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# *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*

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## **Abstract**

*In order to draw a distinction between the Community legal order and other international organizations, the Court of Justice has very often taken a rather prudent attitude towards the application of the principles of customary international law. However, in respect to Article 307 EC (ex Article 234) it has generally made a careful application of those principles. This article first examines the case law related to the subordination clause, contained in paragraph 1, of the EC Treaty vis-à-vis the pre-existing agreements concluded by the member states with third countries. Secondly, it focuses on two recent judgments concerning the obligation, established in paragraph 2, of the member states to eliminate incompatibilities with the EC Treaty found in pre-existing agreements. To find a solution for the two cases, the Court again made reference to the principles of international law, resisting the temptation to develop a particular doctrine, suggested by the Commission, concerning the relationships between earlier agreements and the EC Treaty.*

## **1 The Content of Article 307 EC**

It is well known that the relationships among successive treaties relating to the same subject-matter, but not concluded by the same international subjects, are regulated by two customary principles, codified in Article 30(4) of the Vienna Convention.<sup>1</sup> According to the first of these two principles, in the relationship among subjects which

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<sup>1</sup> Although the Vienna Convention of 1969 is related to the law of treaties concluded between states, and not to those concluded between states and international organizations or between international organizations, it is commonly assumed that it largely codified the customary international law. Furthermore, it is well known that the Vienna Convention of 1986 concerning the treaties concluded between states and international organizations or between international organizations provides almost identical rules.

are parties both to the earlier and to the later treaties, the first treaty can be applied only to the extent that its provisions are compatible with those of the second. According to the second principle, in the relationship between a subject which is party to both treaties and a subject which is party only to one of them, the treaty binding the two subjects governs their mutual rights and obligations. The international customary law also provides the possibility to subordinate the application of the earlier treaty to the latter, or *vice versa*, by means of specific clauses (Article 30(2) of the Vienna Convention). This is done in order to avoid that, when an action is required by a treaty, but at the same time is inconsistent with another, the subject has to make a choice that inevitably brings about an international responsibility for breaching one of the two treaties.

Article 307(1) EC (ex Article 234(1)) represents one of the above-mentioned subordination clauses.<sup>2</sup> According to the text modified by the Treaty of Amsterdam, this Article establishes that the provisions of the EC Treaty do not affect 'the rights and obligations arising from the agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other'.<sup>3</sup> The reach of this provision is specified and circumscribed by paragraph 3 of the Article. The latter has the aim of avoiding the extension of the preferential treatment linked to the economic and customs union provided by the EC Treaty, such as the application of the most favoured nation clause, to third countries with whom member states continue to have international relations by virtue of the agreements safeguarded by paragraph 1. In fact, paragraph 3 provides that: '[I]n applying the agreements referred to in the first paragraph, member states shall take into account the fact that the advantages accorded under this Treaty by each member states form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of the common institution, the conferring of powers upon them and the granting of the same advantages by all the other member states.'

Finally, Article 307 provides a *pactum de agendo*, which aims to eliminate the inconsistencies of the earlier agreements with the EC Treaty. In this respect, paragraph 2 establishes that: '[T]o the extent that such agreements are not

<sup>2</sup> See, as comment on the provision, Bentivoglio, in Monaco, Quadri and Trabucchi, *Commentario CEE* (1965) 1963; Luis and Buckner, *Commentaire Megret*, vol. 12 (1st ed., 1980) 78; Coehn-Jonathan, in Costantinesco, Kovar, Jacqué and Simon, *Commentaire du Traité CEE* (1992) 1497.

<sup>3</sup> The original text of para. 1 was the following: 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more member states on the one hand, and one or more third countries on the other, shall not be affected on the provisions of this treaty.' The provision shows an evident ambiguity. Taken literally, it implies the safeguarding of the agreements concluded before the entry into force of the EC Treaty (1 January 1958) is extended also to the states which acceded after that date. As a consequence, the agreements concluded by those states between the date of entry into force of the EC Treaty and the date of their accession were not safeguarded. This would be contrary to international customary law. The problem never arose because the treaties of accession clarified that the provision was intended to be applicable to the agreements concluded before accession. Nevertheless, the drafters of the Treaty of Amsterdam have correctly modified the text in order to avoid any further uncertainty.

compatible with this Treaty, the member state or states concerned shall take all the appropriate steps to eliminate the incompatibilities established. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

Whereas the Court of Justice has frequently made rulings in the past on the meaning and the reach of paragraph 1 of Article 307, it is only very recently, in two judgments of 4 July 2000, that it took a position on the content of paragraph 2 and on how the obligation of eliminating the incompatibilities with the EC Treaty contained in the earlier agreements can be coordinated while safeguarding these same agreements. Consequently, only today is it possible to analyze the law governing pre-existing agreements concluded by member states with third countries (hereafter also referred to as 'pre-Community agreements'), taking as a reference an almost complete interpretative framework as outlined by the Court of Justice.

## 2 The Interpretation of Article 307(1) EC According to the Principles of International Law Made by the Court of Justice

In the *Burgoa* case,<sup>4</sup> the Court examined some important questions linked to the subordination clause contained in Article 307(1). Noting that the provision 'is of general scope and it applies to any international agreement, irrespective of the subject-matter, which is capable of affecting the application of the treaty', the Court clarified that its purpose 'is to lay down, in accordance with the principles of international law, that the application of the treaty does not affect the duty of the member state concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'.<sup>5</sup> From this statement of principle the Court deduced two corollaries. First, it observed that, even if the provision regards obligations of member states only, 'it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of member states which stem from a prior agreement'; however, it also added that this duty 'does not bind the Community as regards the non-member country in question'.<sup>6</sup> Secondly, the Court held that the safeguarding of the engagements arising from pre-Community agreements 'cannot

<sup>4</sup> Judgment of 14 October 1980, Case 812/79, *Attorney-General v. Burgoa* [1980] ECR 2787. On this case, see in particular Schermers, 18 *Common Market Law Review* (1981) 227–231; and Churchill and Foster, 'European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases', 36 *ICLQ* (1987) 504.

<sup>5</sup> *Burgoa*, *supra* note 4, at paras 6 and 8, respectively. On the point of para. 8, see also the Judgment of 27 February 1962, Case 10/61, *Commission v. Italy* [1962] ECR 7.

<sup>6</sup> *Burgoa*, *supra* note 4, at para. 9. The *dictum* means also that the idea expressed in the *International Fruit* case of a substitution of the Community for member states as regards obligations arising from the GATT has no general application: see the Judgment of 12 December 1972, Cases 21/72 to 25/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit (No. 3)* [1972] ECR 1219.

have the effect of altering the nature of the rights which may flow from such agreements'.<sup>7</sup>

From these corollaries flow some important consequences. From the first corollary, it can be inferred that there exists the obligation for the Community institutions not to hinder the exercise of the rights or the fulfilment of the obligations arising from pre-Community agreements. Nevertheless this obligation does not become a duty of active cooperation with the member states nor does it create a duty upon the Community to give execution to these agreements.<sup>8</sup> From the second corollary, it can be deduced that paragraph 1 implies neither a renovation of the rights and obligations of the member states towards the third states, nor the existence of a Community protection or warranty of such rights and obligations. For this reason the Court clarified that the provision 'does not have the effect of conferring upon individuals who rely upon an agreement concluded prior to the entry into force of the treaty or, as the case may be, the accession of the member states concerned, rights which the national courts of the member states must uphold. Nor does it adversely affect the rights which individuals may derive from such an agreement'.<sup>9</sup>

In the subsequent case law, the Court gave further clarifications on the scope of Article 307(1). In the *Levy* case, it held, a bit pleonastically, that to determine whether a Community rule may be deprived of effect by a pre-Community agreement, 'it is necessary to examine whether the agreement imposes on the member states concerned obligations whose performance may still be required by non-member countries which are parties to it'.<sup>10</sup> More appropriately, in the *Evans* case, the Court affirmed that 'when an international agreement allows, but does not require, a member state to adopt a measure which appears to be contrary to Community law, the member state must refrain from adopting such a measure'.<sup>11</sup> This statement, which aims to impede acts contrary to the obligations arising from the EC Treaty not necessary to fulfil the pre-Community agreements, limits the field of application of paragraph 1 in conformity with the rule of general international law according to which every treaty must be performed by the parties in good faith (Article 26 of the Vienna Convention).

Quite obviously, respect of the rights and obligations arising from pre-Community agreements does not extend to the relationships among member states. In accordance with the above-mentioned rule of general international law, the agreements in question can be applied to the member states only to the extent they are consistent

<sup>7</sup> *Burgoa*, *supra* note 4, at para. 10.

<sup>8</sup> See the Opinion of Advocate-General Capotorti on the case, *Burgoa*, *supra* note 4, at para. 2.

<sup>9</sup> *Burgoa*, *supra* note 4, at para. 10.

<sup>10</sup> Judgment of 2 August 1993, Case C-158/91, *Ministere Public et Direction du Travail et de l'Emploi v. Levy* [1993] ECR I-4287, at 4300, para. 13. The point is confirmed in subsequent judgments, see 14 January 1997, Case C-124/95, *R. v. HM Treasury, ex parte Centro-Com Srl* [1997] ECR I-81, para. 57; and 10 March 1998, Joined Cases C-364/95 and C365/95, *T Port GmbH v. Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023, para. 60.

<sup>11</sup> Judgment of 28 March 1995, Case C-324/93, *R. v. Secretary of State for the Home Department, ex parte Evans Medical Ltd* [1995] ECR I-563, see para. 32.

with the EC Treaty. However, this does not mean that the relationships among these states are *in all cases* regulated by the EC Treaty. In fact, although unusual, it is possible that the application of the EC Treaty interferes with the rights of third states established by a pre-Community agreement.<sup>12</sup> Therefore the Court of Justice in the *Deserbais* case correctly pointed out that a member state cannot rely on the provisions of a pre-Community agreement in order to justify restrictions on the marketing of products coming from another member state 'provided that, as in the present case, the rights of non-member countries are not involved'.<sup>13</sup>

### 3 Interpretative Issues Still Open Concerning Article 307(1) EC

Until now some interpretative problems of the subordination clause contained in Article 307(1) have not been dealt with by the Court of Justice, and some others, although examined, have not found indisputable solutions.

The first of these problems is represented by the fact that the text of paragraph 1, both in the original version and in the version as amended by the Treaty of Amsterdam, makes reference to agreements 'concluded' prior to the entry into force of the EC Treaty or the date of accession of the new member state. A literal interpretation of this text could lead one to think that the EC Treaty does not hamper the rights and obligations arising from agreements signed before 1 January 1958 (or the relevant date of accession), even if these agreements came into force later than these dates.<sup>14</sup> The Court has been rather evasive on this issue. In some cases it has specified that the pre-Community agreement had to be both signed and ratified before the EC Treaty came into force;<sup>15</sup> in other cases it has simply not noticed the juridical difference between the two acts.<sup>16</sup> Notwithstanding this literal interpretation, some elements can be perceived, as paragraph 1 refers to agreements which entered into force prior to the EC Treaty, and not simply those which were signed prior to the EC Treaty. First of all, taking into consideration that, as the Court itself recognized, paragraph 1 is to be understood in conformity with international law, it must be observed that Article 30

<sup>12</sup> See, for instance, the example made by Advocate-General Lenz in the Opinion related to the *Evans* case, *supra* note 11, at para. 33.

<sup>13</sup> Judgment of 22 September 1988, Case 286/86, *Ministere Public v. Deserbais* [1988] ECR 4907, para. 18. Similar conclusions can be drawn from Case 10/61, *Commission v. Italy* [1962] ECR 7, para. 21. On the contrary, the judgment of 11 March 1986, Case 121/85, *Conegate v. Customs and Excise Commissioners* [1986] ECR 1007 is ambiguous because it is stated that the pre-Community agreements cannot be applied in the relationships among member states, but it is not specified that it can be done only where the rights of non-member countries are not involved; see in particular *ibid*, at para. 25.

<sup>14</sup> It may be useful to recall that according to Article 2(b) of the Vienna Convention the consent to be bound to a treaty is expressed by the term 'notification', 'acceptance', 'approval' or 'accession'. On the other hand, the term 'conclusion' is used in Article 6 of the convention to generally indicate the capacity of states.

<sup>15</sup> See, for instance, *Burgoa*, *supra* note 4, at para. 7.

<sup>16</sup> See, for instance, *Centro-Com*, *supra* note 10, at para. 61.

of the Vienna Convention, which regulates the application of successive treaties relating to the same subject-matter, always refers to treaties to which states are parties, that is to say treaties in force among them. Secondly, it must be noted that the rights and obligations safeguarded by paragraph 1 must arise from pre-Community agreements, whereas no rights and obligations arise from agreements merely signed.<sup>17</sup> It must be concluded, therefore, that, to give the provision an *effet utile*, it must be considered to refer to agreements in force.

A second problem, which the Court of Justice has not dealt with, is represented by the conclusions of agreements with one or more third countries after the entry into force of the EC Treaty but before the full exercise by the Community of its functions in the matter. In this case, according to the so-called *Kramer* doctrine, member states maintain the power to assume international commitments.<sup>18</sup> It could be thought that the subordination clause of paragraph 1 also covers the rights and obligations arising from such commitments and therefore the Community acts subsequently adopted cannot undermine their content. This hypothesis must be rejected for two reasons. First, it is not consistent with the literal interpretation of paragraph 1, which, as seen above, unequivocally refers to the date of entry into force of the EC Treaty for each member state; this date cannot be confused with the moment of the effective exercise of functions by the Community. Secondly, it must be recalled that, in the *Kramer* judgment, the Court had pointed out that, even if member states could assume the above-mentioned international commitments, they were still under a duty to assure that those commitments did not hinder the future exercise of functions by the Community in the matter.<sup>19</sup> Consequently, not only are agreements concluded before the exercise of functions by the Community not safeguarded, but also there has been established an obligation not to hamper such exercise of functions; this obligation pursues an aim antithetical to the one fixed in paragraph 1, to the extent to which it supports the validity of the Community acts *vis-à-vis* the international commitments.

Finally, there remains the problem of establishing which jurisdictional body is eventually competent to interpret pre-Community agreement so as to ascertain if and to what extent an agreement impedes the application of the EC Treaty. The Court of Justice has dealt with the problem, but the position it has taken raises some difficulties. In the previously mentioned *Levy* case, the Court held, and has constantly repeated in subsequent case law, that ‘in proceedings for a preliminary ruling, it is not for this Court but for the national court to determine which obligations are imposed by an earlier international agreement on the member state concerned and to ascertain their

<sup>17</sup> According to Article 18 of the Vienna Convention, there is an obligation on the state which has signed a treaty not to frustrate the treaty’s object during the period before its entry into force. However, this obligation clearly flows from the Vienna Convention, not from the treaty itself. It must be recalled that the application of this principle within the Community legal order has been confirmed by the Court of First Instance in the Judgment of 22 January 1997, Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39.

<sup>18</sup> Judgment of 14 July 1976, Joined Cases 3, 4 and 6/76, *Officier Van Justitie v. Kramer* [1976] ECR 1279.

<sup>19</sup> *Kramer*, *supra* note 17, at para. 44.

ambit so as to be able to determine the extent to which they constitute an obstacle to the application'<sup>20</sup> of Community law.

First of all, it must be pointed out that this principle can be applied only in relation to preliminary rulings of interpretation. With regard to preliminary rulings of validity, which aim to ascertain if a Community act is legal in relation to a pre-Community agreement, the Court is the only body competent to resolve the question and therefore it cannot avoid its duty of interpreting the pre-Community agreement, which assumes, by means of Article 307, the function of a parameter of legality.<sup>21</sup> Secondly, it must be noted that the position taken by the Court is not justified upon the principle expressed in the *Vandeweghe* judgment, according to which the Court does not have jurisdiction under Article 234 EC (ex Article 177) 'to give a ruling on the interpretation of provisions of international law which bind member states outside the framework of Community law'.<sup>22</sup> In fact, the presupposition of the application of the subordination clause of paragraph 1 is that the pre-Community agreement is not outside the framework of Community law, but, quite the contrary, has the same subject-matter. Furthermore, it is worth noting that the *Vandeweghe* judgment did not intend to resolve a problem relating to the application of Article 307. On the other hand, the Court could not maintain that within a preliminary ruling it could not interpret national law. Although formally indisputable, this argument does not acknowledge that, as well-established practice, the Court, interpreting Community law, almost inevitably evaluates the meaning and the content of national law. Furthermore, it must be noted that pre-Community agreements, as introduced into national legal orders, cannot formally be distinguished from other national norms. Thus, the Court of Justice does not have grounds to deny interpretation on the basis that the provision to be applied by the national court derives from an international agreement.

The Court's position seems to be justified by other reasons. It should be observed that the only difference between a preliminary ruling concerning the application of a pre-Community agreement and a preliminary ruling concerning other questions is that within the latter the Court must find the field of application of Community law, whereas within the former it should specify to what extent Community law does *not* apply, in so far as it is derogated by the pre-Community agreement. The reluctance of the Court would, therefore, be justified by the fact that, to interpret the pre-Community agreement, it should take a position on a Community provision that would not actually be applied. Even if the position of the Court is understandable from

<sup>20</sup> *Levy*, *supra* note 10, at para. 21. See also the judgment of 3 February 1994, Case C-13/93, *Office National de l'Emploi v. Minne* [1994] ECR I-371, para. 18; *Evans* case, *supra* note 11, at para. 29; and *Centro-Com*, *supra* note 10, at para. 58.

<sup>21</sup> Advocate-General Capotorti in his Opinion related to the *Burgoa* case points out the issue; see *Burgoa*, *supra* note 3, at para. 7. Obviously, the principle under consideration is not applicable in the actions for infringements of the Treaty, because in these cases the problem is to establish whether the failure to fulfil a Community obligation by a member state was justified on the ground of respecting obligations under a pre-Community agreement.

<sup>22</sup> Judgment of 27 September 1973, Case 130/73, *Vandeweghe v. Berufsgenossenschaft für die Chemische Industrie, Heidelberg* [1973] ECR 1329, at para. 1.

a psychological point of view, it cannot be shared under the juridical plan. The Court itself has frequently pointed out that, by means of the preliminary ruling, it may 'provide the national court with an interpretation of Community law which will enable the court to resolve the issue of law with which it is faced'. Thus, in the case of Article 307(1), the interpretation of the pre-Community agreement by the Court of Justice enables the national court to establish the limits of application of the agreement in question and the residual room for the Community law.<sup>23</sup>

#### 4 The Content of Article 307(2) and the Obligation of Denunciation of the Pre-Community Agreements

There is no doubt that there exists a potential tension between the scope of paragraph 1 and the one of paragraph 2 of Article 307: the first provision pursues the safeguarding of pre-Community agreements with respect to the commitments flowing from the EC Treaty; the second provision requires the member states to take 'all appropriate steps' to eliminate from those agreements established incompatibilities with the EC Treaty. From this tension arise some interpretative questions concerning the reach of paragraph 2 and the way this provision must be coordinated with paragraph 1. In particular, it should be asked if, among the steps that must be taken to eliminate the incompatibilities with the EC Treaty, there is also the denunciation of the pre-Community agreement and, if this is the case, in which situations this measure could be adopted.

On these issues, before the two judgments of 4 July 2000 that were mentioned above, the Court of Justice has pronounced only on one occasion. In a recent case, *Commission v. Belgium*, rejecting the argument according to which the failure to modify the pre-Community agreement had to be justified in consideration of a difficult political situation in the third country, the Court held that 'if a member state encounters difficulties which make it impossible to adjust an agreement, it must denounce the agreement'.<sup>24</sup> As will be seen later, even if the two judgments of 4 July 2000 made reference to it, this *dictum* of the Court cannot be considered as a precedent for two reasons. First, the member state in question had not claimed the application of Article 307 in order to justify the failure to modify the pre-Community agreement, and therefore the Court did not give any interpretation on the point. Secondly, in that case, the Community provisions imposing the modification of the pre-Community agreements did not contain any subordination clause and therefore they did not have a content similar to that of Article 307.

Article 307 is, *vice versa*, the main object of interpretation in the two judgments of 4

<sup>23</sup> Schermers, *supra* note 4, comes to a similar conclusion, though on the basis of different arguments.

<sup>24</sup> Judgment of 14 September 1999, Case C-170/98, *Commission v. Belgium* [1999] ECR I-5493, at para. 42.



July 2000,<sup>25</sup> arising from two actions of infringement, which were very similar as regards the facts, brought by the Commission against Portugal for failure to modify some agreements that Portugal had concluded before its accession to the EC Treaty.

In order to allege the violation of Article 307 by Portugal, the Commission took the view that the subordination clause contained in paragraph 1 had to be interpreted in a restrictive manner, because it had the effect of making an exception to the principle of supremacy of Community law. To support this position, the Commission referred to the third paragraph of the Article which, as noted above, has the aim of limiting the scope of the first paragraph by avoiding the extension of the preferential treatments linked to the economic and customs union provided by the EC Treaty to third countries to whom member states continue to be bound by virtue of pre-Community agreements. The Commission also made reference to the case law of the Court, according to which, as noted above, a Community rule may be deprived of effect by an earlier agreement only if that agreement imposes on the member state concerned obligations whose performance may still be required by non-member countries which are parties to it. The Commission drew the conclusion that paragraph 2 of Article 307 imposed on the member states an obligation to achieve a specific result, in the sense of assuring the supremacy of Community law by means, eventually, of the unilateral denunciation of the conflicting pre-Community agreement. This measure was to be used as a last resort in the event that diplomatic steps to renegotiate the agreement failed.<sup>26</sup>

The member state concerned took a different interpretative approach. The second paragraph of Article 307 had to be read in conjunction with the first paragraph, so that any incompatibility had to be eliminated in a manner which affected to the least degree the rights of the third countries party to the pre-Community agreement. The member state took the view that, even taking into consideration the necessity of guaranteeing the full effect of Community law, it did not have an obligation to achieve a specific result, but only an obligation of means. This included denunciation, but this could not be imposed, *sic et simpliciter*, in the event of difficulties or the failure of diplomatic action to renegotiate the pre-Community treaty. If this were the case, the last sentence of paragraph 2 — according to which in such diplomatic action member states shall, where necessary, assist each other and shall, where appropriate, adopt a common attitude — would be devoid of meaning. *Vice versa*, an obligation to denounce a pre-Community agreement could arise only in extreme situations where two conditions were fulfilled: the total incompatibility between a provision of such an agreement and Community law; and the impossibility of safeguarding, by political or other means, the Community interest involved. According to the member state concerned in the two cases submitted to the Court, this second condition was not fulfilled because the pre-Community agreements that needed to be adjusted were not

<sup>25</sup> Judgments of 4 July 2000, Case C-62/98, *Commission v. Portugal* and Case C-84/98, *Commission v. Portugal*, not yet published in the ECR.

<sup>26</sup> For a more complete description of the Commission's position, see the Opinion of Advocate-General Mischo of 20 October 1999 concerning both cases, at paras 28–38.

being applied, and therefore their formal scope did not affect the Community interest.<sup>27</sup>

## 5 The Denunciation of Pre-Community Agreements According to International Law in Two Judgments of the Court of Justice

The position of the Commission contains some logical and juridical flaws. First, the reference to the principle of the supremacy of Community law does not appear relevant because it concerns the relationship between national laws and Community laws and not, as in the cases that were pending before the Court, the relationship among international conventions. Secondly, the reference to paragraph 3 of Article 307 does not support the restrictive interpretation of paragraph 1: a provision that limits the scope of another provision does not imply that the latter, in its limited field of application, has to be interpreted narrowly. Thirdly, it is very difficult to see how the restrictive interpretation of paragraph 1 can be based on the case law which specifies that Community law may be deprived of effect only by pre-Community agreements whose performance can be required by non-member countries which are parties to it. This case law could be used only to confirm the rather obvious rule that, to prevail over Community law, a pre-Community agreement must be still in force. On the contrary, some statements in conflict with the Commission's position can be singled out from the case law of the Court of Justice. For instance, in the *Levy* case, the Court affirmed that national courts are under a duty to ensure that Community law is fully complied with by refraining from applying any conflicting provision of national legislation 'unless the application of such provision is necessary in order to ensure the performance by the member state concerned of obligations arising under an agreement concluded with non-member countries before the entry into force of the EEC Treaty'.<sup>28</sup>

The position of Portugal is not entirely coherent. It is correctly based on the presupposition that an *effet utile* must be given to the second sentence of paragraph 2. However, it does not come to the conclusion, as would seem logical, that the pre-Community agreement can be denounced only following the difficulties or the failure of the common diplomatic action of the member states to adjust the agreement, but only in the presence of two conditions which have nothing to do with the second sentence of paragraph 2.

However, the major flaw that is common to the two positions is that they do not take into consideration international law concerning the denunciation of the treaties. In this regard, it is hardly necessary to recall that, pursuant Article 56 of the Vienna Convention, a treaty that does not specifically provide for it is not subject to

<sup>27</sup> For a more complete description of Portugal's position, see the Opinion of Advocate-General Mischo, *ibid.*, at paras 40–49, and the judgments in the two cases in question, Case C-62/98, at paras 26–29 and C-84/98, paras 31–34.

<sup>28</sup> *Levy*, *supra* note 10, at para. 22, see also *Minne*, *supra* note 19, at para. 17.

denunciation unless the possibility could be inferred from the character of the treaty or from the intention of the parties. This rule has important consequences for the problem examined. If the possibility of denunciation is provided by the pre-Community treaty or if it can be determined by any other means provided by international law, the denunciation aimed to guarantee the fulfilment of the obligations under the EC Treaty does not affect the rights of the third countries party to such an agreement. Thus, the use of this measure, as a step to eliminate the incompatibilities with the EC Treaty according to paragraph 2 of Article 307, is by no means in conflict with the content of paragraph 1 and therefore must be considered fully admissible. Conversely, if the possibility of denunciation is not provided either in the pre-Community agreement or by other means of international law, the denunciation of such an agreement to eliminate the incompatibilities with the EC Treaty appears illegitimate. In fact, it would not only result in international responsibility on the member state concerned, but also would deprive paragraph 1 of Article 307 of *effet utile*, because the respect for Community law would always prevail on the rights of the third countries party to the pre-Community agreement. Consequently, in such a case, the denunciation is not a step that can be admitted pursuant to paragraph 2 of Article 307.

A similar point of view was taken by the Court of Justice in the two judgments of 4 July 2000. First of all, the Court formally made reference to, but substantially modified, the position assumed in the above-mentioned judgment, *Commission v. Belgium*. As noted above, it held in that judgment that a member state is obliged to denounce a pre-Community agreement if it encounters difficulties which make it impossible to adjust. In contrast, in the two judgments in question, having ascertained that the member state had not succeeded in adjusting the contested pre-Community agreements by recourse to diplomatic means within the time limits laid down by Community law, the Court affirmed that 'in such circumstances, in so far as the denunciation of such an agreement is possible under international law, it is incumbent on the member state concerned to denounce it'.<sup>29</sup> Furthermore, it stressed that, on the basis of previous case law concerning paragraph 1 of Article 307, it requires that a member state must 'in all cases'<sup>30</sup> respect the rights of third countries under a pre-Community agreement and perform its obligations thereunto. The Court ruled on the two cases submitted to it supporting the admissibility of denunciation only in respect of international law and the full effectiveness of the subordination clause enshrined in paragraph 1. Consequently, it observed that all the contested agreements contained a clause that explicitly enabled the contracting parties to denounce them, so that the eventual denunciation of Portugal would not have encroached upon the rights of the third countries.

<sup>29</sup> *Commission v. Portugal*, Case C-62/98, at para. 34; and *Commission v. Portugal*, Case C-84/98, at para. 40.

<sup>30</sup> *Commission v. Portugal*, Case C-62/98, at para. 45; and *Commission v. Portugal*, Case C-84/98, at para. 54.

Finally, the Court, having clarified the conditions of admissibility of the denunciation, also outlined the presuppositions of appropriateness, that is to say the circumstances under which, being admissible according to international law, a pre-Community agreement must actually be denounced. Recognizing that, in any case, member states have a choice as to the appropriate steps to be taken, it has stated that the obligation to denounce can not be excluded 'if they encounter difficulties which make adjustment of an agreement impossible'.<sup>31</sup>

<sup>31</sup> *Commission v. Portugal*, Case C-62/98, at para. 49; and *Commission v. Portugal*, Case C-84/98, at para. 58.