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DIRECT EFFECT, THE SEPARATION OF POWERS
AND THE JUDICIAL ENFORCEMENT OF OBLIGATIONS

Un droit n’est pas efficace par lui-même, mais seulement par l’obligation à laquelle elle correspond. ... Une obligation ne serait-elle reconnue par personne, elle ne perd rien de la plénitude de son être. Un droit qui n’est reconnu par personne n’est pas grand-chose.

SIMONE WEIL, L’Enracinement.


1. Introduction.

The doctrine of direct effect, the “infant disease of Community law”, has proved remarkably resilient both to the cure proposed by Judge Pescatore (1) and to the more drastic purgatives of Sir Patrick Neill (2). Over the years it has spread in unexpected ways.

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(2) P. NEILL, The European Court of Justice - A Case Study in Judicial Activism, 1995 (reprinted in 1996 Intergovernmental Conference, House of Lords
With the judgments in the Großkrotzenburg case (3) and Kraaijeveld (4), it may even be thought to have jumped species.

Before we become too excited about the definition and proper limits of “direct effect”, it is perhaps as well to remind ourselves that those words do not appear in the treaties (5). Nor are they consecrated by long usage. They are a label or legal shorthand, of relatively recent origin, used to identify a particular phenomenon of Community law. We should not be trapped by the nominalist fallacy into supposing that there exists, somewhere outside Community law, a predetermined, predefined concept called “direct effect” to which Community law must conform so that, as lawyers, we are in some sense debarred from using that expression to refer to other phenomena which do not quite fit the accepted definition.

We are free to use the term “direct effect” in any way we choose, extending it to cover new situations or limiting it to exclude them. There is nothing to stop us doing either. Indeed, the term has already been used to cover a range of situations which, in significant respects, are different. We should, however, be aware that if the use of the term becomes too wide and imprecise, it will no longer be useful as a tool of legal analysis. Correspondingly, its use is restricted, new expressions will have to be coined to cover fresh phenomena as they are identified.

The purpose of this essay is not to suggest any particular solution to this linguistic conundrum, which is likely to be resolved by usage rather than professorial or judicial diktat. It is rather — as befits any contribution to a Festschrift for Federico Mancini — to recall the common thread of constitutionality which runs through the case-law on direct effect.

Direct effect is about the separation of powers, and specifica-
ly about the extent of the judicial power to enforce the obligations of the state. *Großkrotzenburg* and *Kraaijeveld* fit this framework, whether or not one chooses to place them in the category of direct effect.

2. The new terminology: Van Gend en Loos and International Fruit.

The words "direct effects" (in the plural) first appear in the vocabulary of Community law in *Van Gend en Loos* (*6*). Analysing the wording of Article 12, the Court said that: "The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects". The Court's conclusion was that: "Article 12 produces direct effects and creates individual rights which national courts must protect".

Three aspects of these *dicta* should be noted. First, they are clearly about "constitutional" relationships:

— the contractual, obligation-creating relationships between the Member States, and between them and the Community, arising out of the treaty;

— the consequent relationship between treaty law and domestic law; and

— the consequent modification of the relationship between the Member States and their subjects.

Second, the original texts do not use the same term throughout. In the first passage quoted above, the French text refers to *effets directs* (plural), the German to *unmittelbare Wirkungen* (plural) and the Dutch to *onmiddelijk effect* (singular). In the second, the French is *effets immédiats* (different from the first), the Ger-

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man unmittelbare Wirkungen (the same as the first), and the Dutch directe werking (different from the first). The Italian text differs from all the others in that it does not, in either passage, use an adjective with a noun. In the first passage, the words used are atto a produrre direttamente degli effetti sui rapporti (“...apt directly to produce effects on the relationships...”), and in the second, ha valore precettivo (“...has normative (or obligatory) value...”). This shows that the Court was enunciating a new idea rather than using a term of art whose meaning was already defined and accepted.

Third, the choice of the words “producing direct effects”, and especially the German and Dutch terms Wirkung and werking (“working”), involves use of the active voice, as opposed to the passive.

“Direct applicability” is a passive concept, implying that a text is “susceptible of being applied”. By virtue of the form of the instrument, it is automatically integrated, as a source of law, into the legal orders both of the Community and of the Member States. It does not require any further step of incorporation, transposition or reception to render it “applicable” by a judge. Whether the judge will apply it to a particular fact situation is a separate and subsequent question.

By contrast, “producing direct effects”, “direct working” and “immediate (i.e. unmediated) effects/working” are metaphors used in relation to norms rather than texts or instruments. The words suggest that the norm, by reason of some inherent quality relating to its substance rather than its form, is capable of penetrating the firewall between treaty law and national law. Of course, it will be “susceptible of being applied”. If it were not, it could not have effects. But it is more than “susceptible of being applied” since of itself, the norm (whatever the form of the instrument) creates rights, imposes obligations and alters legal relationships.

With hindsight, it may seem surprising that, by 1972, “the prevailing chaos in legal literature and case law” was such that Professor Jan Winter felt it necessary to reduce it to order by proposing a formal distinction between “direct applicability” and
"direct effect" (7). Nowadays, every student is expected to know the difference. Yet it was only in 1972 that "direct effect" (in the singular) formally entered the vocabulary of the Court in Advocate General Mayras' Opinion in International Fruit (8).

In that Opinion, the Advocate General referred to effet direct and, a few lines later, to la théorie de l'effet direct, but the terminology used in the contemporary translations of the Opinion is by no means consistent.

The German text uses unmittelbare Wirkungen (plural) and die Theorie von der unmittelbaren Wirkung (singular); the Dutch rechtstreeks werken (adverb and verb) and de theorie van de rechtstreekse werking (adjective and noun); and the Italian efficacia immediata ("direct efficacy", rather than "direct effect") and il principio dell'efficacia immediata ("principle", as in the English translation, rather than "theory"). The index of European Court Reports for that year contains only the coy reference, "Community law: application: direct".


The confusion of terminology as late as 1972 shows that the idea of "direct effect" was still relatively novel and explains Winter's concern to bring order into chaos. As he saw it, there were "two fundamental problems": "(1) the question as to how Community Law is incorporated into municipal law so as to become 'the law of the land' [and] (2) the problem of the conditions under which Community norms thus incorporated into the municipal legal order are susceptible of being invoked before national courts before private individuals. As the various notions denote different legal phenomena, it will readily appear that it is dangerous and unwarranted to use them indiscriminately" (9).

(9) WINTER, op. cit., p. 425.
Having examined the traditional concepts of incorporation and direct applicability, he argued that the Court of Justice had not, as some commentators had suggested, extended an existing concept (direct applicability) but created a new one (direct effect). More particularly, from what, at that time, was extremely exiguous case law, he identified what have become the standard criteria of direct effect: "... [A] Treaty provision may be directly applicable... if by its nature it lends itself to producing direct effects in legal relations between the Member States and persons under their jurisdiction and creates individual rights recognized by the courts. A Treaty provision is of such a nature if it is 'complete and legally perfect'. From the court's case law it can be deduced that a Treaty provision is 'complete and legally perfect' if the following requirements are met: (1) the provision must be clear; (2) the provision must be unconditional; (3) the provision must in principle require no further legislative intervention on the part of the Member State or on the part of the Community institutions to implement it or to give it effect" (10).

This is not so much a "definition" of direct effect, as a description of the circumstances in which the phenomenon will be recognized. The underlying idea is that, in those circumstances, the norm has passed from the competence of the legislator to the competence of the judge — an idea already sketched by Chief Justice John Marshall of the United States in *Foster and Elam v Neilson* (1829) (11), quoted by Winter: "After affirming that by its nature a treaty is a contract between nations and not a legislative act, the Chief Justice stated: 'In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it

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can become a rule for the Court’ (12)’. Here again, we can note the “active” metaphor of the norm “operating of itself without aid”.

Winter concluded by observing: “As a matter of fact, the court has never used the words “directly applicable” in the dispositif of its judgments on the direct effect of Treaty provisions, though the term appears in the considérants. The most common formula in the dispositif is that a particular provision produces direct effects (in the legal relations between member States and private parties) and creates individual rights which municipal courts must recognize. The use of two elements in this formula (direct effects and the creation of individual rights) is explained by the fact that at its inception the formula was a reply adjusted to the manner in which the Dutch Tariefcommissie had phrased its request for interpretation of Article 12 of the Treaty in the Van Gend en Loos case. These two elements seem to be inseparable and to stand to each other in a Yin-Yan relationship” (13).

The doctrinal significance of Winter’s Yin-Yan relationship can be seen in the argument of the German government in the Großkrotzenburg case and the fourth question put by the Dutch Raad van State in Kraaijeveld (discussed below).

4. The Pescatore analysis.

In 1982, the usefulness of Winter’s distinction was challenged by Judge Pescatore in a lecture, subsequently published (14), to the British Society of Public Teachers of Law. Rather grudgingly, perhaps, Pescatore accepted that: “No doubt, Winter’s analysis is right, but I am wondering whether this distinction [between direct applicability and direct effect] is not too subtle to be carried through systematically” (15).

Certainly, the terminology took a long time to settle down

(12) WINTER, op. cit., at pp. 428-429.
(13) Ibid., at p. 438.
(14) PESCATORE, op. cit.
(15) Ibid., at p. 164.
completely. As late as 1987, in Demirel (16), the Court applied Winter’s three criteria of direct effect to the question whether “a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable” (17).

Nevertheless, by 1982, Winter’s three criteria were well-established and the doctrine of direct effect had been extended to directives (18), decisions (19), the Association Agreements (20) and the Yaoundé Agreement (21), but not to the GATT (22).

Pescatore’s conclusion, after a survey of this case law, was that:

“It appears in the last analysis that the prerequisite of the unconditional character and the sufficient degree [of precision] of Community provisions, in order to be recognised as having ‘direct effect’ boil down to a question of justiciability. A rule can have direct effect whenever its characteristics are such that it is capable of judicial adjudication, account being taken both of its legal characteristics and of the ascertainment of facts on which the application of each particular rule has to rely. This means that ‘direct effect’ of Community rules in the last analysis depends less on the intrinsic qualities of the rules concerned than on the possumus or non pos-


(17) This confusion continues where para. 14 of Demirel is cited in Case C-192/89 Sevinse [1990] ECR 3461, at para. 15, and in Case C-432/92 Anastasiou and others [1994] ECR I-3087, at para. 23 (though not in the authentic English version of the latter judgment).


sumus of the judges in the different Member States, on the assumption that they take these attitudes in a spirit of goodwill and with a constructive mind.

To this extent, direct effect appears to be in a way l'art du possible, as from the point of view of Community law it is to be expected that national courts are willing to carry the operation of the rules of Community law up to the limits of what appears to be feasible, considering the nature of their judicial function. Within these bounds a rule has direct effect, whereas beyond them this effect must be denied...

‘Direct effect’ is nothing but the ordinary state of the law. Questions will therefore arise only in those exceptional cases where the implementation of a given Community rule, whatever its source and whatever its form, meets some obstacle in law or in fact which even the best-intentioned lawyer feels it difficult to overcome” (23).

In the last sentence, Pescatore seems to come back, once again, to the metaphor already noted in the language of Van Gend en Loos and of Chief Justice Marshall. A rule having direct effect is seen as penetrating, or overcoming, an obstacle or barrier which would otherwise stand in the way of its being applied by the judge in the given case since the rule has not been made “applicable”. For Pescatore, however, the possibility of overcoming this barrier depends, not so much (if at all) on the characteristics of the rule (“by its nature”), but on the preparedness of the judge to overcome the barrier — a preparedness which will, it appears, be a function both of his state of mind and of what national rules permit.

One may question whether this approach is really more “systematic” than Winter’s. One may even wonder whether it is constitutional. Surely, the effect of a rule cannot depend on the subjective willingness of the judge to apply it. Nor, in the Community system, can it depend on whether the national legal system permits the judge to apply it.

In the event, infant disease or not, Pescatore’s pragmatic approach has not gained much support and the doctrine of direct ef-

(23) PESCATORE, op. cit., at pp. 176-177.
fect, as defined by Winter, has survived as a distinct concept in Community law. Nevertheless, Pescatore was right to draw attention to the inherent imprecision of the doctrine.

5. Direct effect and the problem of incorporation.

The barriers that have to be penetrated or overcome in order to produce direct effect are not all of the same sort. At the beginning, in Van Gend en Loos, the barrier was, at least in a dualist legal system, the absence of an act of incorporation by which the treaty norm became susceptible of application by the national judge.

In the case of regulations, no such barrier exists since, in terms of Article 189 EC, regulations are in terms of the treaty — and therefore "by their nature" — directly applicable. But the norms they contain do not necessarily have direct effect. As Winter observed: "This is by no means an unrealistic conclusion. In every Member State there exists quite a bit of law which is not enforceable in the courts, because these rules were not meant to give the private individual enforceable rights, or because they are too vague or too incomplete to admit of judicial application. It is therefore not illogical to make the above distinction, based on the fact that regulations automatically become an integral part of the law of the Member States (direct applicability) but that not all its provisions create rights for private individuals that must be enforced by the courts (direct effect). It is not to be excluded, however, that provisions of regulations which are not suited to take direct effect may nevertheless have certain limited effects in the relationship between the Member States and persons under their jurisdiction. It is conceivable that a national judge declares inapplicable a State measure taken in violation of a regulation without going so far as to secure for the private individual the exact legal position which he would have had if the State had taken the correct positive measures for the performance of this obligation" (24).

(24) WINTER, op. cit., at pp. 436-437. It is significant, in view of what was argued in Großkrotzenburg, that Winter here envisages a situation in which
Unlike regulations, directives are not "by their nature" directly applicable. For this reason it was maintained, notably by the French Conseil d'État, that their provisions could not have direct effect. It is unnecessary here to discuss the merits of the contrary view which was taken by the Court of Justice and which eventually prevailed in France. It is, however, important to distinguish between the types of provision that have been in issue in the cases about the direct effect of directives.

In Van Duyn (25), the terms of the directive were peremptory: "Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned".

It is difficult to see what difference any formal act of incorporation or transposition could have made to the "effect" (or normative character) of that particular provision. The barrier to direct effect was not the nature of the provision but the nature of the act, as a whole, of which it formed part. The argument was that directives as such cannot "by their nature" have direct effect. The Court rejected that argument, essentially on grounds of effet utile. Once that barrier was removed, the result in Van Duyn may be thought to have been obvious as, indeed, it appears to have been to the referring judge (26).

The notion of quasi-estoppel has been thought to underlie the case-law on the direct effect of directives. This approach did not, however, appear until five years later, in Ratti (27). Ratti involved a more complex situation than Van Duyn. Ratti had complied with the labelling rules laid down in a Community directive. The question was whether he could legitimately be prosecuted for having failed to comply with the more stringent and incompatible Italian enforcement of the Community obligation created by a regulation will stop short of conferring a direct benefit on private individuals.


(27) Case 148/78 Ratti, cit.
rules which, formally speaking, remained in force because Italy had failed to transpose the directive. The Court held that: "A Member State which has not adopted the implementing measures required by a directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails" (28).

The notion of a state "relying on its failure" to perform an obligation is not a precise concept. The sense in which Italy was "relying on its failure" in prosecuting Ratti was different in nature from the sense in which, for example, the United Kingdom in Marshall (29), Johnston (30) and Foster (31) was relying on its failure properly to implement directive 76/207 or, again, from that in which Italy in Francovich (32) was relying on its total failure to implement directive 80/987.

The chain of reasoning by which the provisions in question in those cases were found to have penetrated the firewall of non-transposition was necessarily different, as were the "effects" produced — no right to prosecute in Ratti, no right to enforce the retirement age in Marshall and Foster, no right not to renew a contract in Johnston, the obligation to make reparation for loss in Francovich. What underlies the reasoning in all the cases is the identification of an obligation flowing from the directive which the Member State is bound to fulfil and which, once crystallized (33), the courts are not only entitled but bound to enforce.

This can be seen very clearly in the case law on the direct effect of Association Agreements. The formal problem as to how such agreements become incorporated into Community law was

(28) Ibid., para. 22, at 1642.
(33) When the obligation crystallized remains, in some respects, open — see the Opinion of Advocate General Jacobs in Case C-129/96 Inter-Environnement Wallonie v Région Wallonne, 24 April 1996.
initially resolved in *Haegeman* (34) by treating the Council Decision “concluding” the agreement as an act of a Community institution. But a sounder basis was found in *Kupferberg* (35) and repeated in *Demirel* (36).

Incorporation is the consequence of the assumption of obligations by the Member States and the Community vis-à-vis the state with which the agreement is concluded and by the Member States vis-à-vis the Community. So, “it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community” (37).

Resolving the incorporation problem does not, however, determine whether a particular provision of an Association Agreement has direct effect. Nor does that depend simply on the precision or unconditionality of the words used, still less on whether, in Pesca
tore’s words, its application “appears to be feasible”.

The Commission and the Member States saw the problem as more fundamental. The writer may perhaps be permitted to quote from his submissions to the Court as counsel for the Commission in *Polydor* (38): “The question of direct effect is of fundamental importance for the Community’s position in international relations, for its autonomy, its identity and its capacity to defend its interests and those of the Member States for which it has accepted responsibility. From another point of view, the problem of direct effect raises the question of the proper division of powers within the Community legal system between the legislature and the executive on the one hand and the judiciary on the other” (39).

Many provisions in Association Agreements, or in decisions made under them, are drafted in precisely the same terms as provisions of the Treaty or Community regulations which have been held to have direct effect. Nevertheless, the “effect” of the words

(34) Case 181/73 *Haegeman*, cit.
(36) Case C-12/86 *Demirel*, cit., at para. 11.
(38) Case 270/80 *Polydor*, cit.
(39) Ibid., at 342-343.
has been held to be different because the nature of the instrument is different. Association Agreements are like the GATT and unlike the Treaties (40) to the extent that the parties are still, to some extent, at arms’ length and may or may not be prepared to implement the obligations they have undertaken in a uniform way. In terms of separation of powers, the question will be whether any of the terms of the instrument have passed (in Chief Justice Marshall’s words) from the political to the judicial department.

Thus, one must look at the norm in its context. Articles 30 and 36 EC comport the notion of exhaustion of intellectual property rights because “the Treaty seeks... to create a single market reproducing as closely as possible the conditions of a domestic market”. The same words in Articles 14 (2) and 23 of the Agreement with Portugal did not do so because “the purpose of the Agreement was to create a system of free trade” — see Polydor (41) and Kupferberg (42).

It is true that Article 21 of the Agreement with Portugal was held in Kupferberg to have direct effect in the same way as Article 95 EC. But more was required to produce direct effect in Kupferberg than mere identity of clear, precise and unconditional words. What was required was the willingness of the parties to create a directly enforceable mutual obligation defined in clear and unambiguous terms. What was different in Polydor was not the absence of mutual obligation, but the nature and extent of the obligation that the parties mutually undertook to perform.

Similarly, much more recently, in Taflan-Met (43), it was held that no part of decision 3/80 of the EEC-Turkey Association Council could have direct effect, even though some of its provisions are clear and precise. The Court expressly held that the decision created binding obligations, but obligations to do what? The Court’s reasoning on the latter point is very similar to that of Chief Justice Petermann.

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(41) Case 270/80 Polydor, cit., at para. 18.
(42) Case 104/81 Kupferberg, cit., at para. 24.
Marshall: there was a binding obligation on the contracting parties, but it was one which required further action before it could pass from the sphere of the legislator to the sphere of the judiciary.

What emerges from these cases is that the three “Winter criteria” and the Yin-Yan relationship only go some way towards identifying the common characteristic of those cases where direct effect has been held to exist and those where it has not. Ultimately, what is required is an analysis — sometimes quite a sophisticated analysis — of the obligations undertaken or imposed and their consequences for particular states, institutions or people in particular factual or legal situations.

How then do Großkrotzenburg and Kraaijeveld fit into the case-law on direct effect?


Both Großkrotzenburg and Kraaijeveld concerned the Environmental Impact Assessment directive (44). Article 2 (1) of the directive requires that: “Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects”.

Annexes I and II of the directive list those projects in respect of which, respectively, an environmental impact assessment (“EIA”) must always be carried out (Annex I), or must be carried out “where Member States consider that their characteristics so require” (Annex II). In relation to Annex II projects, Article 4 (2) of the directive provides that: “Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment”.

The **Großkrotzenburg** case was brought against Germany by the Commission under Article 169 EC. Germany had failed to implement the directive on time. The question was whether, during the period between the due date for implementation and actual implementation, Germany was bound, under the directive, to submit the Großkrotzenburg power station project to an EIA. The project had in fact been subjected to an EIA, but not in precisely the way required by Articles 2, 3 and 8 of the directive.

The first issue was whether the project was such as to fall under Annex I (compulsory EIA). The Court having held that it did, the next issue was whether, notwithstanding Germany’s failure to implement the directive, an EIA in accordance with Articles 2, 3 and 8 was compulsory.

Germany argued that: “The basis of the case-law of the Court... is that a Member State cannot plead its own failure to implement a directive or its own defective implementation thereof, as against citizens who may be able to base rights upon it, and thus concerns exclusively situations in which individuals’ rights against the State are at issue. On the other hand if it is not that category of persons who are relying on the provisions, the authorities cannot be required to apply such provisions, no matter how definite and precise they may be” (45).

The Court replied that: “In its application, the Commission complains that Germany has not observed, in a specific case, the obligation flowing directly from the directive to assess the environmental impact of the project concerned. The question which arises is thus whether the directive is to be construed as imposing that obligation. That question is quite separate from the question whether individuals may rely as against the State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice” (46).

So, Yin and Yan part company. They do so for the good rea-

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(45) See the Opinion of the Advocate General, Case C-431/92 Commission v Germany, cit.; see also the judgment at para. 24.
son that there is no necessary connection between the obligations assumed by Member States and the rights of individuals or their manner of enforcement. The Court held that Articles 2, 3 and 8 of the directive did “unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an [environmental impact] assessment”. In order to find, under Article 169 EC, that Germany had failed to fulfil that obligation, the Court did not need to say that the directive conferred rights on individuals. In the event, however, the action failed because the Commission had failed to show that the EIA carried out by the German authorities fell short of what the directive required.

The words “direct effect” do not appear in the judgment except in the Court’s summary of the German government’s argument quoted above. But they do appear amongst the key-words preceding the summary of the judgment in ECR. Is the concept of direct effect thereby extended, or is it a mistake? Ruffert (47) explains that, in Germany, the case is seen as creating a new form of direct effect — “objective direct effect” which binds administrative authorities, as opposed to “subjective direct effect” which is conditional upon the existence of an individual right.


*Kraaijeveld* was a reference under Article 177 of the EC Treaty. The zoning plan adopted by the Sliedrecht Municipal Council involved the construction of a dyke which would cut off Kraaijeveld’s access to navigable waterways. Kraaijeveld argued that such a dyke could not be constructed without a prior EIA.

The first issue was whether a dyke of the type proposed fell under Annex II of the directive, requiring an EIA “where Member States consider that the characteristics [of the project] so require”. If it did, the next issue concerned the scope of the Netherlands’ discretion to lay down “specifications, criteria or thresholds” to define the situations in which an EIA was required for dyke projects.

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If the specifications, criteria or thresholds chosen by the Netherlands were incorrect, did Article 2 (1) of the directive come directly into play, requiring an EIA if the project was likely to have “significant effects on the environment by virtue *inter alia* of its nature, size or location”? If so — and this was the crucial question for present purposes — the Raad van State asked: “Does that obligation have direct effect, that is to say, may it be relied upon by an individual before a national court and must it be applied by the national court even if it was not in fact invoked in the matter pending before that court?” (48).

Kraaijeveld and the Commission argued that Article 2 (1) of the directive had direct effect, even for Annex II projects: if a project would in fact have “significant effects on the environment”, Article 2 (1) requires that it be submitted to a preliminary EIA. The Netherlands and the United Kingdom, on the other hand, argued that, when read with the discretionary power to lay down specifications, criteria and thresholds, Article 2 (1) was not sufficiently precise and unconditional to have direct effect.

The Court held that a dyke of the type proposed could, in principle, fall within Annex II and that a Member State could not, in advance, exempt all such dykes from the requirement of an EIA “unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment” (49). Put another way, Member States cannot use their discretion to set specifications, criteria or thresholds in such a way as to exclude from the scope of the implementing legislation projects to which the directive clearly applies.

The propriety of a Member State’s exercise of its discretion is not, however, to be judged *ex post* in the light of its actual consequences, but rather *ab ante* in the light of its foreseeable consequences. A particular Annex II project may turn out to have “significant effects on the environment”, but it may still be exempt from the requirement of a preliminary EIA if, without the benefit

(48) The last part of the question refers to the fact that *Kraaijeveld* had not itself raised the question of direct effect in the main action.

(49) Case C-72/95 *Kraaijeveld*, cit., at para. 53.
of hindsight, such projects would not have been regarded as likely to have such effects.

Consequently, the directive did not create direct effect in the conventional sense of conferring an enforceable right on individuals to require a preliminary EIA for an Annex II project, even if the particular project in question was foreseeably likely to have significant effects on the environment. On the other hand, the directive was not, for this reason, prevented from penetrating the firewall of non-transposition.

The Advocate General sought to maintain the Yin-Yan relationship and to bring the case within the classic conception of direct effect by inferring from the directive a "right to be heard" for affected individuals (50). The Court did not follow this approach, but put the point in a negative way, starting from the basic proposition that Article 189 EC and the directive itself impose on Member States — and therefore on their authorities — the obligation to achieve the result prescribed (51). Individuals cannot be excluded, as a matter of principle, from invoking that obligation (as opposed to a subjective right of their own) before the courts, nor can the courts be prevented from taking it into account, in order to ensure that the national authorities keep within the limits of their discretion (52).

It could, perhaps, be said that the Court’s result is the same as the Advocate General’s. On both analyses, the individual has a procedural right, so the case remains an example of “individual rights” and therefore of “direct effect” in the classical sense. On the other hand, the Court’s judgment gave Kraaijeveld no immediate right to require an EIA to be carried out before construction of the dyke could begin. At the end of the day, having gone through all the proper procedures, all discretions having been correctly exercised, Kraaijeveld might still find themselves cut off from the navigable waterways.

The right recognized was not to secure any positive remedy or

(50) Ibid., at para. 70 of the Opinion.
(51) Ibid., at para. 55 of the judgment.
(52) Ibid., at paras. 56 and 60.
to have a particular result achieved, but rather the right to call for judicial review — the right to ask the courts to ensure that the national legislature and executive, when acting in fields covered by a Community directive, comply with their obligations and do not exceed the bounds of their permitted discretion. Again, we come back to the “core” notions of constitutional limits and the power of the judiciary to enforce performance by the executive organs of the state of the obligations undertaken by the state.

8. Conclusion.

How are we to classify Großkrotzenburg and Kraaijeveld? Do they extend or alter the concept of direct effect? Or are they not really about direct effect at all? As mentioned at the outset, it is up to us what we choose to classify under the heading of “direct effect” or whether we seek to find a new form of words to refer to the phenomenon those two cases represent — or perhaps more accurately, the phenomena, since the cases raised different points.

The principal argument for finding a new form of words is that Winter’s Yin-Yan relationship between direct effect and individual rights is so embedded in the case-law, the literature and Community lawyers’ habits of mind that an extension of direct effect beyond individual rights is liable only to cause confusion. On the other hand, as the argument of the German government in Großkrotzenburg showed, excessive emphasis on the Yin-Yan relationship is liable to give the impression that, unless Yin and Yan are both present, a judge cannot give effect to certain types of Community norm, no matter how definite, precise and binding those norms may be. As a compromise, it might be useful to adopt the German distinction between “objective” and “subjective” direct effect.

Whatever terminology we adopt, we should not lose sight of the fact that, of all the concepts developed in Community law, direct effect goes to the heart of what is genuinely new in the Community legal order. That is, the idea that the relationship between states which remain formally sovereign, and the relationship between those states and those who are subject to their jurisdiction,
can be ordered on a basis that is, in a fully modern sense of the term, “constitutional”.

The role of the courts in this constitutional order is not, as some would have us believe, something novel, unexpected, unlooked for, or dangerous. The role of the courts, including the national courts, is to determine what obligations have been undertaken, whether performance is immediately exigible and if so by whom, and, where appropriate, to enforce performance.

Those are classical judicial functions. Nothing could show this more clearly than the fact that the stimulus towards development of the doctrine has come, not from the Court of Justice, but from national judges. From Van Gend en Loos to Kraaijeveld, nearly all the cases on direct effect were referred to the Court of Justice by national judges whose concern was to establish the obligations of the state and the extent of the judicial power, in furtherance of the rule of law, to enforce them.