperation Research (KHK/GCR21).

## 6. Additional reading

E Cannizzaro, P Palchetti and RA Wessel (Eds.), *International Law as Law of the European Union*, Boston/Leiden: Martinus Nijhoff Publishers, 2011

I Cheyne, 'Haegeman, Demirel and their Progeny', in A Dashwood and C Hillion, *The General Law of E.C. External Relations* (CUP 2000).

S Garben and I Govaere (Eds.), *The Interface between International and EU Law* (Hart Publishers 2019)

M Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP 2013)