CHAPTER 2

# Reciprocity and Direct Effect

## *Yaoundé and Trade Integration*

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### 2.1 INTRODUCTION

The *Bresciani* case is one of a group of early cases in which the legal effect of Community agreements, and their nature as a source of law, was considered and the first case in which a provision of the Yaoundé Convention was explicitly found to have direct effect.[1] In *Haegeman*, two years earlier, the Association Agreement with Greece had been declared to be an 'integral part of Community law', opening the way for preliminary references on the interpretation of Community agreements, as well as the possibility of direct effect.[2] During this period (between the early 1970s and the mid 1980s) a number of issues relating to the direct effect of international agreements were thrashed out, but ambiguities remained – and still remain.

This chapter explores the way in which the specific context of the *Bresciani* case, the trade relations established by the Yaoundé Convention between the Community and some of its former colonies, both influenced the Court's presentation of direct effect in *Bresciani* itself and raised questions about the relationship – still not transparent – between direct effect and the reciprocal (or non-reciprocal) nature of a trade agreement, in particular agreements founded on relationships of integration with the EU. In *Bresciani*, non-reciprocity was a signifier of the closeness of the relationship established by the Yaoundé agreement, and

[1] Case 87/75 *Bresciani*, EU:C:1976:18. The application of Yaoundé was simply assumed without discussing direct effect in Case 48/74 *Charmasson*, EU:C:1974:137.

[2] Case 181/73 *Haegeman*, EU:C:1974:41. See also Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, EU:C:1982:129.

direct effect both a manifestation and an instrument of the integration of former colonies into the Community trading system. This reasoning has been influential in the interpretation of integration-led agreements beyond the postcolonial context of Yaoundé. In focusing on the *Bresciani* case, we shed light on the way the EU's complex colonial and decolonization inheritance has shaped the legal concept of direct effect in its integration-led trade agreements, and indeed the nature of the EU's emerging external relations in the 1970s and beyond.

The chapter starts with a brief introduction to the background to the Yaoundé Conventions which were at issue in *Bresciani* (Section 2.2), before going on to the judgment itself (Section 2.3), some comments on subsequent case law and practice in relation to direct effect (Section 2.4) and an assessment of the ongoing significance of the case (Section 2.5).

## 2.2 THE YAOUNDÉ CONVENTION: BACKGROUND AND NEGOTIATION

The Schuman Declaration of 9 May 1950 claimed that 'with increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent'.[3] The Preamble to the original Treaty of Rome included a reference to the 'solidarity which binds Europe and overseas countries' – a reference which is still found today in the Preamble to the Treaty on the Functioning of the European Union (TFEU). France and Belgium in particular had pressed for the inclusion of specific provision in the EEC Treaty for their colonies, or overseas countries and territories (OCTs) as they were termed,[4] and in the event the EEC Treaty's Part IV established a 'special system of association' for 'the non-European countries and territories [with] which [the Member States] have special relations'.[5]

[3] Schuman Declaration, 9 May 1950. Available at bit.ly/43utL3z.

[4] Eklund aptly refers to the term 'overseas countries and territories' as an example of 'coded' colonial language: H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831 at 835.

[5] Art. 131 EEC. Art. 227(3) EEC provided that 'The overseas countries and territories listed in Annex IV to this Treaty shall be the subject of the special system of association described in Part IV of this Treaty.'

According to Article 132 EEC, 'Such association shall have the following objects … Member States shall, in their commercial exchanges with the countries and territories, apply the same rules which they apply among themselves pursuant to this Treaty.'

Article 136 EEC provided for an initial five-year Implementing Convention, that was therefore due to expire in 1962, and for its replacement by the Council with 'provisions … for a further period'. In addition to this deadline, some of the OCTs had become independent, and the early introduction of the common external tariff gave rise to the need to revise the import tariff regime.[6]

These factors pointed to the need for a new agreement between the EEC and the newly independent former colonies.[7] The Council decided in October 1960 to embark on negotiations for a new agreement, and these opened in January 1961. The first Yaoundé Convention came into force in 1965 and was replaced after five years with Yaoundé II (1970–1975), and then – after the first EEC enlargement – with the geographically broader Lomé Convention.[8] The legal basis of these agreements was Article 238 EEC, providing for association agreements between the EEC and third countries.[9] According to Frisch, the use of the term 'association' in Part IV to describe the relationship between the EEC and the

[6] Commission communication, 'Association des états d'outre-mer a la Communauté : considérations sur le futur régime d'association', 12 July 1961, COM (1961) 110, pp. 9–10.

[7] I. W. Zartman, *Politics of Trade Negotiations between Africa and the European Economic Community* (Princeton: Princeton University Press, 1971), p. 25.

[8] The first and second Yaoundé Conventions were concluded as mixed agreements between the EEC, the (then six) EEC Member States and eighteen associated states; OJ 1964 1431/64; OJ 1970 L 282/1. See further C. Cosgrove Twitchett, *Europe and Africa: From Association to Partnership* (Farnborough: Saxon House, 1978).

[9] Art. 238 EEC provided that 'The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.' On contemporary debates over the scope of Art. 238 EEC see J. J. Costonis, 'The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade' (1968) 5 *Common Market Law Review* 421 at 443–449. Interestingly in the context of this chapter, the proposal to use Art. 238 EEC as the basis for a multilateral agreement between the EEC and the remaining members of the Organization of European Economic Cooperation, including the UK, failed as a result of the UK's unwillingness to compromise its system of commonwealth trade preferences: Costonis, 'The Treaty-Making Power of the EEC', at 445.

OCTs under colonial rule gave rise to an unwillingness on the part of some newly independent states to enter into an 'association' with the EEC on the basis of Article 238 EEC.[10] Indeed some chose not to do so.[11] And in fact, in *Bresciani*, both Advocate General Trabucchi and the Court emphasized the continuity between the original OCT association based on Article 136 EEC, and the Yaoundé Convention based on Article 238 EEC.

The French and Belgian insistence on including provision for the OCT in the Treaty of Rome was thus a significant factor in ensuring that the Community embarked upon a development policy, and the principles of that policy, being set out in the treaty itself, were (we might say) constitutionalized. Thus the Commission argued that the new association agreement – a building block of the EU's nascent development policy – was bound to espouse the objectives set out in Article 131 EEC: close economic relations with the OCTs, their economic and social development and 'the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect'.[12] As we shall see, in *Bresciani* these objectives will be linked by the Court to the non-reciprocal character of the Yaoundé Convention.[13] Yaoundé was concluded with African countries with colonial links to France and Belgium and was therefore regional in nature. Germany and the Netherlands, and subsequently the Commission, were keen to expand EEC relations to other newly independent states in Africa and beyond (as reflected in

[10] D. Frisch, 'The Role of France and the French in European Development Cooperation Policy' in G. Bossuat and G. D. Cummings (eds.), *France, Europe and Development Aid: From the Treaties of Rome to the Present Day* (Vincennes: Institut de la gestion publique et du développement économique, 2013), pp. 109–120. For an exploration of the drafting history and colonial underpinnings of the provisions on the OCTs in the Treaty of Rome, in particular the term 'association', see Eklund, 'Peoples, Inhabitants and Workers'.

[11] E.g. Republic of Guinea, which did not join until 1975; on the consequences of this choice see Case 147–73 *Carlheinz Lensing Kaffee-Tee-Import KG v. Hauptzollamt Berlin-Packhof*, EU:C:1973:156.

[12] Commission communication, 'Association des états d'outre-mer a la Communauté : considérations sur le futur régime d'association', 12 July 1961, COM (1961) 110, pp. 7–8.

[13] See text at note 33.

the Arusha agreement with Kenya, Uganda, Tanzania).[14] As Bartels has pointed out, these colonial relationships shaped EU development policy over decades and the EU's postcolonial 'preferences' towards some developing countries have only relatively recently been subject to challenge and adjustment.[15] The purpose of this chapter, however, is not to trace that influence, but rather to explore the ways in which the Court's interpretation in the *Bresciani* case of the economic integration found in the Yaoundé Convention has shaped its approach to the direct effect of trade agreements outside the development policy context.[16]

## 2.3 THE *BRESCIANI* CASE

The *Bresciani* case, perhaps fortuitously, concerned a public health inspection charge payable on goods (animal hides) imported into Italy from another Member State (France) and a Yaoundé party (Senegal). The question was whether the charge was a 'charge of equivalent effect to a customs duty' (CEE) and as such prohibited in intra-EU trade (Article 13(2) EEC) and Yaoundé trade (Article 2(1) Yaoundé). From the start, then, the Court was asked to consider Yaoundé alongside the EEC Treaty. The questions from the national court concerned the direct effect of the Yaoundé provision and whether the concept of CEE in Article 13(2) EEC also applied under Yaoundé.

In the background of the case were, on the one hand, earlier cases on the interpretation of the equivalent provision of the EEC Treaty,[17]

[14] Commission Memorandum on a Community Policy on Development Cooperation, 27 July 1971. SEC (71) 2700. Supplement 5/71 – Annex to EC Bulletin 9/10–1971.

[15] L. Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715. Although the reference to solidarity with 'the overseas countries' is still in the Preamble to the TFEU (see text at note 4), Art. 21(2) Treaty on European Union includes among the objectives of EU external action the economic and social development of developing countries generally, and the integration of all countries into the world economy.

[16] On the influence of the colonial legacy on another aspect of external policy, see J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24(1) *UCLA Journal of International Law and Foreign Affairs* 163.

[17] Such as, e.g. Case 29/72 *Marimex*, EU:C:1972:126; Case 94/74 *IGAV v. ENCC*, EU:C:1975:81.

and, on the other hand, the *Haegeman* judgment, according to which international agreements concluded by the Community are an 'integral part' of Community law and subject to the interpretational jurisdiction of the Court of Justice,[18] and the *International Fruit Company* cases of a few years earlier in which it had been held that The General Agreement on Tariffs and Trade (GATT) was not capable of creating directly effective rights.[19] The case prompted the question whether the potential for direct effect was a characteristic of the EEC Treaty not to be shared with other international agreements, or whether the ruling on the GATT was a particular case not necessarily to be extended to others. In its judgment, the Court initiated a line of case law on the direct effect of international agreements, an approach which – in its *Bresciani* foundations – owed a great deal to the way in which the EEC envisaged its relations with its Member States' former colonies, but which has since been applied much more broadly within the EU's sphere of influence.[20]

The Commission, in its submission, based its argument on the fact that Article 2 of the Yaoundé Convention expressly referred to the corresponding provisions of the EEC Treaty; in its view, since those provisions create directly effective rights, so too must Article 2 of Yaoundé.[21] The applicants too dwelt on this point, as well as relying on the origins of the Yaoundé Convention in Articles 131–136 EEC and on the *Haegeman* case.[22] No Member State government made submissions in the case.[23] While these arguments of the Commission and the applicants find their way into the judgment, the broader issues of direct effect and reciprocity discussed by the Court appear to have been prompted by the advocate general.

[18] *Haegeman*.

[19] Cases 21–24/72 *International Fruit Company*, EU:C:1972:115.

[20] See e.g. the cases cited in Section 2.4.

[21] Dossier de procédure original, affaire 87/75, CJUE 1743, Commission submission, p. 22.

[22] Dossier de procédure original, affaire 87/75, CJUE 1743, Report for the hearing, p. 7.

[23] A point to which Mendez draws attention with some surprise, given the potential precedential importance of the case; as he says, *Bresciani* 'laid bare the implications of *Haegeman*'. M. Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 *European Journal of International Law* 83 at 89.

In his opinion, Advocate General Trabucchi started from the context in which the Yaoundé Conventions were concluded, emphasizing the continuity between the association with the OCTs established by Article 136 EEC and the Yaoundé Convention, and the express reference in Article 2(1) Yaoundé I to the corresponding provisions of the EEC Treaty, including Article 13 EEC.[24] Although Yaoundé II does not make this express reference, he attached no significance to that change.[25] While accepting that provisions of international agreements would not necessarily carry all the implications of similarly worded provisions in the EEC Treaty, he argued that there is no reason to suppose that the prohibition of customs duties and CEE in the Yaoundé Conventions was intended to mean anything different from its meaning in the EEC Treaty. Trabucchi went on to consider the issue of direct effect. He argued that reciprocity ('whether, in the light of its subject-matter and objectives, the international agreement with which we are concerned is based strictly on the principle of reciprocity') is relevant, not because direct effect depends on reciprocal implementation, but as indicating whether the agreement is in principle capable of direct effect.[26] Rejecting the possibility that all Community agreements as a matter of principle should be capable of direct effect, and stressing the difference between international law and Community law,[27] he went on to recognize the specificity of the Yaoundé Conventions, their continuity with the treaty provisions on OCTs and

[24] Art. 2(1) of Yaoundé I read (in the English translation): 'Goods originating in Associated States shall, when imported into Member States, benefit from the progressive abolition of customs duties and charges having an effect equivalent to such duties, resulting between Member States under the provisions of Articles 12, 13, 14, 15 and 17 of the Treaty and the decisions which have been or may be adopted to accelerate the rate of achieving the aims of the Treaty.' OJ 1964, p. 1431.

[25] Art. 2(1) of Yaoundé II read: 'Products originating in the Associated States shall, on importation into the Community, be admitted free of customs duties and charges having equivalent effect, but the treatment applied to these products shall not be more favourable than that applied by the Member States among themselves.' OJ 1970 L 282/1 and Case 87/75 *Bresciani*, opinion of AG Trabucchi, EU:C:1976:3, [1976] ECR 144, p. 147.

[26] Ibid., p. 148.

[27] The Advocate General (AG) refers to the 'characteristics and operational requirements peculiar to the Community system the essential nature of which clearly distinguishes the legal order of the European Community from that of international law'. It is these characteristics which underpin the doctrines of primacy and direct effect. Ibid., p. 148.

their development objectives, reflected in their non-reciprocity and the fact that they offered 'privileges' (his word) to the associated countries.[28] He expressly reserves his views on the question whether the Community's international agreements *in general* may be capable of direct effect, basing himself on the special nature of the Yaoundé Conventions. The advocate general went on to find that the provision of the Yaoundé Convention at issue in the case, Article 2(1), satisfied the conditions for the creation of directly effective rights, as did its counterpart in the EEC Treaty.[29]

The Court's judgment, as far as concerns its interpretation of the Yaoundé Convention, followed the same line of reasoning as the advocate general.[30] Its starting point is the question of direct effect and the basis on which this is to be determined: 'regard must be simultaneously paid to the spirit, the general scheme and the wording of the Convention and of the provision concerned'.[31] Then, turning to the Convention, the Court starts with explaining its continuity with the provision for OCTs in Part IV EEC. It points to the absence of reciprocity in both Articles 2 and 3 (which provide for the removal of tariff and non-tariff barriers) and Article 61 (which envisages that provisions of the Convention, including Article 2, may be applied by the Community and Member States to countries which are as yet unable to reciprocate).[32] Whereas under Article 2 all customs duties and charges of equivalent effect will be abolished on imports into the EEC from the associated states, Article 3 provides that 'each Associated State may retain or introduce customs duties and charges having an effect equivalent to such duties which correspond to

[28] Ibid., p. 149.

[29] The AG applied the tests set out in *International Fruit Company*.

[30] In the first part of its judgment the Court responds to the first two questions asked, on the interpretation of Art. 13(2) EEC and the date from which its direct effect could be invoked; the third and fourth questions concerned the interpretation and direct effect of the Yaoundé Convention.

[31] *Bresciani*, para. 16.

[32] Art. 61 of Yaoundé I provides: 'The Community and the Member States shall undertake the obligations set out in Articles 2, 5 and 11 of the Convention with respect to Associated States which, on the grounds of international obligations applying at the time of the entry into force of the Treaty establishing the European Economic Community and subjecting them to a particular customs treatment, may consider themselves not yet able to offer the Community the reciprocity provided for by Article 3, paragraph 2 of the Convention.'

its development needs or its industrialization requirements or which are intended to contribute to its budget'. As the Court concludes, 'equality of obligation' was not the aim of the Convention: 'It is apparent from these provisions that the Convention was not concluded in order to ensure equality in the obligations which the Community assumes with regard to the associated states, but in order to promote their development in accordance with the aim of the first Convention annexed to the Treaty'.[33]

However, in the Court's view, this lack of reciprocity or 'imbalance' which is inherent in the 'special nature' of the Convention 'does not prevent recognition by the Community that some of its provisions have a direct effect'.[34] Having decided that there is no structural barrier to direct effect, the Court turned to the specific provision. Here the Court relied on the automaticity of the obligation in Article 2 of Yaoundé, and the fact that it is not subject to any reservation on the part of the Community, as well as its explicit reference to Article 13 EEC: 'By expressly referring, in Article 2 (1) of the Convention, to Article 13 of the Treaty, the Community undertook precisely the same obligation towards the associated states to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other'.[35]

So, in *Bresciani*, directly effective rights, 'which the national courts of the Community must protect' – a part of the special character of Community law – may arise also from a development agreement which is special in the types of relations it establishes: based not on reciprocity of obligation and explicitly linked to the Community system. In holding that non-reciprocity of obligation is not a barrier to direct effect the Court linked the direct effect of the Convention with its 'special nature'; and that specificity was derived from its postcolonial (and development) context, which (in the words of Trabucchi) were the basis of a 'privileged' relationship. This is in contrast to the fully reciprocal GATT which had been found incapable of direct effect in the *International Fruit Company* case.[36]

Thus the non-reciprocal nature of the relationship was a signifier of its closeness, of the degree to which the associated states were integrated

[33] *Bresciani*, para. 22.
[34] Ibid., para. 23.
[35] Ibid., para. 25.
[36] *International Fruit Company*.

into the Community system, a form of integration of which direct effect was a part. Reciprocity (or its absence) was also, a few years later, to play a part in defining the 'essential characteristics' of Community law, the Court rejecting the idea that Member States were entitled, in the case of a breach of obligation by another Member State, to reciprocate by suspending performance of their treaty obligations.[37] In this sense, non-reciprocity is both characteristic of the special nature of European integration, and linked to the integration between the EEC and its former colonies. But in the case of Yaoundé it is integration based on imbalance, on dependence rather than equality.[38]

Interestingly, though, this case was not simply regarded as specific to Yaoundé. The criteria used by the Court, and especially its references to reciprocity, were influential in later cases that were concerned with very different types of agreement.

## 2.4 *BRESCIANI*, RECIPROCITY AND THE DIRECT EFFECT OF INTERNATIONAL AGREEMENTS

The possibility that some of the Community's international agreements could give rise to directly effective rights had been accepted in the *International Fruit Company* case (although denied to the GATT in that

[37] Case 325/82 *Commission v. Germany*, EU:C:1984:60, para. 11: 'A Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default.' Later, in Case C-5/94, *The Queen v. Ministry of Agriculture ex parte Hedley Lomas*, EU:C:1995:193, para. 27, AG Léger draws a contrast in this respect between Community law and international law: 'Nothing is more alien to Community law than the idea of a measure of retaliation or reciprocity proper to classical public international law.' See further W. Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2017) 28 *European Journal of International Law* 935.

[38] The limits to the principle of non-discrimination in the successor Lomé Convention, for example, can be seen in Case 65–77 *Razanatsimba*, EU:C:1977:193, paras. 13–14: 'The wording of [Art. 62 of the Lomé Convention] does not purport to provide equality of treatment between nationals of an ACP [African, Caribbean and Pacific Group of States] state and those of a Member State of the EEC. More particularly, that Article does not oblige either the ACP states or the Member States of the EEC to give to the nationals of a state belonging to the other group treatment identical to that reserved to their own nationals.' On the distinctions embedded in the Treaty of Rome itself, see Eklund, 'Peoples, Inhabitants and Workers'.

case),[39] and some earlier cases such as *Haegeman* had effectively assumed direct effect.[40] In *Bresciani* for the first time the Court both addressed the issue explicitly and gave a positive answer. While the specificities and context of the Yaoundé Conventions helped to underpin the Court's ruling, they also raised a number of questions.

How significant was the postcolonial character of the Yaoundé Conventions, their development objectives and the consequent 'privileged' nature of the relation it established? How were these ideas to be translated to other types of agreement? How significant was it whether the agreement was an association agreement, that is, one designed to establish close and ongoing links between the EEC and the partner country or countries? And how significant was it that the agreement was designed to establish a trading regime that reflected intra-EEC trade relations, with explicit reference to or replicating provisions of the EEC Treaty?

In *Haegeman* the agreement in question was the Association Agreement with Greece, a close neighbour.[41] Other association agreements with neighbouring countries, such as Turkey and Morocco, and – later – the European Free Trade Association States and countries of central and eastern Europe, have also been found capable of direct effect, although not every individual provision might meet the tests for direct effect.[42] In all these cases, the element of close integration with the Community/Union system is emphasized. However, *Bresciani* is also cited as authority for the position that direct effect is not limited to agreements with neighbours or potential future members. Thus the *Bresciani* reasoning was applied to the Lomé Convention, the successor to Yaoundé, again linking non-reciprocity to the development aims of the agreement, and

[39] *International Fruit Company*.

[40] *Haegeman*; *Charmasson*.

[41] A few years later, in *Pabst & Richarz*, para. 26, the Court referred to the provision on taxation in the Association agreement with Greece as 'part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law'.

[42] Case 12/86 *Demirel*, EU:C:1987:400, paras. 14–25; Case 37/98 *Savas*, EU:C:2000:224, paras. 51–54; Case C-18/90 *Kziber*, paras. 20–21; Case T-115/94, *Opel Austria GmbH v. Council of the European Union*, EU:T:1997:3, paras. 101–102; Case C-162/00 *Pokrzeptowicz-Meyer*, EU:C:2002:57, paras. 25–27.

holding that it did not prevent provisions of Lomé from having direct effect: 'Those conventions [Yaoundé and Lomé] are characterized by a quite appreciable imbalance in the level of obligations undertaken by the contracting parties. Their general aim is to promote the economic and social development of the non-member countries participating in them, in particular through an improvement in the conditions of access for their products to the Community market'.[43]

And more recently in the context of the Cooperation Agreement with the Cartagena States, the Court held:

> [T]he fact that this article appears in a cooperation agreement does not mean that, as a matter of principle, individuals cannot rely upon it. It is settled case-law that the fact that such an agreement is intended essentially to promote the economic development of the non-member countries party to it, confining itself to instituting cooperation between the parties without being directed towards future accession of those countries to the European Union, is not such as to prevent certain of its provisions from being directly applicable.[44]

The judgment in *Bresciani*, therefore, ensured that direct effect, as a potential characteristic of EU external agreements, was not to be limited to agreements establishing relations with near neighbours and possible future members but could be extended to other types of association and cooperation agreement, especially where their aim was that of the economic and social development of the partner countries. The language of economic and social development is carried over into broader development policy from Article 131 EEC where it was used in the colonial OCT context.[45] As Roes puts it, *Bresciani* suggests 'that when a treaty's objectives are this closely aligned with those of the EU Treaties, the Court was much more willing to accept that it is capable of creating rights for individuals'.[46]

[43] Case 469/93 *Chiquita Italia*, EU:C:1995:435, paras. 31–35.

[44] Case C-160/09 *Ioannis Katsivardas – Nikolaos Tsitsikas OE v. Ypourgos Oikonomikon*, EU:C:2010:293, para. 35, citing *Bresciani*. See also *Kziber*, para. 21.

[45] See text at note 15; see further Eklund, 'Peoples, Inhabitants and Workers', 848–850.

[46] T. Roes, 'Establishing Direct Effect of Provisions of International Agreements: *Bresciani*' in G. Butler and R. A. Wessel (eds.), *EU External Relations Law: The Cases in Context* (Oxford: Hart Publishing, 2022), p. 75.

But what of free-trade agreements (FTA) with countries that neither establish an association nor seek to replicate the conditions of intra-EEC trade? It is here that a second group of questions raised by *Bresciani* is brought to the fore, since in such cases reciprocity may appear to be an important feature of the relationship.[47] The Court's references to reciprocity in *Bresciani* leads us to question the significance of reciprocity in determining the direct effect of an agreement. How important is (non-) reciprocity of *substantive* obligation, as a stamp of a 'privileged' relationship which may support an argument that the agreement may create directly effective rights? How relevant is *enforcement* reciprocity: if direct effect is not explicitly provided for should the EU grant direct effect where the other contracting party or parties may not do so?

In *Polydor* and *Kupferberg*, decided a few months apart in 1982, these questions were raised before the Court in the context of the FTA with Portugal (not at that time a Member State) and the Court approached the answer in different, complementary, ways.[48] The *Bresciani* case is in the background in both cases. Advocate General Rozès, acting in both *Polydor* and *Kupferberg*, sought to distinguish the FTA with Portugal from the Yaoundé Convention, in particular the non-reciprocal nature of the obligations in the latter and its explicit references to provisions of the EEC Treaty. The FTA with Portugal, in contrast, was an example of traditional, reciprocal international law (what the advocate general called 'the classical international legal order') between arms-length parties and dependent on non-judicial forms of dispute settlement, and should not readily be granted direct effect where that is not an explicit part of the agreement on both sides.[49] Substantive reciprocity, she suggests, is linked to reciprocity in implementation and enforcement:

[47] In order to obtain an exemption from the GATT's most favoured nation obligation under Art. XXIV GATT, an FTA should abolish restrictions on substantially all trade on a reciprocal basis. See further G. Marceau and C. Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO?' (2001) 28 *Legal Issues of Economic Integration* 297; P. Hilpold, 'Regional Integration According to Article XXIV GATT, between Law and Politics' in A. von Bogdandy and R. Wulfrum (eds.), 7 *Max Planck Yearbook of United Nations Law* (Leiden: Brill, 2003) p. 219.

[48] Case 270/80 *Polydor*, EU:C:1982:43; Case 104/81 *Kupferberg*, EU:C:1982:362.

[49] Case 270/80 *Polydor*, opinion of AG Rozès, EU:C:1981:286, p. 355.

> To recognize a provision of that Agreement as having direct effect without the guarantee that an individual may rely on the provision in Portugal on the same terms and with the same results in relation to legal protection would, by reason of the absence of reciprocity, lead to the Community's being at a disadvantage and that would not correspond to the discernible intention of the Contracting Parties.[50]

The Court's judgment in *Polydor*, in contrast, sidestepped the question of direct effect. It did not mention the *Bresciani* case and instead focused on the substantive scope of the provisions in the FTA, comparing them to, and interpreting them more narrowly than, the equivalent provisions of the EEC Treaty. It refused to extend its case law on the exhaustion of intellectual property rights within the Community to the prohibition of quantitative restrictions and measures of equivalent effect in the FTA: as a result, the direct effect of those provisions did not arise. The Court stressed the different objectives of the FTA and the EEC Treaty and cautioned against the assumption that treaty provisions using similar language will necessarily carry the same meaning.[51] In particular, the absence in the FTA of the institutional mechanisms for adopting harmonized regulatory solutions to trade obstacles ('positive integration') militated against giving an extensive reading to the prohibition of measures of equivalent effect to quantitative restrictions ('negative integration').[52]

In *Kupferberg* the Court did address the question of the direct effect of, in this case, the prohibition in the FTA of discrimination in relation to taxation. The advocate general, as we have seen, was concerned about the lack of reciprocity in the enforcement of the agreement, in the 'legal protection' afforded to the different Contracting Parties. The submissions of the French and Danish governments also stressed this point and sought to distinguish *Bresciani* on the ground that the FTA with Portugal, unlike Yaoundé, was based on the principle of reciprocity. The Court, however, held that a potential difference between the parties in recognizing direct effect (judicial enforcement) did not undermine the reciprocal nature of the agreement, since under international law all parties

[50] Case 104/81 *Kupferberg*, opinion of AG Rozès, EU:C:1982:137, p. 3674.
[51] *Polydor*, paras. 14–19.
[52] Ibid., para. 20.

are under an obligation to implement their commitments in good faith, and may do so using a variety of legal means.[53]

*Kupferberg* laid down some basic principles relating to direct effect, including the important ruling that the question of whether or not a provision of a Community (or Union) agreement is directly effective is a matter of EU law and therefore for the Court to decide.[54] No doubt prompted by the arguments of the Member States, the Commission and the advocate general who were seeking to explore the extent to which the *Bresciani* reasoning was relevant to a reciprocal FTA, the Court argued that, while in *Bresciani* a substantive imbalance 'does not prevent' direct effect, neither does an imbalance in enforcement reciprocity. The judgment also made clear that direct effect is not simply an attribute of a special class of non-reciprocal association agreements such as Yaoundé. The case opened the door to a widespread acceptance of direct effect of bilateral agreements in the EU's neighbourhood, as well as the successors to the Yaoundé Conventions.[55]

While these cases were not all concerned with the Union's relations with its former colonies, the agreements in question were bilateral in nature, establishing relationships of close economic integration with the Community (and then Union).[56] As is well known, the approach of the Court to multilateral agreements, including the GATT/World Trade Organization (WTO),[57] the UN Convention on the Law of the Sea,[58] the Kyoto Protocol[59] and even the UN Disabilities Convention,[60] has taken a different trajectory. The reasoning for denying direct effect to these agreements has varied, depending on the nature of the obligations and whether the agreement in question was concerned with establishing a

[53] *Kupferberg*, para. 18.
[54] Ibid., para. 14.
[55] See *Chiquita Italia*, *Ypourgos Oikonomikon* and *Kziber*.
[56] The Yaoundé and Lomé Conventions, like the EEA, are 'essentially bilateral' in character, since they are concluded between the Community (or Union) and its Member States on the one part and the partner states on the other: the Lomé Convention was referred to by the Court of Justice as establishing 'an essentially bilateral ACP-EEC cooperation' in Case C-316/91, *Parliament v. Council*, EU:C:1994:76, paras. 29 and 33.
[57] *International Fruit Company*; Case C-149/96 *Portugal v. Council*, EU:C:1999:574.
[58] Case C-308/06 *Intertanko*, EU:C:2008:312.
[59] Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864.
[60] Case C-363/12, *Z*, EU:C:2014:159.

general regulatory regime rather than the creation of individual rights. But in the leading case on the WTO, the question of reciprocity is given prominence. In *Portugal v. Council*, the WTO is distinguished from 'the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations or create special relations of integration with the Community'.[61] The WTO, in contrast, depends on reciprocity and the Court – while referring to *Kupferberg* – highlights the need for reciprocity in enforcement: '[T]he lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' … may lead to disuniform application of the WTO rules'.[62]

An important element in all these cases is the desire to allow scope for the political institutions to manage the implementation and enforcement of the EU's international obligations. In recent years, EU practice has altered in respect of bilateral trade agreements concluded with developed economies such as South Korea, Japan, Singapore or Canada, expressly removing the possibility of direct effect.[63] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, for example, provides that 'nothing in this Agreement shall be construed as … permitting this Agreement to be directly invoked in the domestic legal systems of the Parties'.[64] The agreements with Japan, Singapore and Ukraine contain similar provisions.[65] Instead, the agreements provide for arbitration-based dispute settlement and, in some cases, investor-state dispute

[61] *Portugal v. Council*, para. 42.

[62] Ibid., para. 45.

[63] A. Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *Common Market Law Review* 1125.

[64] Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ 2017 L 11/1, Art. 30.6.1.

[65] Economic Partnership Agreement between the EU and Japan, OJ 2018 L 330/3, Art. 23.5; Free Trade Agreement between the EU and Singapore, OJ 2019 L 294/3, Art. 16.16; and EU-Ukraine Association Agreement, OJ 2014 L 161/3. Here, the statement on direct effect is oddly placed, in a footnote to the heading of chapter 14, on dispute settlement. See also Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354/3, Art. 336; Association Agreement with Central America, OJ 2012 L 346/3, Art. 356.

settlement. In Opinion 1/17 on the CETA, considering the compatibility of these arrangements with the EU Treaties, the Court refers both to the exclusion of direct effect and to 'the need to maintain the powers of the Union in international relations' in the context of the FTA's reciprocal enforcement mechanisms.[66] Again the absence of direct effect is linked to reciprocity, what we might call 'equality of arms' between the EU and its trading partner. As Advocate General Bot observed in his opinion on the CETA:

> in practice all the free trade agreements recently concluded by the European Union expressly exclude their direct effect. The main reason … is to guarantee effective reciprocity between the parties, in a manner consistent with the objectives of the common commercial policy. … the approach adopted bears witness to the Court's wish, in the interests of preserving reciprocity in the application of the agreement, not to place the European Union at a disadvantage as compared to its most important trading partners, thereby preserving the European Union's position on the international stage.[67]

So modern practice takes the view that when concluding FTAs with 'important trading partners' substantive reciprocity (a condition of WTO compatibility) requires enforcement reciprocity, and this tends to exclusion of direct effect and the adoption of alternative enforcement mechanisms, including investor-state arbitration.[68] This is a shift from the *Kupferberg* reasoning (it is actually closer to the position adopted by Advocate General Rozès in *Polydor* and *Kupferberg*) and is based on the idea that these arm's length reciprocal FTAs are very different in character from the close relations envisaged by Yaoundé and subsequent

[66] Opinion 1/17, EU:C:2019:341, paras. 77 and 117. C. Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) 57 *Common Market Law Review* 1725.

[67] Opinion 1/17, opinion of AG Bot, EU:C:2019:72, paras. 91–92.

[68] Interestingly, if outside the scope of this chapter, the exclusion of judicial enforcement via direct effect has been accompanied by a movement on the part of the EU towards a quasi-judicialization of systems of investor-state arbitration; see further G. Sangiuolo, 'An International Court System for a Transformative Europe?' in I. Bosse-Platière and C. Rapoport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Cheltenham: Edward Elgar, 2019).

association agreements, and also it seems from FTAs that are embedded within relationships of economic integration with the EU's neighbours, where direct effect has been more readily accepted.

## 2.5 CONCLUSION

Are we then to regard *Bresciani* as a relic of history? It has indeed been argued that 'the fact that the judgment's holding is closely linked to the special nature of the Yaoundé Convention has attenuated its use as a precedent'.[69] Nonetheless I would want to argue that *Bresciani*, a case where the former colonial status of the parties to the agreement was central to the argument, has played an important part in shaping the Community's approach to direct effect, and it is an impact which still has repercussions. In fact, while modern practice in respect of bilateral agreements seems very different to the *Bresciani* reasoning, that reasoning can help us to understand these shifts in practice.

First, in following on from *International Fruit Company* and *Haegeman*, *Bresciani* establishes both that the EU's bilateral agreements may create directly effective rights, and that whether they do so depends not only on the nature of the specific provision but also on the nature of the agreement as a whole – or, perhaps better, of the relationship established by the agreement: the 'spirit' as well as the general scheme and wording of the agreement.[70] Second, by referring in *Bresciani* to the non-reciprocal nature of the Yaoundé Convention, the Court brought reciprocity into the picture when assessing whether or not a particular Union agreement may be directly effective. And it is still in the picture. Current agreements founded on reciprocity, whether the WTO or FTAs with developed economies such Canada, Japan or the UK, depend on (reciprocal) international dispute settlement systems such as arbitration rather than (potentially non-reciprocal) domestic judicial enforcement. The emphasis is on the ability of the EU to assert itself through the instruments of international law.

[69] Roes, 'Establishing Direct Effect of Provisions of International Agreements: *Bresciani*', p. 70.

[70] *Bresciani*, para. 16.

But not all the EU's external relationships are of this kind. Many agreements, especially those with its Member States' former colonies, other developing and emerging economies and with its neighbours involve, alongside reciprocal trade liberalisation, a relationship based on EU-directed integration – on sharing, to a greater or lesser extent, in the EU's own logic of integration.

> [T]o a greater or lesser extent, they are substantively based on EU law, aiming to export it to other places. Such treaties rarely, if at all, contain norms that the EU is uncomfortable with or that would require it to change its legislation; instead, they radiate EU law outwards, and thus hardly constitute a threat to the autonomy of the EU.[71]

The Yaoundé Conventions (alongside the associations with Greece and Turkey) may be said to have set a precedent in this respect. They established a close trade relationship between the parties, deliberately reflecting the pre-existing treaty provision for the Member States' OCTs and including references to the EEC Treaties. The particular type of non-reciprocity found in the Yaoundé Conventions is no longer a feature of EU trade agreements, but the EU-centricity of Yaoundé is a continuing characteristic of such integration agreements with the EU. These relationships based on integration with the EU model, as the Court recognized in *Bresciani*, are compatible with the creation of directly effective rights. The postcolonial context specific to Yaoundé becomes part of the broader legal context of these agreements, helping to clarify the part played by reciprocity in interpreting the EU's international relationships.

[71] J. Klabbers, 'The Reception of International Law in the EU Legal Order' in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* Vol I. (Oxford: Oxford University Press, 2018), p. 1217. As Klabbers goes on to say, 'It should come as no surprise, therefore, that the CJEU has in general been very well disposed towards such treaties: it could afford to be, since such behaviour would involve little political costs, at least not in the sense of having to accept rules difficult to reconcile with the fundamentals of the EU's constitutional construct.'