THE EUROPE AGREEMENTS:
LEGAL FRAMEWORK AND POSSIBLE DIRECT EFFECT

by Marc de Bourcy

Dissertation submitted for the L.L.M. in International, Comparative and European Law
at the European University Institute 1996-1997

Supervisor: Professor Claus Dieter Ehlermann

Florence, 25th September 1997
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>A. G.</td>
<td>Advocate General</td>
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<td>art.</td>
<td>Article</td>
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<tr>
<td>CEECs</td>
<td>Central and East European Countries</td>
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<td>CMEA</td>
<td>Council for Mutual Economic Assistance</td>
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<td>COM</td>
<td>Communication from the European Commission</td>
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<td>Court</td>
<td>European Court of Justice</td>
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<td>EAs</td>
<td>Europe Agreements</td>
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<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECU</td>
<td>European Currency Unit</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>EC Bull</td>
<td>Bulletin of the European Communities</td>
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<td>ECR</td>
<td>European Court Reports (English version)</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EPC</td>
<td>European Political Cooperation</td>
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<td>EU</td>
<td>European Union</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>IA</td>
<td>International Agreements</td>
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<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<td>MLR</td>
<td>Modern Law Review</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<td>PHARE</td>
<td>Assistance for Economic Restructuring Poland and Hungary</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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*legal equivalent of Schubert’s “The Unfinished”*

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"The Union's environment is changing fast, both internally and externally. It must set about adapting, developing and reforming itself. Enlargement represents a historic turning point for Europe, an opportunity which it must seize for the stake of its security, its economy, its culture and its status in the world."

Jacques Santer, President of the Commission
Strasbourg, July 16, 1997

Introduction

The European Union has been engaged in determined efforts to end the artificial separation of West and East, and, through the recent conclusion of the Europe Agreements between the European Union and ten states from Central and Eastern Europe to foster social, political, legal and economic integration of the whole of Europe. For their part, the ten Associated states from Central and Eastern Europe have undertaken considerable reforms to introduce the law of democracy and to evolve towards a free market economy.

This thesis presents the essence of the main findings in the form of an overall analysis of both the context and content of the Europe Agreements and deals more specifically, through a selective and comprehensive analogy approach, with the important question of direct effectiveness of Community agreements. This analogy policy with various previous Community agreements will help to enhance the final argument on the eventual support favouring the direct effectiveness in and of the Europe Agreements.

The discussion starts in Part One with a description of the political and legal framework of Community relations with Central and Eastern European countries up to the conclusion of the Europe Agreements. This is followed by a brief presentation of the
notion and practice of the concept of 'association' that the Community has used thus far with other third countries.

*Part Two* concentrates exclusively and thoroughly on the question of the status of international agreements and of joint bodies created in these agreements as well as the question of their legal effects in the Community legal order. In the light of these findings, the reader will appreciate the somewhat unruly and ambivalent solutions and the balance that the Court has proposed concerning the essential criteria for direct effectiveness of various Agreements that the Community has concluded thus far with a number of third states. Suffice it here to indicate that several Free Trade, Trade, Cooperation and Association Agreements have been carefully chosen in the discussion in order to present the case-law of the Court, highlighting several inconsistencies in its approach therein, and in order to look in *Part Three* at the Europe Agreements in comparison with these different agreements, by partly and carefully applying that case-law by analogy to the question of direct effect in the Europe Agreements.

Finally, *Part Three*, as a result and as a logical consequence of the previous analysis, supports the argument in favour of the direct effectiveness of the Europe Agreements as such. By partly and carefully applying by analogy the previous case-law of the Court to the issue of the Europe Agreements, the object and purpose of the Europe Agreements as such, as well as the wording of several provisions of the Agreements and provisions of decisions adopted by the Association Council, can only support such a view. Furthermore, some important and sensitive areas have been chosen in which a citizen of one of the ten Associated states may want to rely upon in a court of law in one of the Member States of the Union.
PART ONE

CONTEXT AND CONTENT OF THE EUROPE AGREEMENTS

The collapse of the socialist-communist system in the Central and East European countries has completely redrawn the political map of Europe and the Ostpolitik of the European Community and its Member States. These events took the Community totally by surprise and the initial responses to these fundamental changes have been quite meagre.

Nevertheless, Perestroika, the fall of the Berlin wall and the collapse of the communist rule in the Soviet Empire can not be considered as the starting point in the Community's relationship with the countries of Eastern Europe. The Soviet Union, which has for a long time considered the Community as NATO's economic arm, refused to recognise it until the middle of the 1980's, which had both political and economic consequences for the other States who were members of the Council for Mutual and Economic Assistance (hereinafter 'CMEA')\(^1\).

The real breakthrough in Community-CMEA relations came in 1988 when the Community formally recognised individual CMEA States, thus providing a legal basis for further cooperation. The establishment of official relations gave individual CMEA States the possibility and the freedom to negotiate with the Community and hence for a detailed, comprehensive and mid-term oriented common policy towards the former socialist countries. The philosophy of the relations consisted of two approaches: one

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\(^1\) Former 'Comecon'.
which concentrated on aid measures and another which emphasised the establishment of a longer term trade regime supporting integration by organised trade. The new generation of Europe Agreements\(^2\) may therefore be considered as a logical result from these initially reactive and fairly limited responses by the Community. As Heinz Kramer concluded in 1993; "the initial reaction to the historic changes east from the 'iron curtain' was more a conglomeration of discrete activities than a result of a well-developed coherent strategy."\(^3\)


\(^3\) See Heinz Kramer, supra note 2, p. 221.
CHAPTER ONE

CONTEXT OF COMMUNITY RELATIONS UP TO THE EUROPE AGREEMENTS

Section 1

The Community’s approach to trade with Eastern Europe independently of Bilateral Relations

A) Inter-institutional relations EEC-CMEA

Before examining the various trade and cooperation agreements that the Community signed with various East European countries during the 1980's until 1993, it is important to trace the evolution of the relationships between the Community and the former CMEA States, for which purpose three different phases are therefore designated.

From the creation of the Community until 1972, the state of relations between the Community and CMEA could be summarised as hostile. Anti-EEC propaganda and the practice of the CMEA countries both to refuse to have official dealings with the Community and to impede its accession to international conventions and participation in multilateral organisations were several important factors that contributed to this.

From 1972 up to the Joint Declaration on 25 June 1988, the relations between the two organisations were characterised as constituting a period of 'valse d'hésitation'- a hesitation based on feelings of insecurity and distrust. A first loosening of tensions was

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achieved through a draft agreement which was signed in 1976 providing for possible further areas and forms of cooperation between the CMEA and the EEC as organisations and which included a section on trade. The draft implicitly provided for basic guidelines for trade policy, which would be laid down in further agreements between the Community and individual East European countries, which would not only be limited to technical matters but also subject to supervision by the CMEA and its member countries 'collectively'. The Community was opposed to this idea of limited bilateral trade agreements with an individual CMEA state, and preferred a substantive policy which would consider relationships with individual CMEA 'countries'. Nevertheless, the CMEA position did not change until 1985, at which time it was ready to seek a common language with the EEC, which it recognised for the first time as a 'political entity'.

This turning point inaugurated a new phase in the relations between the Community and the CMEA countries and was characterised by the Joint Declaration of 1988 on mutual recognition. This agreement attempted to lay down formal official relations between the EEC and CMEA and implied for the first time a recognition of the EEC by the individual members of CMEA. The Parties to the Joint Declaration agreed "to develop cooperation in areas which fall within their respective spheres of competence and where there is a common interest". This legal framework for cooperation did not have, as some expected, the instantaneous effect of stimulating economic cooperation between the EEC and individual states and opening up each others' economies. In fact, as the CMEA rules lacked any commercial policy, the Community planned to conclude trade agreements with individual CMEA states and had therefore begun bilateral negotiations by the end of 1987 with several CMEA members individually.

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8 supra note 5, point no. 2 of Joint Declaration.
B) The Common Commercial Policy and PHARE: initial unilateral responses

The Community's commercial policy approach to trade with Eastern Europe prior to the recent political changes differed from its previous approach to market economies only in form and detail but not in its philosophy. In December 1969, the Council of Ministers enacted a Regulation which stated that the common commercial policy should also apply to "State-trading countries". The differences were indeed more technical than political and the Regulation can be considered as constituting a starting point of trade relations with Eastern Europe.

The Community's approach to quantitative restrictions and anti-dumping can be summarised as penalising and often excluding particular products from particular non-market economies. Similarly, the Member States have been authorised to maintain a much greater number of specific quantitative restrictions on imports from state-trading countries. In addition to their quantitative restrictions, the Community's anti-dumping rules have not been individualised for different CMEA States and have placed the greatest burden on exports from Eastern Europe as a whole, and targeting different CMEA States.

From 1989 onwards the Community also provided aid for Poland and Hungary on behalf of all the countries of the Organisation for Economic Cooperation and Development (OECD). This aid programme was called "Poland/Hungary Assistance for

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Economic Restructuring Programme (PHARE)"\(^{14}\). It originally applied only to Hungary and Poland but it has subsequently been extended to other countries\(^{15}\).

The PHARE programme is significant in two respects: first, the programme unifies a variety of initiatives and generally designates Brussels as the centre of relations with the East. This centralist approach recognises the "pole of attraction"\(^{16}\) of the Community for the Eastern countries with Western initiatives\(^{17}\).

Secondly, the PHARE programme offers the Eastern countries a combination of trade concessions and aid as well as investment guarantees. Its purpose is to function as the foundation for economic and social reform in process in these countries, by financing generally in the form of grants, projects aimed at economic restructuring\(^{18}\). Inside the trade area, the most significant achievements of PHARE, before the signature of the new generation of agreements, had been the reduction or elimination of the Community's historical barriers to the granting of special treatment in favour of products exported to the Community.\(^{19}\) In addition to the trade related aid, the Community has also made available emergency food, medical assistance and direct loans. Following the Essen European Council in 1994, the Programme has gradually evolved towards a policy of supporting the accession of the candidate countries; indeed PHARE has developed as an effective and practical tool, forming one of the cornerstones of the pre-accession


\(^{15}\) The Council Regulation 3906/89 currently applies to 12 countries, namely Poland, Hungary, Bulgaria, the Czech Republic, Slovakia, Albania, Romania, Estonia, Latvia, Lithuania, Slovenia and, since the beginning of this year, to Bosnia Herzegovina.

\(^{16}\) See David Kennedy and David E. Webb, supra note 2, p. 649.

\(^{17}\) The Commission will nevertheless substantially increase the financial decision-making autonomy of its delegations in PHARE countries insofar as it will help eliminate unnecessary bureaucratic delays and make the Programme more responsive to local requirements; O.J. No C 205/94, Tuesday 3 May 1994.

\(^{18}\) PHARE was evaluated 4.2 billion ECU in grants between 1990 and 1994, and the Cannes European Council granted ECU 6.693 billion for the 1995-1999 period.

strategy. The new PHARE programme is therefore the main instrument to assist the acquis communautaire; PHARE’s prime objective has become to prepare the applicant countries from CEECs for accession by focusing the assistance it provides on the two key priorities of institution building and financing investments projects.

Section 2

First and Second Generation Trade Agreements

The central theme of the first and second generation trade agreements between the various Eastern European countries and the Community was the elimination of Community quantitative restrictions on imports from these countries. Because the Community negotiated trade matters individually with each CMEA country, bilateral relations have not been uniform and homogeneous.

A) First Generation Trade Agreements

Among the CMEA member countries, Romania was the first to set up institutional links with the Community, apart from some minor sectorial agreements on meat and textile products concluded between the Community and certain individual CMEA States. In 1980, Romania signed a non-preferential agreement on trade in industrial products with the Community. Prior to this, no formal links existed between the EEC...
and either CMEA or its Eastern European member countries beyond a limited number of sectorial agreements and common membership in GATT\textsuperscript{23}. Czechoslovakia signed a similar trade agreement in 1988, which was limited again in trade for industrial products only\textsuperscript{24}.

Both of these first generation trade agreements with the Community were based on a strict quota system on imports and reinforced by the active use of art. 115 of the Treaty derogations in addition to an active anti-dumping policy. They were only limited to the specific sphere of industrial goods and did not contain a firm commitment to eliminate all discriminatory quantitative restrictions set by these countries on exports to the EC. The Joint Declaration of 1988 accelerated negotiations with several Eastern European countries and transcended in their scope and content the first agreements.

B) Second Generation Trade Agreements

The first of the 'second generation' trade and cooperation agreements was signed with Hungary\textsuperscript{25} in 1988 and was used as a "ready-made model" for the establishment of further bilateral relations with other countries\textsuperscript{26}. Poland\textsuperscript{27}, the Soviet Union\textsuperscript{28}, Bulgaria\textsuperscript{29}, Czechoslovakia\textsuperscript{30} and Romania\textsuperscript{31} concluded their second generation agreements between

\textsuperscript{23} Sectorial Agreements concluded with Romania, Poland, Hungary and Czechoslovakia.
\textsuperscript{25} [1988] O.J. L 327/1.
\textsuperscript{26} See Marc Maresceau, 'A Legal Analysis of the Community's Association Agreements with Central and Eastern European Countries: General Framework, Accession Objectives and Trade Liberalization', in: Konstadininidis, The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market; 1996, pp. 125-127.
\textsuperscript{27} [1989] O.J. L 339/1.
\textsuperscript{28} [1990] O.J. L 68/1.
\textsuperscript{30} [1990] O.J. L 291/2.8
1989 and 1991. Similar agreements were subsequently concluded between 1992 and 1993 with Albania, the three Baltic States and Slovenia, but were rendered obsolete before they were even put into effect as a result of profound political and economic changes, in addition to the knowledge that the first new generation of Europe Agreements were already signed during that period with some CMEA States.

The second generation agreements established not only a framework for negotiations on agricultural trade but also a commitment to commercial cooperation and a timetable for the elimination of quantitative restrictions on industrial products. All of these second generation agreements were similar in form and substance and emphasised innovative provisions concerning commercial cooperation. In these agreements, the Community committed itself in a non-preferential manner to the gradual abolition of quantitative restrictions operating in relation to goods originating from these countries. Furthermore, the agreements contained provisions relating to trade cooperation, an element which was not present in the first generation agreements: in the second generation agreements, the parties would have as their goals to "promote, expand and diversify their trade on the basis of reciprocity and non-discrimination." Finally, the agreements contained a limited institutional framework for economic cooperation which would facilitate sharing Western expertise and know-how.

These agreements, compared with the Europe Agreements evolving during the same period, were thus limited in their scope and in their nature, a fact which was emphasised in support of the legal basis used to conclude these agreements, namely arts. 113 and 235.

35 A unilateral response came through the PHARE programme where the former system of specific quantitative restrictions in the field of trade was abolished.
36 Art. 10(1) of the Agreements with Hungary and Poland.
of the Treaty\textsuperscript{37}. In addition, the rapid disintegration of the Soviet Union at the time that the agreements were conceived contributed to the result that these agreements were obsolete by the time they were put into effect.

The agreements were, however, of important political value to the partners, because the Community had implicitly declared that it no longer regarded the Eastern partners as state-trading countries. It would therefore be an error to underestimate the political and legal value of these now outdated agreements, which, having in mind decades of non-cooperation and mistrust, in retrospect can be considered the first foundations of the Europe Agreements.

CHAPTER TWO
COMMON FRAMEWORK OF THE EUROPE AGREEMENTS

In 1991, the Community began to respond vigorously to the reforms and efforts towards market economies in Eastern Europe. The Commission's proposed "Europe Agreements" were to be targeted towards those countries giving practical evidence of their commitment to economic and political reforms\textsuperscript{38}. The primary aim of the Europe Agreements (hereinafter 'EAs') was thus to support the "retour en Europe" of the Central and Eastern European countries\textsuperscript{39}.

\begin{itemize}
\item \textsuperscript{37} See Jean Raux, \textit{supra} note 2, pp. 51-52.
\item \textsuperscript{38} Commission Communication of 27 August 1990, 'Association Agreements with Countries of Central and Eastern Europe: a General Outline', COM (90) 398 final.
\item \textsuperscript{39} See Robert Toulemon, \textit{La Construction européenne}, 1994, p. 256.
\end{itemize}
The first EAs were negotiated with Poland, Hungary and the Czech and Slovak Federal Republic and signed on 16 December 1991. As a result of the political changes and the dissolution of the Czech and Slovak Federal Republic, the EA originally signed was renegotiated separately between the two new Republics and subsequently led to the signature of separate EAs with these countries on 4 October 1993. In the same year, the Community signed EAs with Romania and Bulgaria. As mixed agreements, the EAs had to be ratified by all the Member States and in order to avoid too much delay before their effect, 'Interim Agreements' were signed separately. On 12 June 1995, EAs with the three Baltic States, Estonia, Latvia and Lithuania, were signed, and on 15 June 1995 the last of the 10 EAs was signed with Slovenia.

At the time of the writing of this thesis, already six EAs have entered into force (ANNEX I). Three EAs signed with Estonia, Latvia and Lithuania and the Agreement signed with Slovenia still need to be ratified by some Member States before they have full effect. In the case of Slovenia, the Slovenian Parliament has only very recently ratified the Agreement. The European Union has now received formal applications for membership from all 10 of the Associated countries, and the Commission, in its

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41 EAs with the Czech and Slovak Republics: [1994] O.J. L 360/2 and L 359/2.
46 Namely on July 15, one day before the issuing of the Commission Communication Agenda 2000 !. The Commission considered the ratification as a prerequisite before any favourable treatment of Slovenia as a future member of the Union. See Agence Europe, Thursday 17 July 1997, p. 7. For the complete set of ratifications by the Member States of a specific Europe Agreement, see ANNEX I of our thesis; Council of the European Union, DG 3A General Secretariat, Bureau des Accords, Juillet 1997.
47 Membership requests were received from the following Associated countries: Hungary (31 March 1994), Poland (5 April 1994), Romania (22 June 1995), Slovakia (27 June 1995), Latvia (27 October 1995), Estonia (28 November 1995), Lithuania (8 December 1995), Bulgaria (16 December 1995), the Czech Republic (23 January 1996) and Slovenia (11 June 1996).
Communication "Agenda 2000" of 15 July 1997\(^4\), recommends that the Council opens negotiations for membership with Hungary, Poland, Estonia, the Czech Republic and Slovenia.

Section 1

Substantive Similarities in all of the Europe Agreements

All of the Europe Agreements that the Community has thus far concluded with 10 Central and Eastern European countries share the same structure; nevertheless, it is important to note that they have been adapted to the needs and particular situation of each Associated country, and, therefore, the numeration and content of their provisions shall not be assumed to be identical between each Agreement. Specific differences exist between the various EAs, and will be dealt with in the following discussion whenever relevant.

There are five main headings which can be considered as a common framework in each of the 10 agreements: legal basis and form (A), political dialogue and institutions (B); free movement of goods, persons and services (C); approximation of Laws (D); and subsidiarily economic, cultural and financial cooperation (E).

In the following analysis, for matters of convenience and clarity, the Agreements signed with Hungary and Poland shall form the basis of this discussion, both because they were concluded first and because they form the link of an initial common model with the Agreements signed later; the inclusion and analysis in this discussion of

provisions coming from EAs other than Hungary and Poland will be noted and dealt with only in case of relevance.

It is important to note at this time that the 10 EAs fall into two main groups: those concluded with the three Baltic States and those concluded with the other seven states. Those concluded with the three Baltic States contain only provisions on free movement of goods and capital, current payments and competition including State aids, as well as more stringent provisions on movement of workers and establishment. In contrast, the EAs with the other seven states also contain provisions corresponding more to the other three Community freedoms.

A) Legal basis and institutions

The Europe Agreements are association agreements based on art. 238 of the EC Treaty, and are mixed. The mixed nature of the Europe Agreements encompasses areas for which the Community has exclusive competence such as commercial policy as well as other important areas which remain largely within the competence of the Member States, such as the sensitive questions of immigration policy, movement of migrant workers and establishment. Excluding the EEA Agreement, the Europe Agreements are the most far reaching of all agreements concluded so far by the Community which establish an association.

An institutional framework is included in the Europe Agreements to oversee the operation and well-functioning of the agreements. Three institutions of association are established: an Association Council, an Association Committee and an Association Council.

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49 For instance, arts. 41 and 43 (1) (iii) of the Agreement with Estonia.
51 Title IX of the Europe Agreements.
Parliamentary Committee. The Association Council, consisting of members of the Community Council of Ministers and Commission and the government of the respective Associated states, has a dispute settlement role and a decision-making power in limited fields, such as for instance the social security systems\textsuperscript{52}, whereas in other fields they merely have a recommendation power, such as on the question of movement of workers\textsuperscript{53}. Its primary function is thus to monitor the implementation of the agreements\textsuperscript{54}. The Association Council may also delegate powers to the Association Committees, consisting of representatives at senior civil servant levels of the Council of Ministers and Commission and the government of the Associated state, which then shall take the decisions normally given to the Association Council\textsuperscript{55}. Finally, the Association Parliamentary Committees, consisting of representatives of the parliament of the respective Associated state and of the European Parliament, have the weakest role of the three institutions; they mainly provide the opportunity for an exchange of views, and their resolutions are non-binding\textsuperscript{56}.

B) Political Dialogue

In April 1990, the European Council in Dublin declared that it would begin discussions on "Association Agreements with each of the countries of Central and Eastern Europe which include an institutional framework for political dialogue" (emphasis added)\textsuperscript{57}. The explicit articulation of the "political dialogue" in an Association

\textsuperscript{52} Art. 39 of the Agreements with Hungary and Poland.
\textsuperscript{53} Art. 42 of the Agreements with Hungary and Poland.
\textsuperscript{54} Arts. 104 and 106 of the Agreements with Hungary and Poland.
\textsuperscript{55} Art. 108 (2) of the Agreement with Hungary and art. 106 (2) of the Agreement with Poland.
\textsuperscript{56} Art. 112 of the Agreement with Hungary and art. 110 of the Agreement with Poland.
\textsuperscript{57} Bulletin of the European Communities, Supplement 6/90, Presidency Conclusions, p. 5.
Agreement was a novelty which sought to expedite political convergence and promote European security and stability.

The EAs have an inherent political dimension and are based, according to their Preambles, on a commitment to "pluralist democracy based on the rule of law, human rights and fundamental freedoms, a multi-party system involving free and democratic elections". There is also an expressed commitment to the goals of the Conference on Security and Cooperation in Europe as well the implementation of the Helsinki Final Act. One of the main differences between the first round of EAs in 1991 with Hungary, Poland, and the Czech and Slovak Federal Republic and those of the second round in 1993 with Romania, Bulgaria, and the Czech and Slovak Republics is that, in the latter, reference is made in the Preamble to the need to respect not only the rule of law and human rights, but also "the rights of persons belonging to minorities". Moreover, the second generation EAs and those concluded with the three Baltic States and Slovenia contain a provision not only in the Preamble but also in the provisions which declares that "respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principle of a market economy, inspire the domestic and external policies of the Parties and constitute essential elements of the present association".

Political dialogue, intended to lead to "close political relations" and to "lasting links of solidarity and new forms of cooperation", forms the subject of Title I of the EAs.

58 Note that the EAs concluded with the three Baltic States and Slovenia contain the clauses for "respect for democratic principles and human rights" in arts. 2 and 1 respectively of the Agreements and not in the Preambles.
59 Art. 2 of the EAs with the three Baltic States and Slovenia, art. 6 of the Agreements with Romania, Bulgaria, the Czech Republic and Slovak Republic.
60 Art. 1 of the Agreements with Hungary and Poland.
61 Art. 2 of the Agreements with Hungary and Poland.
62 Title II for the three Baltic States and Slovenia.
and provides for consultation at a political level and at ministerial level through the Association Council and at a parliamentary level through the Parliamentary Association Committee. Therefore, regular-political dialogue provides for regular exchanges at a political and diplomatic level and facilitates the integration of the Associated countries in the application of the Agreements both at the economic and political level. In addition, in the Associated states it establishes between the Associated states and the Community "new links of solidarity" that may result in a more constructive and regular relationship.

Although this type of political dialogue is less specific and targeted than, as well as different from the political cooperation within the EPC framework, Title I of the EAs are broad enough not to limit it to an empty and mere formality.

Hence, the inclusion of the political dialogue in the EAs, an unprecedented element in existing association agreements, can be seen as an important and symbolic process aimed at strengthening the links between the two parts of Europe, while still carefully avoiding the question of ultimate membership of the associated countries. The political dialogue established through the EAs has been further implemented and refined by the Commission, which has stressed that "new means should be created for this purpose, building upon the existing architecture of European organisations, so as to create a 'European political area'." Furthermore, as a result of the European Councils of

63 Art. 3 of the Agreements with Hungary and Poland.
64 Art. 5 of the Agreements with Hungary and Poland.
Copenhagen and Essen in 1994, the idea of political integration of the 10 Associated countries has led to the organisation of what has been called 'structured relations' between institutions of the Union and the Associated countries. The main aim of these structured relations has been to create an environment of work and cooperation in order to create a pre-accession atmosphere, thereby gradually integrating the Associated countries in the various activities of the Union which covered areas of common interest.

C) Movement of goods, persons and services

1. Free movement of goods

The dissolution of the CMEA has had a dramatic impact on Central and Eastern European countries; indeed, the change from a command to market economy has resulted in the loss of security of guaranteed markets for their goods.

As far as trade is concerned, the EAs' ultimate aim is to establish a free trade zone for all goods, except, for the moment, for agricultural goods, within 10 years to be accomplished in two 5 year stages. However, the EAs do not envisage, in the short run, the establishment of a customs union nor of an internal market. The aim of the

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68 In two Notes of the Commission of 21 February 1996, SI (96) 185, and 27 February 1996, SN 600/1/96 REV 1, the calendar of the regular meetings such as their content of preparation has been improved towards regular meetings every six months. Structured dialogue also contains the preparation and follow up of the IGC, where Central and Eastern European countries will be kept informed on the progress of discussions in the Conference and will be able to express their point of view.

69 See Marise Cremona, 'Community Relations with the Visegrad Group', ELRev, 1993, pp. 345-347.

70 Art. 7 of the Agreements with Hungary and Poland.

71 Note that the main difficulty in implementing a strategy towards the unification of the preferential rules of origin in Europe is the number of bilateral and multilateral agreements signed with Central and Eastern European countries. Furthermore, not all associated countries involved have the same views with regard to trade integration in Europe; See Commission White Paper of 10 May 1995, 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union', COM (95) 163 final/2, at p. 383; See Paul Van den Bempt & Greet Theelen, 'From Europe Agreements to Accession', TEPSA 1996, p. 27 and pp. 39-48.
establishment of a free trade area is based on reciprocal and balanced obligations, however the EAs eliminate trade barriers more rapidly on the part of the Community than on the part of the Associated countries. The objective of trade liberalisation has nevertheless first to be attained\textsuperscript{72}, and indeed one of the objectives of the EAs is "to establish \textit{gradually} a free trade area [...] covering substantially all trade" (emphasis added). Faced with a poor infrastructure and goods of inferior quality, the Associated states run the risk of being flooded by goods from the Community; therefore, the gradual establishment of the free trade area will be mutual for a certain while but asymmetrical with concessions made on the Community side\textsuperscript{73}.

A free trade area, such as the EEA, differs from a customs union and does not operate within a common external customs tariff. Therefore, the free movement provisions will only apply to goods originating in the Community and the Associated states and not to goods in free circulation\textsuperscript{74}. Unlike other Free Trade Agreements such as the EEA Agreement, the EAs only cover goods and are not fully reciprocal regarding the speed at which customs duties and quantitative restrictions should be abolished.

As far as imports of industrial goods into the Union are concerned, apart from textiles and ECSC products\textsuperscript{75}, most products have been excluded from customs duties from the entry into force of the Interim Agreements and for some products the reduction of these duties is phased over either a one or four year period\textsuperscript{76}. Some products are subject to

\textsuperscript{72} Art. 1 of the Agreements with Hungary and Poland.
\textsuperscript{74} Art. 8 and Protocol 4 of the Agreement with Hungary and Poland.
\textsuperscript{75} Annex I of the Agreements with Hungary and Poland.
\textsuperscript{76} Art. 9(2) of the Agreements with Hungary and Poland.
annually increased tariff-free quotas for five years, after which all duties will be abolished.\textsuperscript{77}

In addition to products subject to customs duties, all quantitative restrictions and measures having equivalent effect on imports from the Associated states into the Union have been abolished from the entry into force of the Interim Agreements\textsuperscript{78}. The Associated states, for their part, will gradually abolish customs duties over the transitional period\textsuperscript{79}; quantitative restrictions and measures having equivalent effect on imports will be abolished immediately in most cases\textsuperscript{80}.

The EAs also contain clauses on dumping, and specifically regarding the action to be taken in the case of serious injury to domestic producers or serious disturbance to a sector of the economy as a result of imports\textsuperscript{81}. In addition, the EAs provide the possibility to allow the Associated states to take exceptional safeguard measures in the form of customs duties in order to protect new industries as well as "certain sectors undergoing restructuring or facing serious difficulties"\textsuperscript{82}.

Although the provisions on free movement of goods are a significant improvement on the previous position in the first and second generation of Trade Agreements, they are nevertheless quite a long way from completely opening access to the Community a market for the Associated states, especially in respect of those products which are considered sensitive, such as textiles, steel and agricultural products.

\textsuperscript{77} Art. 9(3) of the Agreements with Hungary and Poland.
\textsuperscript{78} Art. 3(4) of the Interim Agreements with Hungary and Poland.
\textsuperscript{79} Art. 10 of the Agreements with Hungary and Poland.
\textsuperscript{80} Nevertheless, there is, for example, an exception under art. 10(4), or more precisely, under Annex V of the Poland Agreement, where there is some delay for the abolition of quantitative restrictions relating to motor vehicles and petroleum products.
\textsuperscript{81} Arts. 30 and 33 of the Agreements with Hungary and Poland.
\textsuperscript{82} Art. 28 of the Agreements with Hungary and Poland.
2. Movement of workers and the question of right of establishment

The heading "Movement of Workers" under the chapter of workers, which will be dealt with in more detail in Part Three, is significant and highly sensitive. The EAs are not designed to lead to complete freedom of movement of migrant workers between the Community and the Associated states, but rather concern themselves with "the treatment accorded to workers [...] legally employed in the territory of a Member State" (emphasis added). Whereas Title III of the EAs on trade in goods is headed "Free Movement of Goods", the heading to Title IV merely provides "Movement of Workers, Establishment, Supply of Services". Hence, the EAs do not aim to grant full freedom of movement or rights of establishment, but only the right to equality of treatment for legally employed or resident third country nationals.

The Member States maintain their national competence to determine their own immigration policies; no right of entry into the Community from the Associated states is given by the EAs. They include only the principle of non-discrimination based on the ground of nationality with respect to working conditions, remuneration, and dismissal, once the migrant workers are legally employed in one of the Member States. The spouse and children of the worker, once he is legally resident, have also access to the local labour market. Coordination of social security systems is to be implemented by the Association Council and improvement in movement of workers and access to employment is to be achieved through national legislation and through Association Council recommendations, not decisions, as was the case in the 1963 Turkey Association Agreement.

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83 Art. 37(1) of the Agreements with Hungary and Poland.
84 Art. 37(2) of the Agreements with Hungary and Poland.
85 Art. 38 of the Agreements with Hungary and Poland.
86 Arts. 41 and 42 of the Agreements with Hungary and Poland.
For example, art. 40 of the Hungary Agreement does not give the Association Council a decision-making power regarding improvement in movement of workers and access to employment; indeed, contrary to what was the case under the 1963 Turkey Association Agreement, and, more precisely, under the Turkey Association Council Decisions 2/76 and 1/80, "the provisions adopted by the Association Council [...] shall not affect any rights or obligations arising from bilateral agreements [...]" (emphasis added).

In contrast to the right of access to the EC itself and to legal employment within the Community, the EAs impose substantive obligations with respect to the non-discrimination clause for working conditions, remuneration and dismissal for third-country nationals who are "legally employed in the territory of a Member State". As will be seen in more depth in Part Three of the discussion, this obligation in the provisions of the EAs is clear, precise and independent of any further action, and, thus, does not require any intervention on the part of the Association Council to be directly effective. It is therefore very likely that this provision will lend itself well to create directly-effective rights for nationals of the Associated states legally resident or employed in the Community.

The EAs do not themselves extend rights of residence automatically to the family members of the migrant worker. However, if the family members are legally resident under national laws of the Member States the worker's spouse and children are entitled

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87 Council Decision No 276 implementing art. 12 of the 1963 Turkey Agreement with the first stage of free movement of workers. Art 2(1)(b) of that decision provides that "after five years of legal employment in a Member State of the Community, a Turkish worker shall enjoy free access in that country to any paid employment of his choice" (emphasis added). Art. 6(1) of Council Decision No 1/80 on the development of the Association provides in its third intent that "a Turkish worker duly registered as belonging to the labour force of a Member State [...] shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment" (emphasis added).
88 supra note 83.
to access to the labour market of the host Member State for as long as the worker himself is legally employed\(^9^9\).

The provisions on social security are even more limited: they do not themselves grant nationals of the Associated states equality of treatment with respect to access to the social security schemes of the Member States. Indeed, art. 38 of the Agreements with Hungary and Poland only sets out an objective "[...] with a view to coordinating social security systems for workers [...] legally employed in the territory of a Member State and for the members of their family; legally resident there, and subject to the conditions and modalities applicable in each Member State" (emphases added). The programmatic rights granted in the provisions on social security are thus subject to forthcoming decisions of the Association Council, after which they can in principle be directly effective.

Whilst the inclusion of a title on movement of workers can be welcomed as a symbolic step, the effective freedom to move afforded under this title is more apparent than real. The limited scope of this provision may therefore reassure the governments in the East who fear a mass exodus as well as the governments in the West who fear a mass immigration. This title opens the door for future cooperation and more efficiency in the decision-making power of the Association Councils.

The right of establishment is given the same content as in art. 52 of the Treaty, but is accorded a more limited scope; establishment is defined in terms which mirror the wording of art. 52 of the Treaty to include not only the pursuit of economic activity on a self-employed basis, but also the setting up and managing of undertakings\(^9^0\). Here, again, there is a less substantive provision for the three Baltic States concerning the chapter on

\(^9^9\) Art. 37(1) para 2 of the Agreements with Hungary and Poland.
\(^9^0\) Art. 44(5) of the Agreement with Hungary and art. 44(4) of the Agreement with Poland.
establishment to the extent that the non-discrimination clause for migrant workers of these countries only fully applies from 31 December 1999 onwards.  

The subtle boundary between the right of establishment and movement of workers is made evident in the EAs: "self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market of another party" (emphasis added).  

Companies and nationals of the Associated states will be entitled to equal treatment from the date of entry into force of the full Agreement, bearing in mind the two transitional periods of five years. The transition period enables the Associated states' companies to gradually implement the non-discriminatory treatment so that their most sensitive industries will be afforded a certain time of necessary protection. This temporary derogation from the equal treatment principle will not affect Community companies or nationals already established in the Associated states. The Association Councils are charged with the task of easing the barriers to establishment, in particular in the field of mutual recognition of qualifications.

3. Provision of services

Provisions relating to the supply of services do not lay down a detailed timetable for eventual implementation because the Community was not prepared to enter into specific timetable commitments before the Uruguay Round of GATT. As a result, at this time,

91 For instance, art. 43 (1)(iii) of the Agreement with Estonia provides that "The Community and its Member States shall grant [...] as from 31 December 1999, for the establishment of Estonian nationals and their operation, treatment no less favourable than that accorded to Community nationals of any third country, whichever is the better" (emphasis added).
92 Art. 44(5)(a)(i) of the Agreement with Hungary and art. 44(4) (a) (i) of the Agreement with Poland.
93 Art. 44(2) of the Agreements with Hungary and Poland.
94 Art. 46 of the Agreements with Hungary and Poland.
95 Art. 58(2) of the Agreements with Hungary and Poland provides the possibility of adjusting the provision of services (and establishment) following the results in the Uruguay Round.
no deadline is set, there is no reference in the EAs to national treatment, and liberalisation is to be implemented entirely by an Association Council decision in order to take "the measures necessary to progressively implement the provisions."  

D) Approximation of Laws

The approximation of the legislation of the Associated states is recognised to be a 'pre-condition' for their economic integration into the Community; indeed, "the major precondition for [...] economic integration into the Community is the approximation [...] of existing and future legislation to that of the Community." Under this title, which is conditional in nature, the Associated states are to ensure that their existing and future law is consistent with many branches of Community law, such as company law, banking, intellectual property, employment protection, consumer and health protection and environment.

A minor difference exists between the first Agreements signed with Hungary and the other nine Agreements with respect to the stringency of the legal approximation process; indeed, according to the first Agreement, "the Contracting Parties recognise that the major precondition for [...] economic integration into the Community is the approximation of [...] existing and future legislation to that of the Community." And accordingly, in order to achieve this precondition, Hungary "shall act to ensure that future legislation is compatible with Community as far as possible." In contrast, the later Agreements require that the country concerned merely "use[s] its best endeavours

96 Art. 55(3) of the Agreements with Hungary and Poland.
97 Art. 67 of the Agreement with Hungary and art. 68 of the Agreement with Poland.
98 Arts. 67-69 of the Agreement with Hungary and arts. 68-70 of the Agreement with Poland.
99 Art. 67 of the Agreement with Hungary.
to ensure that its legislation will be gradually made compatible with that of the Community.

Nevertheless, compared with the EEA Agreement, the approximation of laws, thus the adoption of the acquis communautaire, is far less demanding in the EAs than in the EEA. The Commission in its White Paper of 10 May 1995 provided a guide to assist the Associated states in preparing themselves for operating under the requirements of legislative alignment to the Union’s internal market. The Associated states themselves have the main responsibility for alignment with the internal market and will establish their own sectoral priorities.

The main challenge for the Associated states in assuming the internal market legislation is not so much their obligation to “act to ensure that future legislation is compatible with Community law as far as possible”, which has already been substantially achieved in the various Associated countries. The challenge lies more in the adaptation of their administrative machinery and their societies to the conditions which are necessary to make the legislation work effectively. Consequently, it has been suggested to increase the assistance provided by the Union with regard to the approximation of laws.

E) Areas of cooperation

100 For instance art. 68 of the Agreement with Poland.
102 suprana note 71, at point 3 and especially in the Annex.
103 Art. 67 of the Agreement with Hungary and art. 68 of the Agreement with Poland.
104 Practical assistance may be intensified by extending TAJEX (Technical Assistance Information Exchange Office) which already provides information on the Community acquis and shall broaden the scope of its activities not only as regards governments but also firms, in order to prepare them for the legal disciplines of the single market; See Agenda 2000, suprana note 48, Volume II, Chapter IV.
Cooperation with the Associated states is planned within a wide range of economic, cultural and financial activities. Economic cooperation is designed to assist the Associated states in their efforts towards economic restructuring and development. The cooperation covers all areas of mutual interest such as industrial cooperation, investment promotion, science and technology, environment, telecommunications and broadcasting. Furthermore, the Community provides the Associated states with a certain degree of financial support, independently from PHARE, IMF, EBRD and G-24 aids, to assist them in achieving the proscribed objectives of eventual ultimate membership. A new instrument, namely "Accession Partnership", will be the key feature of the reinforced pre-accession strategy and will unify all forms of financial assistance to the applicant countries in Central and Eastern Europe within a single framework. This institution will facilitate the implementation of national programmes to prepare them for membership to the Union.

Finally, cultural cooperation is a recently emerging feature, introduced for the first time in Title IX of the EC Treaty. The inclusion of cultural cooperation in the EAs has a symbolic importance; it aims to strengthen the common links between the respective parties without prioritising the national cultural identity and diversity of any Associated state. The main motivation is to create and to promote a sense of European identity in the Associated countries: for example, provision is made for cooperation in cultural events with a European character.

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105 See Agenda 2000, supra note 48, Part Two, Chapter III.
106 Art. 128 (1) and (3) EC provides as follows: "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the force. [...] The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe".
107 Art. 97 of the Agreement with Hungary and art. 95 of the Agreement with Poland.
Section 2

Critical evaluation of conditionality in and for the EAs: a carrot and stick approach?

The substantive provisions of all of the EAs, such as their political, legal and economic objectives towards membership, are characterised by the presence of 'conditionality' and follow, hence, the Community's strategy of managing the integration process, which was also evident in the Turkey Association Agreement. The EC has imposed the concept of conditionality as the dominant element during the various stages of integration of the Associated states; first, PHARE was offered to Poland and Hungary and then to additional countries only in the event that they were able to show a sufficient level of commitment to the market economy and democracy. Secondly, the conclusion of the EAs was made conditional, based on the progress that was achieved through political and economic reforms in the Associated countries. Finally, the EAs themselves explicitly provide that progress on the association relationship will depend partly on progress of the Associated countries in developing a market economy. From the initial spirit and the wording of the Commission communication of 1990 on Association with Central and Eastern Europe\textsuperscript{108}, it was clear that, in the short term, the EAs were considered as an alternative route to accession, a so-called membership minus plena\textsuperscript{109}.

Furthermore, the carrot and stick approach that the Community has used for the Associated states in order to continue to apply the Agreements and to facilitate future membership, is based on criteria set unilaterally by the Community and refined by subsequent European Council Summits. The EAs' political language is clear: "serving the

\textsuperscript{108} supra note 38

twin aims of preserving the EC's flexibility and providing it with a basis to influence internal policy.\textsuperscript{110}

The assessment of the legal value in case of failure of an Associated state concerning the Association Agreement is not clear and the criteria laid down in art. O TEU leave the judgment up to the Community.

A) Conditionality of accession to the Community

1. Minimum socle for accession in the Treaty: art. O TEU and limited openness

Art. O of the Treaty on European Union\textsuperscript{111} provides that "Any European State may apply to become a member of the Union" (emphasis added). These conditions required are neither defined nor clearly articulated, but instead are to be "subject of an agreement between the Member States and the Applicant State".

Any State which can be considered as European, may thus be considered as being able to join the Union; accession is open to any European state\textsuperscript{112}. There is no doubt that culturally, historically and geographically the Associated states from Central and Eastern Europe are part of the required 'European' element in art. O TEU\textsuperscript{113}. The conditions of


\textsuperscript{111} Formerly art. 237 CE.


\textsuperscript{113} Note that in the European Council in Lisbon in June 1992, in the Commission's report 'Europe and the Challenge of Enlargement', the Commission suggested that the word European "[...] combines geographical, historical and cultural elements which all contribute to the European identity". The Commission refused to define what is the "[...] shared experience of proximity, ideas, values, and historical interaction". Indeed, it is "subject to review by each succeeding generation. The Commission believes that it is neither possible nor opportune to establish now the frontiers of the European Union,
accession shall be subject to an agreement between the Member States and the applicant, which implies ratification by all the parties concerned. Among these conditions, political elements such as the presence of well-functioning democratic institutions, the respect of human rights and the protection of minorities are of course of overriding importance for accession to the Union. This has been recently confirmed in the Draft Treaty of Amsterdam which proposes to amend the first sentence of art. O: "Any European State which respects the principles set out in Article F(1) may apply to become member of the Union".114

Nevertheless, it is important to stress that art. O TEU forms neither the core nor the exclusive element of minimum conditions for accession to the Community in the Treaty; indeed, the minimum socle for membership, namely the openness of the Community to new members, may be found primarily in the Preamble of the ECSC Treaty, where the Member States are "Resolved to substitute for old-age rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared [...]". With regard to political criteria for membership, the Amsterdam Draft Treaty has enshrined in art. F a constitutional principle that "The Union is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law".115 Accordingly, the Draft Treaty wishes to modify art. O TEU in order to make compliance with art. F TEU an explicit and additional condition for membership.

whose contours will be shaped over many years to come". Bulletin of the European Communities, Supplement 3/92, point 7.
a compliance which was previously required in the various European Council Decisions concerning eventual membership to the Union.

Finally, the openness of the Community to any new members has been emphasised and refined in the Preamble of the Treaty of Rome where the will is "Determined to lay down the foundations of an ever closer union among the peoples of Europe. [...] Resolved by thus pooling their resources to strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal—to join in their efforts" (emphasis added).

Potential applicants, whose accession to the Community at first seems fully open and universal, but are asked to "join in". There emerges a certain additional conditionality limiting the *a priori* open invitation under art. O TEU to any European state towards membership to the Union\(^{116}\). The potential applicants must be aware of the European "efforts" necessary to join, namely the acceptance of the *acquis communautaire*\(^{117}\).

The Court, in its preliminary ruling in *Mattheus*\(^{118}\), refused to answer the question of the setting of legal limits of accession which may arise in the wording of former art. 237 of the Treaty. Without directly denying that art. 237 of the Treaty may include some discretion towards legal conditionality of accession and that its content could be refined, the Court nevertheless refused to have jurisdiction under art. 177 of the Treaty to define itself the content of these conditions in art. 237 of the Treaty. The solution the Court has adopted under the old art. 237 of the Treaty can be transposed to art. O TEU since they substantially coincide\(^{119}\).

\(^{117}\) For more information about the content and adoption of the acquis for the Associated states of CEECs; see *Agenda 2000*, supra note 48, Part Two, Chapter One.
\(^{118}\) Case 93/78, ECR [1978] 2212.
\(^{119}\) Note that the "Community" in art. 237 EC has been replaced in art. O TEU by the "Union", and see Arthur Lopian, *supra* note 116, pp. 31-32.
It is important to note that the criteria laid down in art. O TEU are neither obligatory for the Community nor the Associated states. Art. O TEU includes neither obligations for the Community nor rights for the Associated states. The wording of art. O TEU gives both the Community and the Associated state the discretionary possibility to simply refuse accession\textsuperscript{120}. The Associated states are free to formally request membership, since art. O TEU provides that "any European state may apply to become member of the Union". The Community for its part may simply refuse the accession request.

Thus, the existence of additional political criteria towards membership in the Association Agreements themselves, as in previous Associations such as for Greece and Turkey\textsuperscript{121}, does not alter the 'legal' situation of any Associated state, but may only provide 'political' arguments for the Associated states or the Community\textsuperscript{122}. It is interesting to note that the Draft Treaty of Amsterdam seeks to incorporate a suspension clause in new arts. Fa TEU and 236 of the Treaty which refers to the idea of allowing for the suspension of any Member State failing to respect human rights. As a consequence of an eventual application of these proposed articles, certain voting rights deriving from the application of the Treaty may be suspended. Once the Associated states will have joined the Union, their voting rights can be suspended if they are in breach of any of the principles on which the Union is founded. Where the voting rights of a Member State deriving from the application of the Treaty have been suspended, the obligations of that Member State under the Treaty shall nevertheless continue to be binding on that State. Thus, there emerges the idea that conditionality not only operates before accession of an Associated state but also after membership is granted to that state.

\textsuperscript{121} Art. 72 of the Association Agreement with Greece and art. 28 of the Association Agreement with Turkey.
\textsuperscript{122} See Constantinos Lycourgos, supra note 120, p. 343
2. Conditionality of accession in the Europe Agreements and European Council Summits

During the course of negotiations with Hungary, Poland and Czechoslovakia, there were threats to suspend negotiations and the Community finally accepted to include an explicit but ambiguous reference to membership in the EAs. The last part of the Preamble of the EAs states that "the final objective is to become a member of the Community and that [this] association, in the view of the Parties will help to achieve this objective" (emphases added).

The legal significance of this reference in the EAs remained somewhat limited. The reference in the Preamble to accession as a final objective only emphasises the Community's original view that the association would help as an ultimate 'goal' to achieve accession, but that accession in itself was not foreseen as an immediate goal in the various EAs.

Nevertheless, the Community's approach on the issue of accession has fundamentally changed since the signature of the various EAs. The question of ultimate membership has evolved from mere unilateral objectives of the Associated states towards a common goal, at least in the political formulation in the various European Council Summits.

In addition, next to the formal and somewhat vague criteria for membership which are articulated in the Treaties, there emerge political and more detailed preconditions in the European Council Decisions that have to be satisfied by an applicant country (ANNEX II).

After the launch of negotiations for the accession of Austria, Finland and Sweden, the next impetus for enlargement and breakthrough for the CEEC's occurred at the
European Council Summit in Copenhagen in June 1993. The European Council decided "that the associated states that so desire shall become members of the European Union [...] as soon as the associate member state is able to fulfil the obligations of membership as well as the economic and political conditions"\(^{123}\).

According to the Copenhagen Conclusions' definitions of minimum socle of membership, these conditions "require that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union"\(^{124}\).

The imposition of these political criteria seems self-evident considering that accession must be in the interest of both the Union and the candidates; nevertheless, the question remains whether or not all of these criteria have to be assumed immediately after membership arises. It is important to note that the political conditionality in the various European Council Summits is more stringent and somewhat more discriminatory than in previous enlargements because it is based on specific and explicit political and economic criteria, which has caused some criticism\(^ {125}\).

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\(^{124}\) *Ibid.* and reiterated especially in the Essen, Cannes (see in the Annexes 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the European Union'), Madrid and Amsterdam European Council Conclusions, Bulletin of the European Communities, Supplement 12/94, at point I. 39; Supplement 6/95, at point I. 32; Supplement 12/95, at point I. 25; Supplement 6/97.

B) Conditionality of the EAs and suspension: difficult assessment of eventual failures

The Association founded on art. 238 EC implies a participation of the objectives of the Treaty\textsuperscript{126} whereas agreements founded on art. 113 EC are generally only limited to commercial objectives and therefore are less political; Community agreements concluded on the basis of art. 113, nevertheless, can include clauses on human rights. The Community's choice whether or not to conclude an agreement with a third state founded on art. 113 EC or art. 238 EC is therefore important.

Although art. 238 itself contains no explicit requirements regarding political conditionality of an association, the practice has shown in the past that the Community has suspended some parts of the Greece and Turkey Association Agreements. For example, the Community refused to grant Spain, which was ruled under Franco dictatorship, an Association Agreement but instead granted a Trade Agreement founded on art. 113 EC\textsuperscript{127}.

The EAs themselves contain an express reference concerning the Associated countries' obligations under the Agreements. These Agreements, which are concluded for an unlimited period, can nevertheless be denounced after a six month period\textsuperscript{128}. The institutionalisation of a practice of denouncement or suspension makes it difficult to create a background of confidence within the legal framework of the EAs. Furthermore, the EAs state that "The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained."\textsuperscript{129}

\textsuperscript{128} Art. 120 of the Agreement with Hungary and art. 118 of the Agreement with Poland.
\textsuperscript{129} Art. 117 (1) of the Agreement with Hungary and art. 115 (1) of the Agreement with Poland.
The Associated states are thus invited to comply with the spirit and contribute to the well functioning of the EAs. In case of any failure, either Party "may take appropriate measures. Before so doing, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties" (emphasis added) 130.

The wording of "appropriate measures" to be taken invites one to think that the eventual failures and sanctions are neither well-defined nor elaborated. Suspension, which has been previously used in the Greece Association Agreement, gives a precedent for eventual sanction by the Community. Nevertheless, the lack of any legal appreciation would inevitably lead to arbitrary measures.

Explicit conditionality thus creates some problems concerning the criteria and arbitrary assessment of eventual failures concerning the conditions of the EAs. Indeed, bearing in mind the important changes and inherent efforts in the democratisation process in the Associated states, the Community's response of integrating political and economic conditionalities in the EAs seems both disproportionate and practically difficult to operate131.

CHAPTER THREE

THE EUROPE AGREEMENTS, ONE WAY OF VARIOUS ASSOCIATIONS WITH THE COMMUNITY

130 Art. 117 (2) of the Agreement with Hungary and art. 115 (2) of the Agreement with Poland.
131 See Heinz Kramer, supra note 125, p. 127
The EAs can be evaluated and analysed from different perspectives. The approach used here is to focus on the general legal scheme and objectives of Association proposed in the Treaty and to look at the EAs in comparison with other Agreements concluded by the Community. Given, as we have seen, the political priority for the EAs, the question to be discussed here is whether these Agreements really form a new kind of relationship with third countries or merely a slightly adapted form of normal Association Agreements the Community has concluded so far with other third countries.

Section 1:

Notion and Practice of Association under art. 238 of the Treaty

The first paragraph of art. 238 of the Treaty provides that “The Community may conclude with a third state, a union of states or in an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures” (emphasis added).

It is difficult to elaborate objective legal criteria to explain which agreements should be concluded on the basis of art. 238, but an attempt has been provided to define the main elements which have over the years gone far beyond to what was the initial vocation given by the draftsmen of the Treaty.132

The term 'agreement' has no special meaning in this context; it denotes an undertaking entered into under international law which has binding force. An association agreement concluded under art. 238 is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of art. 177 (b) of the Treaty.

132 Analogy with the association between the ECSC and Great Britain of 21 December 1954.
The term 'establishing an association' implies a certain degree of permanence in the relations created, and in fact, all agreements under art. 238 have been concluded for an indefinite period of time, except for the ACP Convention which contains that it should be replaced to fit the developments needs of the countries in question. The importance of long lasting relationships as precondition of any association with the Community is highlighted: "L'association est un lien durable et spécifique entre un Etat tiers et la Communauté qui organisent leur coopération au sein d'organes paritaires"133 (emphases added). There would thus appear to be a common ground in believing that the notion of association connotes a form of permanent link between the parties. The frame of any relationship under the vocabulary of 'association' shall therefore be a close link between the parties. Indeed, "l'association crée entre les partenaires des liens étroits, voire même très étroits, puisqu'ils pourront aboutir, tout au moins aux termes des accords, à faire de l'Etat tiers un membre de l'organisation"134 (emphasis added). The element which differentiates the Association from the Commercial Agreements with the Community has been summarised by M. Hallstein under an equation in which he attempted to define the concept of Association135: accession - 1 and Commercial Agreement + 1. The Association Agreements, like the Commercial Agreements, include a commercial part. But additionally, contrary to what is the case in the Commercial Agreements, the Association Agreements contain several elements of the Community freedoms and often a financial aid programme136.

134 See Catherine Flaesch Mougin, supra note 127, p. 36.
135 Ibid., p. 33.
136 See Pierre Pescatore, supra note 126, pp. 138-152.
Another similar definition of Association has been provided by Advocate General Mayras in the *Haegeman v. Commission* case\(^{137}\).

"Article 238 does not define the association and does not particularise in any way the possible contents of an association agreement. It follows that such a type of agreement may lead to the establishment of a very close institutional cooperation between the Community and the associated country without going as far as the unconditional accession of that country."

Art. 238 does not define the association and does not give particulars of possible contents of an association agreement. The practice is not entirely coherent, since political considerations have served to influence the choice of countries to be afforded what is regarded as the privileged status of being associated with the Community as well as the nature of that association. The practice is presented mainly in four broad categories: (a) association as a preliminary to membership, such as Greece, Turkey, to some extent Cyprus and CEECs. (b) the EEA, which we will place and requalify under Free Trade Agreements in our discussion below. (c) association as a special type of development assistance without membership, such as the ACP Convention. (d) association of the countries which form part of the Mediterranean policy, which will be requalified under Cooperation and Trade Agreements, such as the Mashreq and Maghreb countries.

The proposition that the proximity of art. 238 to former art. 237 indicated that association was possibly intended as the preface to accession, notwithstanding the fact that art. 238 was not limited to the European countries, has not been seriously defended.

\(^{137}\) *Case 96/71, Haegeman v. Commission* [1972] ECR at 1023 of the Opinion, also called "*Haegeman I*".
The disappearance of art. 237 and its relocation as art. O TEU puts an end to such a theory.

Section 2:
Past and Present practice of art. 238 of the Treaty

1. Past

The first Association Agreements were concluded in 1963 and 1964 by the Community and its Member States with Greece and Turkey respectively. Both of them envisaged accession as soon as the relation had progressed far enough to enable the Associated country to assume the obligations of the Treaty. This has come true for Greece but not yet for Turkey. The Ankara Agreement closely followed the provisions of the Treaty in the areas of workers, establishment, services and competition but foresaw only that the Parties were to be 'inspired' by the equivalent provisions in the Treaty of Rome and that the Association Council should take decisions laying down detailed rules and procedures.

In the late 1970s the Community concluded a number of mixed agreements with the Maghreb\textsuperscript{138} and the Mashrek\textsuperscript{139} countries. Although these were called Cooperation Agreements, they were concluded, like any Association Agreement, on the basis of art. 238 of the Treaty. In order to take account of different developments and to accelerate the development of the third country concerned, the Community granted various concessions in trade but received only 'Most Favoured Nation (MFN) treatment' in return. Detailed provisions laid the foundations for the establishment of economic and

\textsuperscript{138} Algeria, Morocco and Tunisia.
\textsuperscript{139} Egypt, Syria, Lebanon and Jordan.
financial cooperation, in form of a 'Financial Protocol'. The only provisions similar to those of the Treaty were those requiring non-discriminatory treatment in the labour area.

With Israel the Community resorted to art. 238 only in 1978 when it enlarged the previous Free Trade Agreement to cover technical and financial cooperation and thus required the presence of the Member States.

The third significant use of art. 238 was the ACP Convention. Like Mediterranean Agreements, the Community granted preferential trade concessions but only received Most Favoured Nation treatment in return. The major part of the Convention set out very detailed procedures for the provision of economic, financial and technical cooperation from the European Development Fund. A significant number of articles lay down in detail the rules for the decision-making process to be followed by the Council at Ministerial level, the Committee of Ambassadors and other Committees, and set out as well the procedures for the establishment of a Joint Assembly for parliamentary cooperation and for the settlement of disputes.

2. Present

All the EAs are concluded on the basis of art. 238 of the Treaty. Each Agreement establishes a free trade area, in an asymmetrical way over ten years, with detailed provisions on the abolition of duties, taxes and quantitative restrictions and the introduction of policies in areas of competition and subsidies. Thus, not only do the Associated countries appear to 'participate' in the substance of the Community system of free movement of goods, but also the free trade agreement must clearly be the 'privileged link' mentioned in the Demirel case where the Court described the Association Agreement with Turkey as
"[...] creating privileged and special links with a third country, which must, at least in part, take part in the Community system"140

Furthermore, the EAs break new ground by granting national treatment in the area of establishment, following closely the rules of Chapter 2 of Title III of the Treaty, and include provisions on equal treatment of workers and articles on services. The EAs have no time-limit, and thus create a permanent link with the Community. The decision-making power of the Association Councils highlights the close legal integration with the Community.

Art. 238 was also the legal basis for the Agreement establishing the European Economic Area (EEA), which provides for the taking over of Community legislation in the areas of basic freedoms and most policies of the Community. Although the absence of a time limit to the relations establishes a permanent link, this link has been largely superseded, since three of the six EFTA countries141, namely Austria, Finland and Sweden, became full members of the Union as of January 1995. It is ironic therefore to note that the possibility of accession to the Union was not explicitly nor implicitly mentioned and envisaged in the EEA Agreement, contrary to what was the case for the EAs in the Copenhagen Summit in 1994.

141 Norway, Sweden, Finland, Iceland, Austria and Liechtenstein.
PART TWO

STATUS AND LEGAL EFFECTS OF INTERNATIONAL AGREEMENTS ON THE COMMUNITY'S LEGAL SYSTEM

The Court of Justice has so far had little opportunity to develop a coherent or detailed approach to the question of how International Agreements and acts of Joint Bodies instituted by such agreements form an integral part of the Community legal system. The question of the legal effects of these agreements has evolved gradually and has left open the issue of consistent standard criteria to be chosen in the Court's future assessment of direct effectiveness of International Agreements.

The Court has had the opportunity to deal with the question of direct effect of International Agreements on several different occasions, which have influenced its method of interpretation. The relevant issue will be addressed in the following discussion.
in the context of different types of agreements that the Community has thus far
concluded with third countries; in this manner, an examination will be made of the extent
to which the nature of the agreements, such as Cooperation, Free Trade, Trade or
Association Agreements, has influenced the Court's considerations for the choice of
criteria for direct effectiveness.

The Court decided that International Agreements (hereinafter IA) "form an integral
part of the Community legal system" without explaining the specific reasons for this
characterisation\(^\text{142}\). This has placed the interpretation of Community agreements within
the sphere of competence of the Court and has provided the possibility of an
interpretation of their provisions as well as of the provisions of implementing decisions
by joint bodies in a similar manner to that inherent of the Community law \textit{stricto sensu}.

The practical consequences of granting direct effect to International Agreements are
clearly important; the direct effect doctrine in Community law has had the immediate
result of allowing private individuals to raise issues that the Court integrates into the
legal system of the Community.\(^\text{143}\)

Having established that IA are fully incorporated into the Community legal system,
the Court failed nevertheless to answer by coherent general or standard formulae the
question of why and how a provision in an agreement as such and a provision of an
implementing decision adopted by a joint body can have effects in the Community
system\(^\text{144}\). The Court has created neither a comprehensive nor a complete system of
assessment and its case-law still leaves space for further refinement on this issue.

\(^{142}\) Case 181/73, \textit{Haegeman v. Belgium} [1974] ECR 449 at ground 6, also called "\textit{Haegeman II}".
6.
\(^{144}\) See Luc Imbrechts, 'Les effets internes des accords internationaux des Communautés Européennes',
An analysis will therefore be made of the various existing criteria the Court has used thus far in its case-law with respect to different types of International Agreements. The method of this analysis will be by 'category' or 'nature' of an agreement and we will focus on ambivalent or inconsistent conditions that the Court has used to grant direct effect to a provision of an agreement and to a provision of a joint body decision. The analysis begins by highlighting the incorporation of International Agreements in the Community legal order before presenting the direct effect doctrine of Community law *stricto sensu*. Then, a critical study is conducted of the various requirements that the Court has thus far chosen for various existing agreements and implementing decisions in these various agreements. The examination concludes by attempting to categorise or rationalise the criteria chosen so far by the Court for eventual direct effectiveness of Community agreements in future cases.

One should expect to find in this analysis a method or a group of methods of deduction that have been used thus far in the case-law of the Court in its interpretation of different types of Community agreements. One should therefore not expect to find a comprehensive and exhaustive list of the Court's judgments concerning the direct effect of International Agreements.

**CHAPTER ONE**

**INTERNATIONAL AGREEMENTS AS AN INTEGRAL PART OF THE COMMUNITY LEGAL ORDER**

*Section 1*
Status of International Agreements in the Community legal order

The question of direct enforceability of International Agreements by individuals, which will be addressed more specifically in the following chapters, is part of the broader question of the status and place of these agreements within the Community legal system and the domestic legal systems of the fifteen Member States. Indeed, the cautious and often inconsistent approach of the Court on the direct enforceability of International Agreements by individuals is connected with the fact that it has not attempted to establish a "firm and clear theory on the broader question of the status of international agreements in Community Law".

For example, in the Haegeman v. Belgium case, which concerned the Association Agreement between the Community and Greece and in which the Court was asked whether it had jurisdiction under art. 177(1)(b) of the Treaty to give preliminary rulings on the agreement, it hastily stated that the Association Agreement with Greece "forms an integral part of Community law" without any further elaboration. The Court stated simply that it had jurisdiction to interpret the agreement "within the framework of Community law" and that the agreement constituted an act of a Community institution "in so far as it concerned the Community."

In addition, the laconic provisions of Art. 228(7) of the Treaty give no clear guidance concerning the status of International Agreements in the Community legal system, except that agreements "concluded" are "binding on the institutions of the

146 supra note 142 at ground 6.
147 See para 6 of the judgment.
148 See para 4 of the judgment.
149 Formerly art. 228 (2) of the Treaty.
Community and on the Member States”. The institutional provisions are silent on the question of whether an international agreement, which is binding on the Community, becomes finally part of Community law. The principal judicial consideration of the effect of an agreement entered into by the Community on the Member States is given in the Kupferberg case, where the Court stated that the words in art. 228(7) of the Treaty were “binding on [...] the Member States in the same way as on the institutions”\(^{150}\) (emphasis added).

The fact that an agreement is part of Community law does not automatically imply that it is capable of conferring rights on individuals. Undoubtedly, international law is primarily concerned with the rights, duties and interests of signatory states, and international treaties, a major source of international law, usually impose obligations and give rights only to signatory states and not to private applicants. The infringement of international treaties cannot automatically imply the conferring of rights to individuals, rights which national courts must protect. Indeed, the Polydor case concerned the Free Trade Agreement between Portugal and the Community\(^{151}\) and was an example of integrating an agreement into the Community legal order, where the Court stressed that,

"by virtue of Article 228 of the Treaty the effect of the Agreement is to bind equally the Community and its Member States".

Thus, the agreement becomes part of the Community legal order by its conclusion and approval by the Council and also by its publication in the Official Journal of the Community. The form in which an agreement is approved by the Council is irrelevant.

when considering a possible direct effect of an agreement and hence in the *Haegeman v. Belgium* case the Court ruled that the agreement formed an 'integral part of Community law'.

However, the declaration that an international agreement which is binding on the Community forms part of Community law does not necessarily answer the question about its role in the hierarchy of this system of law. As will seen below, there is no doubt that international agreements are an important source of Community law, and by considering them as such, we can analyse three principal consequences: firstly, the agreements, through their provisions, can give rise to directly effective rights and duties, secondly, Association Council decisions or decisions of other joint bodies created by the agreement can become part of Community law, and, thirdly, the Court can have exclusive jurisdiction in the interpretation and application of these agreements.

Section 2

Status of Joint Body decisions in the Community legal order: agreements in simplified forms

It is important to distinguish and to separate in this discussion two types of instruments which may affect the Community legal system: on the one hand, the provisions of Community agreements as such, and, on the other hand the provisions of decisions adopted by joint bodies that are institutionalised in these Community agreements.

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154 Especially decisions of Association Councils may have direct effect in Community law, which will be dealt with in more detail in Part Three.
agreements. As indicated above, provisions of Community agreements as such are an integral part of the Community legal system; it is relevant to establish what status the provisions in decisions adopted by joint bodies have in the Community legal system.

The creation of joint bodies is a common feature of many Community agreements concluded with third countries. The agreements with the highest level of institutionalisation are the Association Agreements concluded with Greece and Turkey, the ACP Convention, the EEA and the EAs. For the Association Agreements, with Turkey and Greece as well as for the EAs, the joint bodies created are designed on the model of the Community institutions. In the EAs, the so-called Association Council is the main organ of the agreement and is granted the power of supervision, settlement of disputes and of adopting binding decisions. These decisions are binding on the Contracting Parties and are enacted and adopted only when explicitly provided for in the EAs, whereas the other instruments, such as recommendations, opinions and resolutions, which by their nature are not binding, can be adopted whenever it is considered desirable by the Association Council155.

The decisions adopted by joint bodies, either called 'Cooperation Council' under the Cooperation Agreements with, for instance, Morocco156 and Algeria, 'Council of Ministers' under the ACP Convention157, or 'Association Council' under several Association Agreements with, for instance, Greece, Turkey and recently with the ten Associated countries under the EAs, may be qualified in the international legal order as

155 For instance, in art. 42 of the Agreements with Hungary and Poland, the Association Council shall examine further ways of improving the movement of workers and social security schemes "[d]uring the second stage referred to in Article 6, or earlier if so decided [...]" (emphasis added).
156 Arts. 41 and 42 of the Morocco Cooperation Agreement.
157 For instance, art. 176 of the ACP Convention establishing a Council of Ministers for rules origin, art. 188 establishing a Comity of Cooperation.
genuine agreements in simplified forms. In fact, as one author has explained: "(...) les parties contractantes, dont la Communauté, ont, dans l'accord, habilité les organes considérés à arrêter des décisions [...] avec effets contraignants. Par conséquent, la Communauté a anticipé l'effet contraignant dans l'accord lui-même. Sous cet aspect, on pourrait qualifier ces décisions comme une catégorie d'accords conclus sous une forme simplifiée"

However, it must be clarified whether Community agreements as such can be considered as genuine Community acts, or acts having the effects of Community acts, even in the absence of an act which provides for transformation of the Association Council decisions into the Community legal order. It shall be noted that the eventual decisions adopted are "binding on the Parties" (emphasis added) and therefore invite to think that they cannot have any legal effects on individuals in the Community legal system. In its *Hellenic Republic v. Commission* case, the Court explicitly accepted that decisions adopted by an Association Council form an integral part of the Community legal system. In that case, Greece brought an action of annulment against two Commission decisions that approved the financing of certain projects for Turkey, and claimed that the Association Council's decision 2/80 was not a sufficient legal basis for implementing payments and that an act of the Council was therefore required for that purpose. The Court accepted this interpretation on the basis of the following reasoning. After having recalled its previous judgment in the *Demirel* case, where it ruled that the agreements concluded under art. 238 and 228 of the Treaty are, from the entry into force in the Community, an integral part of the Community legal system, the Court held that

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158 See Peter Gilsdorf, 'Les organes institués par des accords communautaires: effets juridiques de leurs décisions', RMC, 1992, especially at footnote no. 2.


160 Art. 106 of the Agreement with Hungary and art. 104 of the Agreement with Poland.

since the decisions taken by the Association Council are directly connected with the Association Agreement, they also form an integral part of the Community legal system.

On the basis of and by expansion of the *Hellenic Republic v. Commission* case, the Court followed the Opinion of Advocate General Darmon in the *Sevincé* case\(^{162}\) and found that it had,

"[...]

jurisdiction to give preliminary rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation."\(^{163}\)

Therefore, the transformation of any decision through a Community act is not necessary and instead takes place *automatically* through the act itself of the Association Agreement, which contains provisions conferring a decision-making power on the Association Council. As one author put it: "It seems that such decisions are regarded as in some sense—partaking of the legal nature of the agreement under which the organ which adopted them was set up."\(^{164}\)

**Section 3**

**Hierarchy of International Agreements and of Cooperation/Association Council**

**Decisions in the Community legal order**

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\(^{162}\) *Case 192/89 (1990) ecr I-3461*, p. 3474 at paras 4-8 of the Opinion.

\(^{163}\) *Ibid.*, at para 10 of the judgment.

There is a final question which needs to be examined with regard to the status of Community agreements and of the decisions of the Cooperation/Association Council within the legal order of the Community and of the Member States. What happens if a provision contained in an act of the Community or of the Member States conflicts with the Community agreement as such or with a decision of the Cooperation or Association Council?

The direct effect and the status of an agreement are two separate questions. A provision contained in a Community agreement can have direct effect without at the same time taking priority over a provision enacted subsequently. It is also clear that there is a difference between the principles of supremacy and direct effect as applied in the relationship between Community and Member States law and in the relationship between international and Community law.

Arts. 228 and 238 of the Treaty establish the rule that an agreement concluded is binding for the Community and for the Member States. As clarified above in the Haegeman v. Belgium case, the agreement becomes part of Community law as soon as it enters into force. Transformation, that is the incorporation of a Community agreement in Community law, is required only when the provisions of an agreement explicitly require integration by internal rules for their application. Community agreements become sources of law for the community and their Member States’ legal order. These provisions take priority over secondary Community legislation but have the same status in the hierarchy of norms as the Treaty. This means that the Community institutions are obliged not only to adopt implementing measures, when it is so required by a Community agreement, but also to refrain from adopting any act which is contrary to that agreement.
Furthermore, the agreement takes priority, as an act of Community law, over Member States' legislation, regardless of the relations which the national legal orders establish between national and international law. In case of mixed agreements, and only if the division of competences between the Member States and the Community is clearly established, the subject matters which fall within the Member States' competence should be the status that international agreements have in each Member State.

The observations made above as regards the rank of Community agreements should also apply to the decisions of the Cooperation and Association Council. Community agreements cannot prevail over Treaty provisions. Decisions of the Cooperation and Association Council cannot prevail over provisions of the agreement or over provisions of the Treaty.

Section 4

Jurisdiction of the Court to give preliminary rulings

As far as the EC Treaty is concerned, the Court's jurisdiction to give preliminary rulings is based on Art. 177\(^\text{165}\), which permits rulings on the interpretation of the Treaty and on the validity and interpretation of "acts of the institutions of the Community". Since agreements with non-Member States are clearly not part of the EC Treaty, they will be covered only by the Court's jurisdiction if they are regarded as acts of Community institutions. The concluding of Community agreements is carried out on behalf of the Community by the Council\(^\text{166}\) and all agreements concluded by the Council constitute

\(^{165}\) Article 177(1) (b) EC reads as follows: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions of the Community and of the ECB" (emphases added).

\(^{166}\) See art. 228 (1) of the Treaty.
acts of the institutions of the Community within the meaning of art. 177 (b) of the Treaty. Consequently, the Court should also have jurisdiction to give rulings on the validity of agreements concluded by the Community. In any event, this was not explicitly stated in the Haegeman v. Belgium case, but if a preliminary ruling of the Court could affect the internal validity of an agreement, then the Community would remain bound by its international obligations.

In the Haegeman v. Belgium case, the Court considered that International Agreements concluded by the Community were covered by Art. 177 since these agreements, in the Court's view, were concluded by means of a decision or regulation of the Council, which is an act of the Community. At this time, one may question whether the position taken in the Haegeman v. Belgium case was legally justified. The Court indicated that the Association Agreement had been concluded by means of a Council decision, but it is important to note that it was not the Council decision that the Court interpreted, but the Agreement itself. It should nevertheless be noted that such a criticism, supported by Advocate General Warner, should not be stretched too far even if the party to the Agreement on the Community side was the Community itself and not the Council.

Furthermore, in the view of Advocate General Warner, the Court did not have jurisdiction under art. 177 EC to interpret the Association Agreement; he argued that the jurisdiction of the Court under art. 177 EC is to rule on the interpretation of the

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167 Note that the discussion is here limited to the cases where the Community has exclusive competence to conclude international agreements with non Member States. The question on mixed agreements will therefore not be treated here. For more information on the issue of mixed agreements, see Nanette Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements', CMLRev, 1991, p. 717, 'Shared Powers or Combined Incompetence? More on Mixity', CMLRev, 1996, p. 667; C.-D. Ehlermann, 'Mixed Agreements, A List of Problems' in: Mixed Agreements, by David O'Keefe and Henry G. Schermes, pp. 3-21.

168 supra note 142, at p. 473 of the Opinion.

169 supra note 142 at pp. 472-473.
Treaty and on the validity and interpretation of acts of the Community institutions. Thus the Court did not have, according to the Advocate General, 'direct jurisdiction' to rule on the interpretation of an international agreement such as the Association Agreement with Greece. This line of reasoning suggests that the Court's jurisdiction to interpret this agreement could only arise where interpretation was relevant to the question of validity of an act of a Community institution. Such a point was not accepted by the Court on the grounds which were explained above.

In several instances, the Court recognised its jurisdiction to interpret, under Art. 177 of the Treaty, agreements concluded by the Community. In the *Haegeman v. Belgium* case, having found that the Association Agreement with Greece was an act of one of the institutions of the Community within the meaning of Art. 177 of the Treaty, the Court finally concluded that,

"the provisions of the Agreement, from the coming into force thereof, form an integral part of Community law. Within the framework of this law, the Court *accordingly* has jurisdiction to give preliminary rulings concerning the interpretation of this Agreement"\(^{170}\) (emphasis added).

Exactly the same question was examined for the first time by the Court in the *Sevince* case\(^{171}\), where the Court interpreted some provisions contained in two decisions of the Association Council created in the framework of the Association Agreement with Turkey. The Court, by analogy to the solution adopted previously in the *Haegeman v. Belgium* case, recognised its competence to interpret the decisions of the Association Council.

\(^{170}\) *supra* note 142, at 459 ground 4.

\(^{171}\) *supra* note 162.
Council under art. 177 of the Treaty on the basis of its competence to interpret the provisions of the agreement. It was ultimately the link between the agreement and the act of the Association Council which was relevant for the Court.

From a mere legal policy point of view, the Court is justified in its goal to consider it desirable that international agreements that bind the Community should receive a uniform interpretation in all the Member States. But law is not policy and therefore the Court's findings in *Haegeman v. Belgium* are "rather suspect" from a purely legal point of view.

**Section 5**

**Overlapping between direct applicability and direct effect**

While the notion of immediate enforceability was envisaged by art. 189 EC by the concept of 'direct applicability', the doctrine of direct effect was not. Indeed, it has gradually been developed by the Court on an *ad hoc* basis. As a result of the successful evolution of the preliminary ruling system, the Court has been able to develop the doctrine of direct effect to an extent "jusque là inconnu".

Introduced for the first time as an exception by the *Van Gend & Loos* case, the doctrine of direct effect heavily relied on international law tradition and evolved into the rule rather than the exception within the framework of the whole Community legal order, with the notorious current exceptions of GATT, which will be discussed below.

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For the purpose of the present study of direct effect, the conceptual differences which exist between the terms 'direct effect' and 'direct applicability' will be highlighted. It is notable that the Court uses them interchangeably and minimises the differences in meaning between these two concepts\(^{173}\). Throughout the ensuing discussion, the language of the Court will be adopted for matters of convenience and clarity, and especially due to the limited scope of the discussion\(^{176}\).

It is significant that the Court considers that there cannot be direct effect without direct applicability. Nevertheless, this consideration does not necessarily imply that all directly applicable measures are directly effective in Community law\(^{177}\).

The question of whether an international provision is directly applicable in a Member State suggests that a national court must directly apply this provision. Only then can the question of direct effect of that provision can come into force for the benefit of an individual. Thus, direct applicability and direct effect are interdependent and yet function in different spheres.

The creation of individual rights by a Community act that could be relied upon before national courts has two important consequences: the incorporation into the national legal


order of such an act, which is thus directly applicable in this order, and the granting of specific rights or obligations provided by this act to individuals, that is, its direct effect in this order.

Since direct effect is now the rule rather than the exception, it is tempting to conclude that the provisions of an agreement are capable of conferring rights on individuals since the Court stated that international agreements form an integral part of Community law. However, the doctrinal concepts differ because the application of a norm in a national court does not necessarily imply that an individual may directly rely on it. A national court may be 'directly applying' a measure in the national legal system without granting an individual the right to 'directly rely' on it. Nevertheless, the goals do converge and overlap and the distinction between direct applicability and direct effect is, for the present purposes, very dogmatic. The differences "[...]are neither clear-cut nor important enough to warrant a special term to describe them"\textsuperscript{178} and it appears that the Court does not recognise their different doctrinal meanings.

\section*{CHAPTER TWO}

\textbf{CRITERIA FOR DIRECT EFFECT IN COMMUNITY LAW}

\section*{Section 1}

\textit{Recognition of the doctrine of direct effectiveness}

\textsuperscript{178} See Hartley, \textit{supra} note 172, at p. 207.
The texts of the EC Treaties make no explicit reference to the effect which their provisions will have\(^{179}\), and it is apparent from arguments in the early cases before the Court that some of the Member States did not envisage that the provisions of these Treaties would or could be different from previous international treaties and conventions.

However, in a fundamental case, the Court took a different approach to the nature and effect of the EC Treaties, which was based on a particular vision of the Community and of the kind of legal system which the effective creation of such a Community would necessitate\(^{180}\). This view of *une certaine idée de l'Europe* became clear in the *Van Gend & Loos* case, perhaps the most high-profile of all of the Court's decisions, in which a private firm sought to invoke Community law against the Dutch customs authorities in a Dutch tribunal. Subsequently, the question was referred to the Court which presented the doctrine of what has become known as the 'direct effect' of Community law\(^{181}\).

The Dutch Court made a reference under the art. 177 EC procedure in order to determine, *inter alia*, whether art. 12 EC could provide the basis for claiming individual rights that the court must protect. The Court held that,

"the objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the Preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the

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\(^{179}\) Note that there is no express provision in any of the Treaties as to whether a provision of a Treaty has direct effect. Articles 189 EC and 161 Euratom only state that a regulation is 'directly applicable in all Member States'. The existence in arts. 177 EC and 150 Euratom of provision for a preliminary ruling by a national court to the Court does not imply that such provisions may be directly effective.


\(^{181}\) *supra* note 174.
establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.\textsuperscript{182}

It is evident that the Court reasoned in part by reference to the text of the Treaty itself. More importantly, its reasoning implied a vision of the kind of legal Community system that the Treaties were designed to create. This teleological interpretation led the Court to 'fill the gaps' in the Treaties by reading them in such a way as to further what it considered as the fundamental and consistent objectives of the whole Community enterprise.

The importance of the \textit{Van Gend & Loos} case is the effective inclusion of individuals in the Community system: therefore, direct effectiveness strengthened and considerably deepened the legal integration process of Community law in the various national systems by juxtaposing it with ordinary international treaties. It should be noted that generally the breach of directly effective Community law may be challenged at both Community and national level.\textsuperscript{183}

Direct effect has become the core of the Community constitutional \textit{construction}. As one author has suggested: "if constitutionalism is the process by which the EC Treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime \textit{conferring judicially enforceable rights and obligations} on all legal persons and entities, public and private, within the sphere of application of EC law,

\textsuperscript{182} See para 12 of the judgment.

\textsuperscript{183} See Weatherill, ed., 'Cases and Materials on EC Law', 1995: notion of 'dual vigilance' where an individual may challenge directly at national level under art. 177 EC procedure or directly at Community level under art. 173 para 4.
direct effect and supremacy are conditions which must exist for that to be true" (emphasis added).\textsuperscript{184}

Section 2

The specific conditions for direct effect

Integration, effectiveness, and uniformity were among the essential motivating factors behind the principle of direct effect of provisions of Community law. At the same time, the Court recognised that there could be practical limitations with this approach and in the \textit{Van Gend en Loos} case, the Court further held that,

"the wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. [...] The implementation of Article 12 does not require any legislative intervention on the part of the states."\textsuperscript{185}

Thus, a Treaty provision is capable of direct effect only when it is clear, unambiguous, unconditional and not dependent of further implementation. For example, if the terms of a provision are not clearly defined or dependent upon the exercise of further discretionary power, national courts will face difficulties in applying that provision properly and in a manner consistent with other Member States.\textsuperscript{186}

\textsuperscript{185} See para 13 of the judgment.
\textsuperscript{186} Case 8/81 \textit{Becker v. Finanzamt Münster-Innenstadt} [1982] ECR 53.
It shall be seen that the specific Community criteria of clarity, precision, unconditionality and the absence of the need for further implementation measures form the substance of the Court's reasoning in the case of Treaty provisions.\(^{187}\)

A) Clear and Precise Provisions

A provision must be clear and precise which means in practice that a provision has to be straightforward enough to speak for itself and to be suitable for interpretation and application by a court. Far from requiring an absolute precision in the wording of a provision in the Treaty, the Court assesses the precision of a provision within the more general context of the provision. Furthermore, the Court has often established itself the clarity of a provision on behalf of the national courts.\(^{188}\) Indeed, from broadly and ambiguously worded provisions, the Court derived binding principles. The lack of precision or clarity of various provisions did not deter the Court from extending in a quasi-legislative manner the entitlement of individuals to rely on an increasingly wide range of Treaty provisions in domestic litigation.\(^{189}\)

In cases where Treaty provisions have seemed to be too broad or general, the Court has followed ways of "severing or considering separately the less precise parts."\(^{190}\) The part of the provision which was deemed sufficiently clear was interpreted by the Court as enabling the national court to apply directly, even when another part of the same

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\(^{188}\) See Denys Simon, Le système juridique communautaire, PUF 1997, pp. 243-246

\(^{189}\) See P. P. Craig, 'Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law', 1992, 12 OJLS, p. 453.

provision was too general or imprecise. Indeed, the Defrenne\textsuperscript{191} and Reyners\textsuperscript{192} cases, which address the question of direct effect of art. 119 EC and art. 52 EC respectively, both contain elements of unclarity and imprecision. It is evident that the Court's concern in these direct effect issues was more focused on the preservation of the Community aims than the assessment of clarity and precision of specific provisions.

According to Advocate General Trabucchi in the Defrenne case,

"[...]even though Article 119 defines the concept of pay for the purposes of equality, the definition given of it is not so complete as to exclude all doubt about the precise meaning of the rule. Under the case-law of the Court, however, the fact that the concepts relied upon in a provision require interpretation by the national court [...] constitutes no obstacle to the recognition of its direct effect\textsuperscript{193}.

If a national court were uncertain about the exact meaning of the relevant provision, the Court would be more than willing to clarify its scope and thereby grant direct effect in the national court in an integrationist manner.\textsuperscript{194}

Like many provisions of national law, Community law is often unclear and ambiguous. This has not prevented the Court in some cases from making adjustments and clarifications for the national courts and thus granting direct effect.\textsuperscript{195} Clearly, the Court's concern in the Defrenne case was to isolate the principle of art. 119 EC, that of equal pay for equal work, and to ignore the fact that there could be cases lacking

\textsuperscript{191} Case 43/75 [1976] ECR 455 at paras 28, 30 and 31.
\textsuperscript{192} Case 2/74 [1974] ECR 631.
\textsuperscript{193} A.G. Trabucchi at p. 486 of the Opinion.
\textsuperscript{194} See P. P. Craig, supra note 51, p 486-7.
sufficient precision or clarity to enable the national courts to apply art. 119 EC; the Court's position suggests that the lack of clarity in some part of the provision would not affect the direct effectiveness of the core principles of art. 119 EC.

On closer scrutiny, the case-law of the Court exhibits several minor differences regarding the conditions of precision and clarity; indeed, the Court often relaxes the strict requirements of clarity and precision in Treaty provisions containing very broad meanings.

Additionally, this trend is noticeable primarily in some cases concerning direct effect of directives. In the Francovich and Marshall judgments, the Court gives a broad interpretation of these conditions; even the fact that the Member States have several means at their disposal for achieving the result of a prescribed directive does not preclude direct effect, provided the content of the rights can be determined sufficiently precisely on the basis of the provision of the directive alone, as has been done concerning Treaty provisions, such as arts. 52 and 119 EC.

B) Unconditional Provision

A Community provision will not be prevented from being directly effective merely because the rights it grants are dependent on an event; in fact, once the condition or the event is satisfied, the provision should be enforced by national courts. The requirement of unconditionality implies that the right must not be dependent on some action or

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196 The requirement applied here by the Court is that provisions, 'as far as their subject-matter is concerned, have to be unconditional and sufficiently precise' in order to be capable of being relied upon by individuals before the national court; see Case 8/81 Becker v. Finanzamt Münster-Innenstadt [1982] ECR 53 at para 25. For further judgments, see Cases 297/89 Ryborg [1991] ECR I-1943; C-19-20890 Karella and Karellas [1991] ECR I-2691, C-381/89 Syndesmos [1992] ECR I-2111.
control of an authority, such as a Community institution or the Member State itself

An example of a right dependent on the discretion of a Member State would be a provision stating as follows: 'Each Member State shall, in so far as it considers it desirable...'. This provision is clearly not directly effective, as the Member State is discretionarily granted the right to take or not to take any action.

A different kind of discretion is provided in safeguard clauses that occur quite frequently in various Treaty provisions, such as in art. 48(3) EC, which grants workers the right of free movement between Member States but also provides that this right is "subject to limitations on grounds of public policy, public security or public health". The discretionary element which is present in the provision designates it as conditional and a priori not directly effective. Since the national authorities decide what the requirements of public policy are, it may be appreciated that this provision makes the right to immigrate subject to a condition dependent on the judgment of the Member State.

Nevertheless, as shall be seen below concerning the safeguard clauses, art. 48 (3), as an example of the absence of direct effect does, not prohibit the more general attitude of the Court towards safeguard clauses included in, for instance, art. 36 with respect to art. 30.

In fact, in its case-law, the Court rejected the argument that safeguard clauses in the Treaty automatically hinder direct effect, and maintained that the discretionary element in a provision of the Treaty containing safeguard clauses did not exclude the possibility for direct effectiveness.

C) Not Dependent on Further Action

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199 Case Capolongo 77/72, [1973] ECR 611 at paras 4-6.
200 See Hartley, supra note 164, p. 203.
If a Community provision explicitly states that the rights it grants will come into effect only when further action is taken either by a Community authority or by the Member States, one may conclude that the direct effectiveness of that provision is dependent upon that action being taken. It is apparent that a relationship exists between unconditionality and dependence on further action, and discretion becomes the key factor in deciding whether a provision is ultimately directly effective.

As a consequence of the requirement of further action in a Treaty provision, the Court has been laying down a rule in its case-law that if a Community provision gives a time-limit for its implementation, it becomes directly effective only once the deadline has elapsed. Therefore, the direct effect of a provision is only 'postponed' until after the deadline, and not nullified.

The discretion character is often carefully scrutinised by the Court and often enables direct effect in provisions: the crucial criteria for evaluating whether the further action represents at all a true discretion on the part of Community institutions or Member States thus barring direct effect were analysed by Advocate General Mayras in the van Duyn case, in which the Court was asked to give preliminary rulings on art. 48 EC containing a discretionary element. He concluded that,

"Member States must not be left any real discretion with regard to the application of the rule in question". (emphasis added)

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202 Art. 119 EC provides an example where the Member State has action to bring the principle into operation: "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work" (emphasis added).


204 supra note 201, p. 1347, at ground 6.
In conclusion, provided and in so far as a provision of Community law is sufficiently operational to be applied by a court of law, it has direct effect. As stated, the conditions of clarity, precision, unconditional nature, completeness or perfection of the rule and lack of dependence on discretionary implementing measures are subordinated to the extent to which the provision is capable of being applied by a court to a specific case. If the provision lends itself to judicial application it will almost certainly be declared directly effective. The above analysis concerns direct effect. A separate consideration will be given to International Agreements, where the focus will change depending on the type of agreement concluded by the Community.

CHAPTER THREE

AMBIVALENCE OF CRITERIA FOR DIRECT EFFECT OF INTERNATIONAL AGREEMENTS

The Community has thus far concluded a great number of agreements pursuing widely different objectives. What is surprising is not so much that the Court concluded that IA "form an integral part of the Community legal order", but that the Court failed to establish a coherent system of criteria for direct effect. The purpose of the analysis here is to explore the extent to which the direct effect doctrine, first developed within the Community legal system, has exerted influence on and 'spilled over' into the field of the

203 See Pierre Pescatore supra note 126, p. 177.
relations between international law and Community law. This influence has created some confusion about the coherence and choice of standard criteria chosen for granting direct effect.

It would be a difficult, if not impossible, task to categorise in an objective manner, as under Community law, the conditions for direct effect that the Court has used so far in the wide range of international agreements. Rather than attempting to systemise the Court's case-law, and for the purpose of this central discussion on the possible direct effect of the Europe Agreements, the relevant cases will be presented through a 'nature of agreement' basis, namely, by considering which criteria the Court has chosen in the past and, more importantly, how it has assessed the criteria to recognise direct effect. These considerations will be particularly helpful in the analysis of the Court's role in reconciling emerging and latent conflicts between international law and Community law and will help to identify the tendencies of direct effect assessment that the Court has taken in several kinds of agreements, such as GATT and WTO, Free Trade and Cooperation Agreements and several Association Agreements.

It will be shown that the Court has gradually expanded the specific and objective Community law criteria to various international agreements, while, on occasion, it has used separate and general conditions, and this either independently or jointly with Community criteria. The cases decided by the Court demonstrate that, in evaluating direct effect, the Court considers the criteria of the rule as it does when applying Community rules *stricto sensu*. Under Community law, it is automatically assumed that the contracting parties intend to confer rights on individuals by means of the Treaties; the only requirement for direct effect is that the rules be precise, clear and not dependent on further action. It is noticeable that no such intention may be presumed for the application
of an international agreement. In such cases, the nature, objective and general scheme of the agreement in question play an important role in the Court's assessment of direct effect.

In conclusion, the Community doctrine of direct effect of Community provisions applied or transposed automatically to international agreements would be both too simplistic and incorrect. The Community legal system may indeed be separate and different from international law proper, but the distinction is neither clear-cut nor static. The creation of a variety of criteria for agreements with diverse objectives differs from the test of strict Community law and illustrates the inherent problem of legal standardisation.

Section 1

Diversity and differentiation in the Court's reasoning

The Court has had so far little opportunity to provide coherent standard formulae for direct effectiveness of the various international agreements. According to the Court, a provision of an international agreement has direct effect if it includes a "clear, precise and unambiguous obligation, not dependent on further action," a definition which implies a traditional approach of Community law. Additionally, the Court examines the provision "in the light of both the object and the purpose of the Agreement and of its context," and the principle by which Treaty provisions are "virtually presumed" to produce direct effect.

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210 Kupferberg judgment, supra note 150 at 3659 para 23.
211 Ibid.
effect is deduced by the specific nature and characteristics of the Community legal system; such a presumption can nevertheless not be inferred automatically in the case of international agreements.212

There exist 'two aspects' of the Court's analysis of direct effect of IA which are evaluated both together and independently; this differentiation is of key importance to the present discussion and should be kept in mind. In its analysis of GATT, for example which will be dealt with in more detail below, the Court never reached the stage of the examination of a specific provision but instead analysed it only as a whole.213 The rationale of the presence of these two separate aspects is made clear in the Demirel case:214

"A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure". (emphases added)

The objective criteria chosen systematically in the case of Treaty provisions do not apply automatically and exclusively in the field of international agreements. It remains to be clarified how the Court assessed the diverse specific Community criteria and more general criteria for direct effect which depend on the nature of an agreement concluded

212 See Denys Simon, supra note 188, pp. 255-256.
with the Community. What is clear is that in its approach, the Court has taken into consideration, additionally to strict Community law criteria, some classic international law issues determining its approach.

Indeed, before the Court examined the relevant characteristics of provisions of an agreement, it looked at what was to be called in the Polydor\textsuperscript{215}, Pabst\textsuperscript{216} and Kupferberg\textsuperscript{217} cases, the object, purpose, context and aim of a provision to be interpreted in the light of an agreement itself. In the Sevince case, for instance\textsuperscript{218}, the Court found that, even when an agreement was in itself too general and conditional to be relied upon by individuals, further elaboration of the provisions may help to give rise to direct effect. Finally, in order to decide whether article XI of GATT and article 2 of the Yaoundé Convention were directly effective, the Court in the International Fruit\textsuperscript{219} and Bresciani\textsuperscript{220} cases referred to the concepts of "spirit", "general scheme" and "wording" of these agreements and provisions. In contrast, in the GATT cases, it was not so much the wording of the provision which precluded any direct effect, but rather the "general flexibility"\textsuperscript{221} and consensus character of the agreement as a whole.

Hence, the Court uses a "twofold test"\textsuperscript{222} in order to grant direct effect to a provision in an agreement: standard Community law criteria \textit{stricto sensu} as well as more general sources of international law.

Indeed, the Vienna Convention of 1969 has been a source of assessment of direct effect of agreements concluded by the Community\textsuperscript{223}. For example, the Court itself in

\textsuperscript{215} Case 270/80 [1982], ECR 329.
\textsuperscript{216} Case 17/81 [1982], ECR 1331.
\textsuperscript{217} Case 104/81, [1982], ECR 3641.
\textsuperscript{218} Case C-192/89 [1990] ECR 3461.
\textsuperscript{219} Cases 21-24/72 [1972], ECR 1219.
\textsuperscript{220} Case 87/76 [1976], ECR 129.
\textsuperscript{221} \textit{International Fruit} judgment, \textit{supra} note 219, A.G. Mayras at para 1237-1238 of the Opinion.
several cases has made reference to its obligation to interpret an international agreement according to a more general international instrument than the EC Treaty. Art. 31 § 1 of the Convention allows for an interpretation in the light first of the wording as well as of the object and purpose of an agreement. In addition to such criteria as the wording, the object and the purpose, art. 31 § 1 also mentions, but apparently with minor importance than the wording due incorporation of the context in that article, mentions the context of an agreement. An international tribunal looks therefore first at the wording of a provision in order to discover the intentions of the parties; often, it will be difficult to establish the true intentions of the parties when it is not stated clearly in the wording what they actually wanted.

The Court has often used the guidelines of the Vienna Convention without ever feeling obliged to do so; it is interesting to note that the Court has until recently avoided any explicit and direct reference to it. The interpretation of international agreements in the Community legal system differs from the interpretation of international law in a tribunal where it must be based on the 'intentions' of the other parties to the agreement found through the wording, the object and the aim. The Community legal system allows for different methods by which the true intentions of the parties may be found. In international law, the intention of the parties is determined through the literal meaning of the wording of the provisions. In Community law, this intention is detected also through the wording, which will not necessarily be the literal meaning as in international law, but more the 'effet utile' wording. In addition to the wording of a provision, the purpose and objective, which are only subsidiarily and secondarily considered pursuant to the Vienna

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224 Art. 31 § 1 stipulates as follows: "en règle générale [...] un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but".
Convention, play a fundamental role in the interpretation of various Community agreements.

Thus, international law bases its criteria primarily on the subjective wording of a provision as opposed to Community law, where language has never played as much of a key role.

It is interesting to note that the Court has recently and for the first time made explicit reference to the 1969 Vienna Convention. In Opinion I/91225, in which the Court explained that,

"Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its objects and purpose".

Furthermore, referring to the same Convention in the Anastasiou case226, the Court added that the Convention has "substantial importance to any subsequent practice in its application". Finally, in the Kupferberg case227, the Court stated that,

"it is true that the effects within the Community of provisions of an agreement concluded by the Community with a non member country may not be determined without taking into account of the international origin of the provision in question [...] according to the general rules of international law there must be bona fide performance of every agreement".

227 supra note 150 at p. 3663 grounds 17 and 18.
From these references, it is even more evident that the Court's approach to direct effect is or can be connected to the Convention, which is based primarily on the intentions of the parties analysed through the spirit, general scheme and wording of a provision.

The Kupferberg case illustrates well the presence of these differentiated criteria; nevertheless, the hierarchy of priorities in this case should not be considered in order of importance but merely as an illustration of the presence of the diversity of criteria that the Court has at its disposition. First, the "nature" and the "structure" of the agreement were considered. Secondly, the intention of the parties to grant direct effects on a reciprocal basis was established. Thirdly, the question of whether the agreement itself allowed for direct effects was considered. Fourthly, the provision in question had to be established as unconditional, clear, unambiguous and not dependent on further action.

Using the multiple and differentiated criteria, it will be possible under a 'type of agreement approach' to create a catalogue of the main elements of interpretation that the Court has used so far without necessarily evaluating the importance of each criterion separately: GATT, Free Trade and Cooperation and Association Agreements will be analysed in the following discussion.

Section 2

"Object and Purpose" as a pre-condition for direct effect

\[supra\] note 150 at para 13.
Before examining whether a provision itself in an agreement is "capable of creating rights of which interested parties may avail themselves in a court of law," the Court additionally examines what is to be called the objective, purpose and nature of an agreement as a whole. In considering whether a provision of an agreement confers directly applicable rights on citizens, the Court, in its case-law, stipulated that the purpose, spirit, general scheme, and terms of the agreement must be examined.

The various agreements concluded with the Community often differ in their objective and purpose, and therefore these agreements are categorised in the following discussion under GATT/WTO cases, Free Trade and Cooperation cases, Association cases, such as the Greece and Turkey cases, and Yaoundé and Lomé cases.

A) GATT/WTO

Based on the case-law of the Court, GATT has been unequivocally denied direct effect. Indeed, in six instances, International Fruit, Schlüter, SPI, SIOT, Singer and Fediol, the Court has denied that GATT provisions have direct effect on the grounds of the objectives and purpose, or, in short, due to the "great flexibility" of GATT as a whole.

230 Note that the Association Agreements with Cyprus and Malta, signed in 1972 and 1971, resemble in their finality and substance the Greece and Turkey Associations type of agreement. See, especially, Flasch Mougin, supra note 127, pp. 233-234.
231 Hereinafter referred to as the 'ACP Convention', which was signed in Lomé in 1975, succeeding the Yaoundé Convention of 1963. Since 1975, three further Conventions have been concluded: Lomé II 1979, Lomé III 1984 and Lomé IV 1989 which runs until 29 February 2000.
232 supra note 219.
233 supra note 216.
235 Case 266/81 [1983] ECR 731.
238 A.G Mayras in the International Fruit case, supra note 219.
For the signatory parties, GATT includes commitments with an execution mainly policy oriented, in contrast to law oriented provisions of an agreement which provide unconditional obligations. GATT is pursuing an objective that is different from and more flexible than the Treaty; it has not the ambit nor the purpose to create a common market nor to harmonise the policies and legislations of the parties.

The Court explained its position clearly in the SPI judgment:

"The Court reached the conclusion on the basis of considerations concerning the general scheme of GATT, namely that it was based on the principle of negotiations undertaken [...] and was characterised by the great flexibility of its provisions, in particular those concerning the possibilities of derogation [...] and the settlement of differences between the contracting parties". (emphases added)

In this case, the Court denied direct effect solely on the ground of the "nature", "objectives" and "structure" of GATT and therefore did not consider it necessary to examine the question of specific Community requirements for direct effect of a provision. More than ten years later, the Court in the Banana case echoed that reasoning when it stated that Germany could not rely on the rules of GATT to challenge the lawfulness of the common market organisation for bananas:

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239 See Jean Groux, supra note 153; p.216-217.
240 Note that in Kupferberg, the EFTA Agreement with Portugal did not aim to create a common market, but was more law oriented than GATT. See Imbrechts, supra note 144, p. 70.
241 supra note 234.
"The special features noted above show that the GATT rules are not unconditional and that an obligation to recognise them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of the GATT".

The WTO Agreement is a significant upgrade of the old 1947 GATT Agreement, with many new extensions\footnote{For recent contributions on GATT or WTO, See Meng, 'Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG', in: Recht zwischen Umbruch und Bewahrung- Festschrift für Rudolf Bernhardt, 1995, pp. 1064-1172; Lee and Kennedy, The potential direct effect of GATT 1994 in European Community Law, 1996, JWT, pp. 67-89; Neuwahl, 'Individuals and the GATT: Direct effect and indirect effects of the General Agreement on Tariffs and Trade in Community Law', in: Emiliou and O'Keefe, The European Union and World Trade Law, 1996, pp. 313-328; Vermulst and Driessen, 'An overview of the WTO Dispute Settlement System and its relationship with the Uruguay Round Agreements', 1995, JWT, p. 135; Martin Khor, 'L'OMC, fer de lance des transnationales', Le Monde Diplomatique, Mai 1997, p. 10.}. The WTO Agreement does not contain explicit provisions about its direct effect in the domestic legal order of the WTO Members\footnote{Exception is made with respect to the GATS Agreement where it is stated in the Introductory Note to the Schedule that GATS does not have direct effect.}. It would be hasty and partially wrong to simply extend the settled case-law on the old GATT to the WTO Agreement "as a whole"\footnote{See Eeckhout, supra note 213, pp. 32 and 57}. In view of the differences between GATT, GATS and TRIPs, a separate analysis of direct effect is necessary\footnote{Note for instance that the TRIPs agreement would appear to be apt for direct effect. Indeed, Art.1(3) of TRIPs states as follows: "Members shall accord the treatment provided for in this Agreement to the nationals of other Members [...]" (emphasis added).}. 

The common WTO dispute settlement mechanisms may well ensure a more effective application of the rules of the WTO Agreement than under the old GATT Agreement. The manner in which trade disputes are now resolved comes close to a system of adjudication, which allows for possible direct effectiveness; nevertheless, the panel system cannot be considered yet as fully judicial\footnote{See Timmermans, 'The Implementation of the Uruguay Round by the EC', p. 504; P. J. Kuyper, 'The New WTO Dispute Settlement System: The Impact on the Community', pp. 87-115, in: Bourgeois, Berrod and Gippini Fournier, The Uruguay Round Results-A European Lawyers' Perspective, 1995.}. 

\footnote{\textsuperscript{243} For recent contributions on GATT or WTO, See Meng, 'Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG', in: Recht zwischen Umbruch und Bewahrung- Festschrift für Rudolf Bernhardt, 1995, pp. 1064-1172; Lee and Kennedy, The potential direct effect of GATT 1994 in European Community Law, 1996, JWT, pp. 67-89; Neuwahl, 'Individuals and the GATT: Direct effect and indirect effects of the General Agreement on Tariffs and Trade in Community Law', in: Emiliou and O'Keefe, The European Union and World Trade Law, 1996, pp. 313-328; Vermulst and Driessen, 'An overview of the WTO Dispute Settlement System and its relationship with the Uruguay Round Agreements', 1995, JWT, p. 135; Martin Khor, 'L'OMC, fer de lance des transnationales', Le Monde Diplomatique, Mai 1997, p. 10.\textsuperscript{244} Exception is made with respect to the GATS Agreement where it is stated in the Introductory Note to the Schedule that GATS does not have direct effect.\textsuperscript{245} See Eeckhout, supra note 213, pp. 32 and 57\textsuperscript{246} Note for instance that the TRIPs agreement would appear to be apt for direct effect. Indeed, Art.1(3) of TRIPs states as follows: "Members shall accord the treatment provided for in this Agreement to the nationals of other Members [...]" (emphasis added).\textsuperscript{247} See Timmermans, 'The Implementation of the Uruguay Round by the EC', p. 504; P. J. Kuyper, 'The New WTO Dispute Settlement System: The Impact on the Community', pp. 87-115, in: Bourgeois, Berrod and Gippini Fournier, The Uruguay Round Results-A European Lawyers' Perspective, 1995.}
The old GATT was refused direct effect as a whole and therefore the stage of analysing whether a specific provision could have the characteristics of having direct effect was never reached. In contrast, the WTO, especially TRIPs provisions, could be suitable, in the light of the specific Community requirements, for being recognised as having direct effect. Thus, a restatement of the law is probable and would be from a purely legal point of view, welcome, but a delicate balance between the legal and political level must be achieved. The concerns of the Council, on proposal by the Commission, go against direct effect of the WTO Agreement\(^{248}\). It is noticeable that the stage of the operational character of a GATT provision, namely, whether it is sufficiently clear and unconditional, was never reached. At the level of judicial policy, and considering the current malaise of the Court, there are several arguments for and against direct effect of the WTO Agreement, an important topic which goes beyond the scope of the present discussion.

The question remains open for further refinement and, in conclusion, the Court cannot simply deny direct effect to WTO by automatically extending the law as applied to the old GATT.

B) Free Trade and Cooperation Agreements

The Free Trade and Cooperation Agreements suggest that their objective and purpose is generally not to create a common market nor to envisage eventual accession to the Community. Indeed, their initial objective is to promote a free trade area and to encourage overall cooperation. In the following analysis, relevant case-law of the Court will be examined with respect to the Cooperation Agreements with Morocco and

\(^{248}\) Council Decision C 994/12 as regards the WTO Agreement COM(96) 154 final, O.J. 1996.
Algeria, the Free Trade Agreements with Portugal and Spain and, finally, the EEA Agreement.

In the *Polydor* case, the Court analysed the Free Trade Agreement of 1972 with Portugal. In particular, the case concerned arts. 14(2) and 23 of the Agreement on elimination of restrictions on trade. The Court considered the purpose and the nature of the Agreement and declared that it was fundamentally different from the EEC Treaty. The Court referred to the more modest objectives of the free-trade agreement which was limited to the mere liberalisation of trade between Portugal and the Community.

Only at that point did the Court consider the purpose of the provisions themselves as well as the quantitative restrictions and measures having equivalent effect which under the Agreement did not have.

"the same purpose as the EEC Treaty, inasmuch as the latter [...] seeks to create a single market reproducing as closely as possible the conditions of a domestic market."

In the *Polydor* case, the Court concluded that the first aspect of direct effect, namely the question of the purpose and objective of an agreement *as a whole*, did prevail and that consequently the question of direct effect of the provisions in the agreement was irrelevant.

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249 For a substantive typology of Free Trade and Cooperation Agreements, See Flaesch Mougin, *supra* note 127.
250 *supra* note 215.
251 Note that the Court only very briefly mentioned the different institutional set-up to emphasise the differences, at para 348 ground 13 of the judgment.
In contrast, in the *Kupferberg* case, the Court found that the 1972 Portugal Agreement was in principle capable of containing provisions having direct effect. This judgment implied that the purpose of the Agreement was not the determining factor for the possible direct effect of its provisions.

While the Court did not follow Advocate's-General Rozès views both in *Polydor* and in *Kupferberg*, who commented that the aim and content of the agreement itself including the relevant provisions precluded any direct effect, the Court nonetheless this time did not halt on the purpose and objective of the Portugal Agreement to refuse direct effect of the provision in question. The Court considered the legal nature of the Agreement irrelevant for its effects. The Court thus recognised for the first time the principle of direct effect of the Agreement regardless of the arguments on objectives of the Agreement.

The *Kziber*, *Yousfi* and *Hallouzi-Choho* cases all concern the 1976 Cooperation Agreement with Morocco and, specifically, art. 41(1) of that Agreement, a provision which establishes a prohibition of discrimination on the basis of nationality in the field of social security against workers of Moroccan nationality and the members of their families living with them. The Court held in *Kziber* that,

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234 Note that A. G. Rozes for the same reason accorded direct effect to art. 53 of the Agreement in the *Pabst* case, concerning the EEC-Greece Association Agreement. In particular, he accorded direct effect to art. 53, an article conferring a right on individuals to claim the same fiscal treatment as accorded to domestic considerations, which was almost identical with art. 95 EEC, since the 'objectives' and 'nature' of the Association Agreement were far more than a mere freetrade agreement of a classical type. A. G. Rozes referred to the Preamble of the Agreement which expressly envisaged that the Agreement aim to 'prepare accession of Greece to the Community'; *supra* note 238 p. 1350.

235 Note that compared to the *International Fruit* case dealing with GATT, here despite similarities with GATT, the Court concluded in favour of capability of direct effect of some provisions after having differentiated the institutional structure and safeguard clauses from those in GATT.


"as regards the argument that the subject-matter and the nature of the Cooperation Agreement preclude its provisions from being regarded as having direct effect, suffice it here to recall that the Court has expressly recognised that the fact that the Cooperation Agreement does not refer to 'Morocco's association with or future accession to the Communities is not such as to prevent certain of its provisions from being directly applicable"259.

(emphasis added)

Therefore, the nature and objective of the Agreement did not prevent the Court from considering it capable of direct effect and the characteristics of art. 41(1) of the Agreement, which were related to cooperation in the field of labour and social security were favoured such a view.

Similarly, in the Krid case260, which concerned the 1976 Algeria Cooperation Agreement and, specifically, art. 39(1) which resembles art. 41(1) of the Agreement with Morocco, both the terms of the provision and the purpose and nature of the Agreement itself were taken into consideration for possible direct effect. Thus, the purpose and objective of the Agreement were not granted any greater importance in the Court's decision.

The Court has dealt with the EEA Agreement on three occasions261: Opinion 1/91262, the Opinion 1/92, and the Opel Austria case263. In Opinion 1/91, the Court compared the objectives of the EC Treaty and the EEA Agreement and concluded as follows:

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259 supra note 256 at para 21, and reiterated in Opinion of A. G. Tesauro in Yousfi at para 6, followed by the Court.
261 Case C-395/95 Geotronics SA, judgment of 22 April 1997, not yet reported, deals more specifically with the PHARE programme and with an action for annulment and damages than on the question of direct effect of the EEA Agreement.
262 Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079, and subsidiarily Opinion 1/92 [1992] ECR I-2821. The Court ruled in Opinion 1/91 that the system set up by the agreement was incompatible with the EC Treaty. The Agreement had provided
"With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition [...] have developed and form part of the Community legal order, the objectives which go beyond that of the agreement."

The Court held that the rules of trade and competition in the EEA Agreement did differ from those defined in the EC Treaty and that its provisions, interpreted in the light of the agreement as a whole, did not aim to achieve economic integration which would lead to the establishment of an internal market as well as an economic and monetary union. Therefore, the objectives of the EEA Agreement are more limited than those of the Treaty. One example is that the EEA essentially creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the intergovernmental institutions which it sets up. In contrast, the Community Treaties, as consistently held after the Van Gend & Loos seminal, establish a new legal order for the benefit of which the States have limited their sovereign rights in ever wider fields and of

for the establishment of an EEA Court which would include judges from the Court of Justice. There was also a provision enabling the EFTA States to authorize their courts and tribunals to ask the Court of Justice for its interpretation of the provisions of the Agreement. Following Opinion 1/91, the Agreement was amended. Opinion 1/92 ruled, after the creation of an EFTA court, that the provisions were compatible with the EC Treaty provided certain conditions were satisfied. For further analysis, See Schermes, 'Opinions 1/91 and 1/92', CMLRev 29, 1992, p. 991; A. Evans, 'The Integration of the European Community and Third States in Europe, A Legal Analysis', Oxford University Press, 1996, pp. 353-379.


264 supra note 262, paras 15-18 of Opinion 1/91.
which the subjects comprise not only Member States but also their nationals. Primacy and direct effect are the essential elements which guarantee homogeneity in the whole Community legal system. The mere fact that provisions in the Treaty and in the EEA are similar or even identical does not in itself secure the attainment of that vital homogeneity in the interpretation and application between EEA and EC law; indeed, the Court continued and concluded that:

"[...] homogeneity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their context or wording. [...] the divergences [...] stand in the way of the achievement of the objective of homogeneity in the application and interpretation of the law in the EEA"265. (emphasis added)

The Court explained the contextual differences between the Agreement and the Treaty and, without explicitly precluding the argument on direct effect of EEA rules within the Community system and irrespectively of similar or identical worded provisions, it presented its concerns for the homogeneous application and interpretation of EEA law in the EEA states. Based on these considerations and more precisely due to the initial proposed judicial system in the EEA which was held incompatible with the Community legal system, the Court was dubious on the question of direct effect of EEA rules not so much before national courts in the Community but more before the EFTA courts.266

265 Ibid., paras 22 and 29 of the Opinion 1/91.
266 Note that some authors have criticised the solutions adopted by the Court both in Opinion 1/91 and 1/92, especially Walter van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect', Fordham International Law Journal, Vol. 16, 1993, pp. 955-983, who argues that the principles of direct effect and supremacy are present in EEA Law and minimizes the conceptual differences between EC and EEA law; Christophe Reymond, Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area', CML Rev 30, 1993, pp. 448-480, who
Nevertheless, without directly overruling *Opinion 1/91* and after *Opinion 1/92*, in the *Opel Austria* case, which dealt mainly with import duties\(^{267}\) and customs duties\(^{268}\), the Court of First Instance further elaborated upon *Opinion 1/91* and held that,

"The significance in regard to the interpretation and application of the Agreement of the Contracting Parties' objective of establishing a dynamic and homogeneous EEA has not been diminished by the Court of Justice in Opinion 1/91. When the Court held that the divergences existing between the *aims and context of the Agreement*, on the one hand, and the aims and context of Community law on the other, stood in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA, it was considering the judicial system contemplated by the EEA [...] and *not a specific case [...]*" (emphases added)\(^{269}\).

The initial dispute settlement system established in the first version of the EEA Agreement included a proposal for the creation of an independent EEA Court and was rejected by the Court in *Opinion 1/91*. This initial system stood in the way of any direct effectiveness of EEA provisions in the EEA states. Nevertheless, an EFTA Court has been created which monitors the application of the Agreement on the part of the EFTA States, while the Commission, the Court of Justice and the Court of First Instance do so on the part of the Community. This system reinforces the homogeneity of the Community legal system.

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\(^{261}\) Art. 12 EEA.  
\(^{267}\) Art. 12 EEA.  
\(^{268}\) Art. 10 EEA.  
\(^{269}\) *supra* note 263, para 109 of the judgment.
It follows from those findings that the fear of lack of homogeneity of the EEA Agreement felt initially in *Opinion 1/91* is not justified any more and that the EEA Agreement involves a high degree of integration with provisions essentially corresponding in aim and context to the parallel provisions of the Treaty:

"[...] it should also be borne in mind that the first sentence of Article 10 of the EEA Agreement provides that customs duties on imports and exports and any charges having equivalent effect are prohibited between the Contracting Parties. [...] Article 10 thus lays down an unconditional and precise rule subject to a single exception which is itself unconditional and precise. It follows that ever since the EEA Agreement entered into force has direct effect"\(^{270}\)

The question on direct effect of EEA law, which seems now to be settled in principle, has created debates between some authors, some of whom favour or disfavour direct effectiveness of EEA provisions\(^{271}\).

C) Association Agreements

As has been seen in Part One of this thesis, the Community has concluded a wide range of Association Agreements, often differing in their scope as well as in their objectives\(^{272}\). The practice of Association Agreements is not entirely consistent because political considerations have served to influence the selection of countries that are

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\(^{270}\) *Ibid.*, para 102 of the judgment.


associated with the Community. Nevertheless, all of the Association Agreements share
the same legal basis, art. 238 of the Treaty, and most of them also share the same
common objective: the preparation of the Associated country for future membership in
the Community. The eventual preparation to membership is indeed the only political
criterion which may distinguish them from other kinds of Community agreements, even if
art. 0 of the Treaty does not mention accession as the ultimate goal of the concept of an
association. Turkey and Greece are the only countries to contain explicit provisions for
future membership. Cyprus and Malta do not explicitly contain such provisions, and,
excluding Cyprus, an eventual membership is currently not foreseen for Malta as a
common objective. The ACP Convention, which has been concluded under art. 238 of
the Treaty, is not a classical Association Agreement since the political integration of the
countries concerned is very limited; an eventual membership has never been foreseen for
these countries.

Unconditional membership as a common goal is not expected in the nature of these
various associations; indeed an agreement may be limited to the granting of
discriminatory advantages, such as in the ACP Convention, because the Member States
of the Union for their part do not enjoy reciprocal treatment in the ACP countries whose
goods are treated better than EC goods. An agreement may also establish a true
preferential system with a gradual customs union such as the agreements with Cyprus
and Malta, or the creation of a customs union, such as in the Greece and Turkey
agreements.

273 See Lycourgos, supra note 120, p. 310.
274 Art. 72 of Greece Association Agreement and art. 28 of Turkey Association Agreement.
275 Note that the recent political changes in Malta have put the forthcoming negotiations and pre-
accession strategy in a secondary phase.
276 Note that Decision No 1/95, [1996] O.J. No L 35/1, of the EC-Turkey Association Council has
implemented the final phase of the Customs Union with Turkey, and states, inter alia, in the Preamble
that "[...] the Customs Union represents an important qualitative step, in political and economic terms,
In the *Pabst* case, which concerned mainly art. 44(1) of the Association Agreement with Greece, a provision which regarded the freedom of movement of workers, the Court concluded that the Association Agreement between the Community and Greece and the provision in question

"[...] forms 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 harmonisation of agricultural policies by the introduction of freedom of movement of workers and by other measures for the gradual adjustment to the requirements of Community law"277. (emphases added)

As a result of the judgment in the *Pabst* case, there can be no doubt that an association agreement may have direct effect. Providing a preliminary ruling on a question concerning a provision of the Agreement, the Court gave particular regard to the purpose and nature of that agreement, as it has consistently done since the *Kupferberg* case278. In addition, it held that the provision in question contained a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

Like the Association Agreement concluded with Greece, the Association Agreement concluded between the Community and Turkey also contains an explicit indication, albeit less ambitious than in the Agreement with Greece, as to the objective of preparing

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277 supra note 216 at para 26 of the judgment and reiterated subsequently in the *Demirel* judgment, supra note 214, at para 14, as well as in the Opinion of A.G. Darmon in *Sevince*, supra note 162, para 11.

Turkey for the possible entry into the Community. The Ankara Agreement is less ambitious and less elaborate in its treatment of agriculture and, especially, with respect to the freedom of movement of workers. Regarding the arguments of limited purposes of the Agreement with Turkey, the Court concluded in the *Demirel*\textsuperscript{279} case as follows with respect to confusing direct effect of art. 12 of the Agreement on free movement of workers:

> "the Agreement provides for a *preparatory stage* to enable Turkey to strengthen its economy with aid from the Community, a *transitional stage* for the progressive establishment of a customs union and for the alignment of economic policies, and a *final stage* based on the customs union and entailing closer coordination of economic policies" (emphases added)

Despite the fact that the Greece and Turkey Agreements are very similar both in form and substance, in the *Demirel* case the Court added arguments regarding the more modest role of the Council of Association in its decision-making power as well as the more limited scope of the freedom of movement for workers\textsuperscript{280}, indicating that the provisions

> "essentially serve to set out a *programme* and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers"\textsuperscript{281}. (emphasis added)

\textsuperscript{279} supra note 214, at ground 15 of the judgment.

\textsuperscript{280} Art. 12 of the Agreement provides that the contracting parties agree to be guided by arts. 48, 49 and 50 of the Treaty for the purpose of progressively securing freedom of movement for workers; art. 36 of the Protocol gives the Council of Association exclusive powers to lay down detailed rules for the progressive attainment of freedom of movement of workers, See *Decisions No 2/76 and 1/80*.

\textsuperscript{281} supra note 214, at ground 23 of the judgment.
Nevertheless, in later cases, which did not concern provisions of the Ankara Agreement but provisions of the decisions adopted by the Turkey Council of Association\textsuperscript{282}, the Court has not refused in principle their direct effect. Advocate General Darmon supported this restatement of the law in the \textit{Sevince} case\textsuperscript{283} and concluded that it is not necessary for a provision to be included in an "in-depth" Association Agreement to be capable of direct effect, such as is the case with Greece. Recent cases like \textit{Kus}\textsuperscript{284}, \textit{Bozkurt}\textsuperscript{285}, \textit{Eroglu}\textsuperscript{286}, \textit{Süleyman Eker}\textsuperscript{287}, \textit{Recep Tetik}\textsuperscript{288}. \textit{Kadiman}\textsuperscript{289} and \textit{Kol}\textsuperscript{290} are yet other additional links 'in the chain' started by the judgment in \textit{Sevince} to consolidate the legal position of Turkish workers on the basis of decisions of the Association Council.

The goal in the Cyprus and Malta Association Agreements regarding membership was initially clear: the gradual establishment of a customs union. In the Court's analysis of the 1977 Protocol to the Association Agreement concluded between Cyprus and the Community, it declared in the \textit{Anastasiou} case, in order to grant direct effect to the Protocol, that,

"the aim of the Association Agreement is the progressive elimination of obstacles to trade between the Community and Cyprus"\textsuperscript{291}.

\textsuperscript{282} See different analysis of these two instruments at pp. 45-56.
\textsuperscript{283} Case C-192/89 [1990] ECR 1-3461, at para 28 of the Opinion.
\textsuperscript{284} Case C-237/91 [1993] 2 CMLR 887.
\textsuperscript{287} Case C-386/95, Opinion of A.G. Elmer on 6 March 1997 and judgment of 29 May 1997, not yet reported.
\textsuperscript{288} Case C-171/95, judgment of 23 January 1997, not yet reported.
\textsuperscript{289} Case C-351/95, judgment of 17 April 1997, not yet reported.
\textsuperscript{290} Case C-285/95, judgment of 5 June 1997, not yet reported.
\textsuperscript{291} Case C-432/92 [1994] ECR 1-3087, at ground 24.
Hence, the association is little more than a preferential trade agreement. Unconditional accession is irrelevant for the Court's assessment of the eventual direct effect of a provision in an agreement.

This conclusion becomes even more apparent in the Court's case-law concerning the ACP Convention. The *Bresciani* case²⁹² dealt with a conflict between national law of a Member State and art. 2(1) of the Yaoundé Convention that prohibited the Member States from imposing customs duties and charges having equivalent effect on imports from the Associated states. It was one of the first judgments concerning the effects of Association Agreements within the Community legal system, and this was particularly important for the subsequent jurisprudential developments. Referring primarily to the "special economic and political connections and [...] special nature of the Convention"²⁹³, the Court inferred direct effect to the specific provision, without additionally analysing the criteria of the provision itself in depth. In his submissions, Advocate General Trabucchi warned strongly against automatically applying the concepts and criteria which the Court had applied between Community law and national law to the relationship between Community law and international law. Nevertheless, the development and aid character of the Convention did play a crucial role in granting direct effect to the provision in question²⁹⁴.

Indeed, as an exception to the rule, the special nature of the Convention and its particular links with the Community was one of the main grounds for which the Court considered the notion of charges having an effect equivalent to a customs duty under the

²⁹² *supra* note 220.
²⁹³ grounds 22 and 23 of the judgment.
²⁹⁴ *supra* note 84, at p. 148 of the Opinion.
Convention to be the same as those which were developed by the Court under the Treaty.

Section 3

"Wording"

The wording of an agreement and the wording of a provision in an agreement must be distinguished. As has been explained, the wording of an agreement compared with the wording of the EC Treaty is interpreted within the general context and in the light of the objective and the purpose of an agreement as a whole. The wording of a Community provision is mainly interpreted through its unconditional, clear and independent-of-further-action-character, whereas a provision in a Community agreement may also be interpreted on the basis of more general criteria. Thus, the very concept of wording has a 'two-fold' meaning. In Community law, *stricto sensu*, the wording of a provision is exclusively assessed through its special characteristics, namely its unconditionality, clarity and independence of any further action features. In general, for the Court, the wording of a provision in an agreement means that the "meaning"^{295} of a provision must be interpreted independently but within the general context of the agreement as a whole. A two-stage test exists, in which usually the object and context of an agreement is assessed first and the wording of a specific provision becomes relevant only afterwards. There have been some additional inconsistencies concerning which of the two elements in the wording, if any, prevails in the Court's decisions, elements which also often depend on the nature of the agreement concluded with the Community.

^{295} See Bebr, *supra* note 252, pp. 69-70.
Similarity or identity of wording of a provision in an agreement with a provision of the Treaty is insufficient to automatically infer direct effect to that provision. The meaning of a Treaty provision may not be transposed automatically to a similar or identical provision of a Community agreement.

A) GATT/WTO

All of the agreements that have been concluded by the Community and have been analysed so far lend themselves in principle to direct effect, with the important notorious exception of the GATT rules. It is essential to distinguish the somewhat 'tricky' GATT case from those cases in which it was decided that certain specific provisions of an agreement are not directly effective because they are not sufficiently clear or must be further implemented. Some of the basic provisions of the GATT are no less clear or unconditional than some of the basic provisions of the Treaty. Nevertheless, since the International Fruit saga, the Court has not recognised the possibility of direct effect of any provision of the GATT. Indeed, the Court reiterated that tendency in two recent instances, namely in the Werner case and the Leifer case, in which the Court based its interpretation in part on the rule of free exportation in art. 1 of Council Regulation No. 2603/69, which included certain measures of equivalent effect to quantitative restrictions, as well as on art. XI of GATT, which was more explicit in that respect.

Bearing in mind the Court's reasoning concerning the GATT, it is not so much the "great flexibility of its provisions" that the Court described in the International Fruit case, but more the general consensus-based dispute settlement system of the GATT as a

296 supra note 219.
299 International Fruit judgment, supra note 219, at para 21.
whole that prevented any direct effect of specific provisions. In all of the GATT cases, the Court did not even consider the analysis of the relevant GATT provisions in order to arrive at its conclusion; since the wording of the GATT agreement as a whole was considered too flexible, direct effect was refused.

As indicated above, the WTO Agreement provided new issues and it will not be possible for the Court to simply extend the old GATT case-law on the basis of alleged lack of precision and unconditionality of some of its provisions or because of the alleged weakness of the new dispute settlement system. Suffice it here to recall that some TRIPs provisions would appear to be eminently suitable for direct effect100. A separate analysis of the WTO's spirit, general scheme or terms for determining whether or not it is directly effective therefore seems necessary.

B) Free Trade and Cooperation Agreements

All Community Trade Agreements contain clauses that are expressed in terms that are identical or similar to those of the EC Treaty300. One may ask whether the existence of similar or identical clauses is a sufficient reason in itself to infer direct effect, bearing in mind the limited objectives of these agreements?

In the exceptional Bresciani case, the Court supported the view that identically worded provisions automatically implied identical interpretation. The Court held that,

"by expressly referring, in Article 2(1) of the Yaoundé Convention, to Article 13 of the Treaty, the Community undertook precisely the same obligation towards the Associated

300 Art. 1(3) of the TRIPs agreement.
301 Such clauses include especially those on the abolition of restrictions on intra-Community trade often using the terms "measures having equivalent effect to quantitative restrictions" identical to Art. 30 EC.
States to abolish charges having equivalent effect as, in the Treaty, the Member States assumed to each other.\textsuperscript{302} (emphasis added)

The purpose of the ACP Convention is much more limited than the creation of a common market and would therefore invite one to think, as noted above, that, due to the limited objective and nature of that Convention, it should not be granted direct effect. It is ultimately only due to the specific relations with the Community that some provisions of the Convention have been exceptionally given the same interpretation as provisions of the Treaty. The fact that the Convention's general context, its scheme and purpose were more limited and less substantial than the Treaty did not hinder the Court from giving the same interpretation to art. 2(1) of the Convention.

In contrast to the Association Agreements with Greece and Turkey, the Trade Agreement with Portugal established neither a special link with the Community nor the preparation for further membership.\textsuperscript{303} Nevertheless, here again, the Court was not prevented from recognising as a principle direct effect to some of some of the provisions which had the same or identical wording as provisions of the Treaty. Indeed, in the \textit{Kupferberg} case,\textsuperscript{304} the Court considered, by granting direct effect, that analogy or identity of terms were not conclusive \textit{in themselves} for an interpretation in favour of direct effect, but that other \textit{additional} criteria should be taken into consideration. As a result of the Court's rulings, if a provision in the Treaty is precise and unconditional, a similar provision in an agreement that is unconditional and precise does not automatically imply as having direct effect. In fact, the Court decided that the question of the possible

\textsuperscript{302} \textit{supra} note 220, at ground 25.
\textsuperscript{304} \textit{supra} note 150; See L. Imbrechts, \textit{supra} note 144, pp. 74-75.
direct effect of art. 21 of the Portugal Agreement, which is similar to art. 95 of the Treaty, had to be examined additionally “in the light of both the object and purpose of the Agreement and of its context”\textsuperscript{305}. Therefore, criteria such as the purpose, general scheme and wording of an agreement as a whole played a key role in the Court’s assessment of the Portugal Association Agreement.

Having a clear, precise and unconditional character is not a sufficient condition for granting direct effect; art. 21 of the Agreement was in its scope and in the light of its objective less substantial and less far reaching than the similarly worded art. 95 of the Treaty, but all this did not prevent the Court from granting direct effect. Advocate General Rozès concluded that art. 21 of the Agreement was appreciably different in wording from art. 95 EC and emphasised the importance of the latter provision\textsuperscript{306}. The nature of the agreement should be considered, according to the Advocate General, as irrelevant for eventual granting of direct effect to a provision; the Court did not follow the Advocate General and refused to base its reasoning exclusively on a Bresciani point of view. Other factors, such as the spirit, the general scheme and the wording of the Agreement predominated to ultimately grant direct effect to art. 21 of the Agreement.

In the Kziber and Yousfi cases, which both dealt with art. 41(1) of the Cooperation Agreement with Morocco, the Court was concerned with the wording of the article as well as the purpose and nature of the Agreement of which that article forms a part. Advocate General Tesauro emphasised that,

\textsuperscript{305} supra note 150, at ground 23; Note that instead of “context”, the Court used in Polydor the term “wording”, supra note 215, at ground 8 of the judgment.

\textsuperscript{306} Ibid., at para 3673 of the Kupferberg judgment; and See L. Imbrechts, supra note 144: “la parenté avec une norme communautaire directement applicable ne constitue pas une condition supplémentaire pour reconnaître l’effet direct aux normes internationales”; I. Macleod, I.D. Hendry, and Stephen Hyett, supra note 152, pp. 140-141.
"[...] the concept of social security in Article 41(1) of the Agreement must be understood by means of analogy with the identical concept in Regulation No 1408/71."  

The Cooperation Agreement only confirms the position that the Court has taken granting direct effect of the similarly worded provision that concerns social security for Moroccan workers in the Agreement as well as in a Council Regulation. The Court deduced first and predominantly from the wording of the provision, as well as from the purpose and nature of the Agreement, that art. 41(1) is capable of having direct effect. The same reasoning was used in the Krid case, which concerned art. 39(1) of the Algeria Cooperation Agreement and in which the Court predominantly analysed the direct effect criteria of clarity, precision and unconditionality of the provision; the article forms part of an Agreement whose purpose and nature supported the view taken by the Court.

In the Opel Austria case, the Court of First Instance did not minimise the position adopted in Opinion 1/91, but instead analysed carefully the wording of a provision in order to assess whether, in a specific case, it may be granted direct effect, bearing in mind the high degree of integration in the EEA:

"It is clear from the case-law of the Court of Justice that the provisions of the EEA Agreement constitute an integral part of Community law [...]. Article 10 of the Agreement, which prohibits customs duties on imports and any charges having equivalent effect between the Contracting Parties, corresponds to Articles 12, 13, 16 and 17 of the EC Treaty. It is identical in substance to internal Community law and should therefore be
analysed [...] in the light of the Court of Justice regarding provisions of the EC Treaty which are identical in substance.310 (emphases added)

Thus, a provision of the EEA Agreement, like any other provision in a Community agreement, can be considered as clear, unconditional and not dependent on further action and as directly effective as long as it is identical or similar in substance to the corresponding rules of the EC Treaty. In contrast to what the Court has concluded in the other Free Trade and Cooperation Agreements, identical interpretation for identical wording has thus been retained as exclusive and conclusive interpretation of the EEA Agreement; the high degree of legal integration in the EEA Agreement helps to support such a view.311

C) Association Agreements

According to the case-law of the Court with respect to the criteria chosen to grant direct effect to Association Agreements, the wording of the agreement as a whole prevails over the wording of a provision. With the exceptional case of the ACP Convention in which the Court's decision was based more on the wording of a specific provision than the general scheme and context of the Convention as a whole, the Association Agreements are not analysed on the wording of one provision alone.

Advocate General Elmer emphasised in his Opinion on the Bozkurt case, which concerned the question of direct effect of Turkey Association Council Decision No 1/80, that,

310 supra note 263, para 49 of the judgment.
311 paras 106 and 107 of the judgment; See J. A. Usher, 'Variable Geometry Or Concentric Circles: Patterns For The European Union', ICLQ, Vol. 46, April 1997, pp. 262-266.
"the interpretation which the Court has given to similar provisions or concepts in the Treaty or secondary Community legislation cannot be directly transposed to an international agreement or to provisions issued in pursuance thereof, inasmuch as it must be first considered whether the wording and scope of the agreement in question prevent it."312, (emphases added)

Decision No 1/80, which is closely related to that which has been examined in the Court's case-law in the Morocco and Algeria Cooperation Agreements regarding cooperation in the field of labour and the social security scheme, was granted direct effect.

The two aspects of the test used to determine direct effect are often used together and the similarity of objectives between Turkey-Greece Association Agreements and the EC Treaty has made it easier to grant in principle direct effect to similar or identically worded provisions.

Thus, similarity of wording may be useful for assessing the direct effect of an Association Agreement, but it is significant that the Court refused to recognise the wording as a supplementary criterion of direct effect in all of its cases. If the Court considers similarity of wording as conclusive, then it is only in conjunction with other conditions, as analysed in detail above, namely the objectives and purpose of an Association Agreement.

It is interesting to note here, independently to any case-law of the Court, that art. 66 of Decision No 1/95 of the EC-Turkey Association Council, implementing the final phase

312 para 13 of the Opinion, supra note 285 and as recently confirmed by A.G. Elmer in the recent Süleyman Eker case, supra note 287, at paras 21-23.
of the customs union, has established itself some guidelines concerning the interpretation of provisions of Decision no 1/95. Art. 66 states that,

"[...] the provisions of this Decision, in so far as they are identical in substance to the corresponding provisions of the Treaty establishing the European Community shall be interpreted for the purposes of their implementation and application to products covered by the Customs Union, in conformity with the relevant decisions of the Court of Justice of the European Communities"\(^{313}\). (emphasis added)

The Contracting Parties of the Ankara Agreement and more particularly the members of the Association Council have sought to express a clear and precise view concerning the eventual interpretation of provisions of Decision No 1/95 which are identical in substance to corresponding provisions of the Treaty. Exceptionally, it was not the Court that judicially established that which parties actually wanted in a provision of an Association Council decision. Here, the parties to the Agreement themselves have clearly expressed how provisions which are identical in their substance to similar Treaty provisions should be interpreted by the Court. Is is nevertheless unsure whether the Court would automatically follow the advice of the parties or whether it would supplant itself to determine by interpretation that which the parties actually wanted.

Section 4

Rejection of Arguments on Reciprocity and Safeguard Clauses

\(^{313}\) supra note 262, No L 35/15; See Rusen Ergec and Koen Coppenhole, 'Dispute settlement and judicial remedies under the customs union between EC and Turkey', RAE, 1996, pp. 236-241.
On several occasions, arguments on reciprocity and safeguard clauses have been raised in the Court's case-law concerning the interpretation of various Community agreements and concerning the refusal to grant any direct effect to their provisions. Nevertheless, these issues have not prevented the Court from granting direct effect as might have been the case in an international tribunal applying international law. The underlying rationale for such a position of the Court is clear from a judicial policy point of view and has undeniably placed the Court before difficult choices in future assessments of international instruments in the Community legal order.

Within that Community legal order, reciprocity of the Member States' recognition of direct effect of a Community agreement was never viewed as an obstacle. The policy principles of unity and effectiveness have now replaced the principle of reciprocity in execution of Community obligations. The Court necessarily perceives the need to impose the same fundamental principles of the Community legal system on third states as on its internal Community matters with respect to Member States. It is precisely the guarantee of a uniform interpretation and uniform application that is lacking in the various free trade agreements concluded by the Community.314 In the Community legal order, the balance between obligations is the very foundation of the relationship between the Member States, but Community law is "more than an agreement which merely creates mutual obligations between the contracting States"315. It is based not only on reciprocity, but also on an underlying solidarity between the Member States to achieve the goals described in the Treaty. The fear that the needed homogeneous and uniform application and interpretation of the Community legal system would fall into pieces by accepting the

314 See Bebr, 'Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg', CMLRev 20, 1983, at p. 69.
315 Van Gend & Loos judgment, supra note 174, at para 12.
argument on reciprocity and safeguard clauses has led the Court, in a sort of a missionary spirit, to impose the solutions of Community law.

The principle of reciprocity is one of general international law, while within the Community legal order, non implementation of a provision by a Member State does not necessarily imply the non implementation of that provision by another State. The argument on reciprocity was never welcome in the Community legal order and this is understandable from a legal policy point of view where "the principle of solidarity has replaced in the Community legal order the principle of reciprocity". This concept of equality has been taken into consideration by the Court due to some initial attempts by Member States and the Commission, both of whom hoped for an eventual refusal of any direct effect. Nevertheless, the Court has refused to accept the argument on reciprocity of international law in the Community order and held in Kupferberg that,

"[...] the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement."

The Court held that a failure of one of the contracting parties to recognise a direct effect of an agreement does not, according to the general principles of international law, infringe on the reciprocity required for a full and faithful performance of an agreement.

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316 See Meesen, 'The application of rules of public international law within the community law', 1976, CMLRev, p. 494.
317 See Bebr, supra note 252, p. 71.
318 supra note 150 at ground 18.
The wording of the Court in *Haegeman v. Belgium*, where it held that an imbalance of obligations assumed 'may not' preclude the direct effect of the association agreement in question, is indicative of the Court's rationale on this issue. Furthermore, in the *Bresciani* case, the Court held that,

"[...] the Convention was not concluded in order to ensure equality in the obligation which the Community assumes with regard to the Associated States, but in order to promote their development. [...] This imbalance between the obligations assumed by the Community towards the Associated States, 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".\(^{319}\)

Also in this case, the Court raised the question of reciprocity, but ultimately rejected it, and maintained the principle that imbalance of obligations does not preclude direct effect. The existence of safeguard clauses in an international agreement may also be important in assessing such agreements with respect to their capability to produce direct effect.

Indeed, in *Bresciani*, Advocate General Trabucchi argued that the safeguard provision of Art. 2 of the Yaoundé Convention was subject to substantive rules and well-defined procedural requirements.\(^{320}\) However, the Court did not find it necessary to refer in its judgment to the safeguard clause which was provided for by the Convention. This clarification was made clear in *Kupferberg*:

\(^{319}\) *supra* note 220 at grounds 22-23.

\(^{320}\) *Ibid.*, at pp. 149-150.
"As regards the safeguard clauses which enable the parties to derogate from certain provisions of the agreement it should be observed that they apply only in specific circumstances and as a general rule after consideration within the joint committee in presence of both parties. [...] The existence of such clauses [...] is not sufficient in itself to affect the direct applicability which may attach to certain stipulations in the agreement." (emphases added)

In conclusion, the Court clearly did not attach any importance to the flexibility of the safeguard clauses in several agreements in order to refuse direct effect. The Court held that it was sufficient that the clauses could be invoked only in special and exceptional situations.

CHAPTER FOUR

PROPER LAW GOVERNING THE EFFECTS OF INTERNATIONAL AGREEMENTS

The case-law of the Court does not provide enough indications as to what extent it has maintained its requirements for specific provisions having direct effect in international agreements and for Community law. In this discussion, an attempt has been made to show that, in addition to the expansion and transposition of specific Community criteria stricto sensu into the field of Community agreements, the Court additionally, sometimes jointly or sometimes independently, applies its own criteria for direct effect.

321 supra note 150 at para 21.
The question is therefore not so much if the Court uses its proper law governing the direct effect of agreements; it has been indicated above that more general criteria have been elaborated in order to assess various Community agreements. When the Court does so, it is also important to analyse how and when certain criteria for direct effectiveness are used either together with or independently of specific Community law criteria.

As a result of the Court's case-law, special Community requirements and more general independent requirements emerge as factors in the assessment of possible direct effect. This situation has created some difficulties in establishing a genuine standard test for direct effectiveness in the sphere of international agreements.

Thus, the analysis of the wording of a specific provision in an agreement occurs alongside the analysis of the wording of the agreement as a whole. Nevertheless, these two stages of the same test play at different moments in the Court's reasoning.

Section 1

Question of spill-over of special Community law criteria

The direct effect doctrine developed within the Community legal system for the purpose of the relations between Community law and the Member States' law has 'spilled over' into the field of relations between Community law and international law.

A Community law provision can be said to have direct effect where it not only imposes a clear and unconditional obligation but also has an implementation or effectiveness that is not dependent upon further action. As the evolution of the case-law shows, this test does not operate in a mere "organic or chemical manner". What is

322 See Bourgeois, supra note 145, at p. 1268.
clear and unconditional in a provision depends to some extent on its meaning in the more
general context.

For example, in the Court's view in the *Polydor case*\textsuperscript{123}, art. 14 of the Agreement with
Portugal requires an unconditional abolition of certain trade restrictions which could be
viewed as one of the standard requirements for direct effect of a Community provision.
But within this context, the Court did not attach much importance to the nature of this
obligation because the objectives and aims of the agreement were of primary importance
to the Court. Only when the Court applied the usual specific criteria required for direct
effect of a Community provision did it accept that the provision could be viewed as a
clear and unconditional obligation.

Therefore, it is not possible to apply Community law to international law because
conditionality and clarity can be interpreted in many ways. Conditionality and clarity in a
Community provision are exclusively scrutinised in the provision alone, since the
objectives, aim and nature of the EC Treaty "virtually" presume direct effect\textsuperscript{124}. The
automatic spill-over of Community law criteria into the field of Community agreements
should not lead to any confusion; these criteria allow us to ascertain whether a provision
may or may not be worded as having direct effect, since clarity, unconditionality and
independence of further action are insufficient prerequisite elements for the overall
assessment of direct effectiveness of Community agreements.

Whatever the "purpose", "object" and "wording" of an agreement, the provisions
themselves ultimately will have to be unconditional, clear and not dependent on further
action if an agreement as a whole favours such effect. An exception to this rule is the
*Bresciani case*\textsuperscript{325}, in which the Court considered the special nature of relations between

\textsuperscript{123} *supra* note 215.
\textsuperscript{124} See Denys Simon, *supra* note 188, p. 255.
\textsuperscript{325} *supra* note 220.
the ACP countries and the Community as sufficient criteria for recognising direct effect, regardless of the limited objectives and aims of the Convention as a whole.

The *Kupferberg* case, more than any other ruling of the Court, has clarified some aspects of the spill-over of Community criteria to agreements. The Court has insisted that the provisions of an agreement are necessarily interpreted in terms of their own objectives, those being the unconditional, clear and independent of further action characteristics of any provision.326

The Court has still not yet developed a coherent strategy for distinguishing or differentiating between the criteria necessary for direct effect of a provision and criteria of an agreement, especially when they are interpreted together in a case.

**Section 2**

**Test of Agreement prior to test of provision: towards a general rule?**

It follows from the above discussion that the Court in its reasoning uses a 'two stage' test of direct applicability of a provision of an agreement. Provisions of Community agreements which have direct effect in the Community legal system are not interpreted in the same way as similarly or identically worded Treaty provisions. It is interesting at this stage of the discussion to mention the fact that within this twofold test, the Court in its various cases has shifted towards prioritising the object and wording of an agreement as a whole over the specific Community criteria.

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326 *supra* note 150 at grounds 26-29.
Indeed, as stated above, the Court decided in the *Polydor* case that similarity of wording is insufficient for transposing the case-law on Treaty provisions to the provisions of international agreements. The scope of these provisions

"[...] must indeed be determined in the light of the Community's objectives and activities [...] it is necessary to analyse the provisions in the light of both the objective and purpose of the Agreement and of its wording"327. (emphasis added)

Furthermore, in the GATT cases the Court analysed only and exclusively the purpose and aim of the GATT Agreement as a whole and within its more general context in order to conclude that its provisions, regardless of their closeness or identity in wording to Treaty provisions, could not be granted any direct effect. The GATT cases illustrate that the Court never reached the second stage of the test for direct effect.

Nevertheless, it is difficult to reach strong conclusions about the Court's sparse case-law to determine when these aspects of criteria were analysed together or separately, and if used together, to understand when the Court expresses a preference towards one or the other criteria. An analysis by 'type of agreement', as conducted above, in order to find the different criteria for direct effect in various Community agreements, may have been useful in order to locate the object of a Community agreement. On several occasions, namely concerning Free Trade and Cooperation such as various Association cases, the Court has examined the objective, nature and aim of these agreements before addressing the more specific question of whether the provision relied upon meets the criteria of Community law.

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327 *supra* note 215, grounds 16 and 8 of the judgment.
In most of its case-law, the Court has emphasised implicitly or explicitly the 'closeness' of the 'purpose' of the agreement to that of the Treaty, even though this argument was rejected as sole argument in *Kupferberg*. Indeed, in *Bresciai* and *Pabst*, the relevant provisions of association agreements were held to have similar purposes to those of the Treaty and could therefore in principle be allowed direct effect. Even if similarity of wording is not in itself sufficient, it was suggested by a judge of the Court that international agreements should be viewed as a series of concentric circles around the Community, and the closer the agreement is with the purpose and aim of the Community, the more likely direct effect will be granted.

These circles are assessed in terms of the "spirit, general scheme and term" of an agreement, as was illustrated indirectly in *Fediol*. Before looking at the legal techniques of a provision in an agreement, one author considers the nature and the purpose of an agreement, which the Court characterises as the "so-called 'preliminary question'". Therefore, in most of the Court's case-law, Community law criteria seem to play only a secondary role in the assessment of direct effect of an agreement.

Section 3

Functional requirements for direct effect

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328 *supra* note 150 at 3665 of the judgment.
330 *supra* note 237, at para 4198.
The general requirements for direct effect which the Court has used so far illustrated that it has established a rather similar approach for the interpretation of the international agreements as that which it has used for Treaty provisions.

Interpretation of Community agreements has been influenced, *inter alia*, by international law, which has been considered a relevant source for the Court; it has often taken into consideration a 'functional' approach in which both Community law and some principles of international law would be retained. Nevertheless, the general requirements are not identical to those for the direct effect of Community law. In international law, the same list of requirements functions differently and, therefore, the results of interpretation may differ.

The Court repeatedly emphasised that the EC Treaty is "more than a treaty which merely creates mutual obligations between the contracting parties". Initially, it seemed that the Court would not have been prepared to apply the fundamental key doctrine of direct effect to international agreements concluded with the Community. Indeed, the Court could have refused to recognise direct effect in respect of most of these agreements not because they were neither precise nor unconditional enough in terms of Community criteria, but more importantly because the objects, purposes and contexts of these agreements largely differed in their scope from those of the Treaty. In fact, in a large number of Community agreements, many provisions have been literally copied from the wording of Treaty provisions for which the Court had already recognised direct effect. Therefore, the wording of these provisions in Community agreements could a *priori* lend themselves well to the granting of direct effect; but, it was more the more

332 *Van Gend en Loos supra* note 174, at para 12.
general object, purpose and spirit of these agreements which, in many cases, pleaded against direct effect.

However, this has not prevented the Court from deciding in 'appropriate' cases in favour of direct effect of international agreements, with the general exception of GATT. One may wonder whether the chosen balance between wording of an agreement and wording of a provision is the adequate one and whether this balance will continue to hold for the future, in particular in view of the necessity to review, as has been strongly suggested herein, the reasoning on the WTO Agreement. Furthermore, if the Court continues to stretch that balance to the extreme by continuing, for whatever reasons it may choose, to refuse direct effect with respect to the WTO rules, that balance cannot be hold any more by comparison to other Community agreements where the Court, for exactly the same reasons, came to a fundamentally different solution.

What the Court considered as 'appropriate' often became obscure as far as legal techniques of direct effectiveness were concerned. Notions like "spirit, general scheme, and terms", "objective", "aim", "wording", "context" and many others have been used as general criteria to test the direct effect of an agreement.

Some authors admit that these terms have a similar meaning to the specific Community law requirements\(^{333}\) and that what is clear and unconditional in a legal norm should not vary according to the international meaning. Other authors strongly disagree on this point\(^{334}\), and without denying the relevance of specific Community law requirements to the sphere of interpretation of international norms, they favour the emergence of a distinct, proper and independent law governing the direct effect of

\(^{333}\) See Jean Groux, supra note 153, p. 216 and L. Imbrechts, supra note 144, at p. 74.

\(^{334}\) See Bebr, supra note 252, at p 43 and Bourgeois, supra note 145, at p 1253.
international agreements, which in some cases have been subsidiarily influenced by elements of Community law.

The trend in the jurisprudential developments appears not only as a simple organic extension of the notion of direct effect of Community law to agreements concluded by the Community. In addition, independent criteria have taken over in the Court's reasoning which depend on the category of agreement concluded.

The case-law of the Court is inconsistent and often incoherent, and any attempt at standardisation or rationalisation of criteria for forthcoming cases is a difficult task, bearing in mind the number of jurisprudential decisions the Court has taken concerning different types of Community agreements.

\[\text{PART THREE}\]

ARGUMENTS AND AREAS FOR DIRECT EFFECTIVENESS OF THE EUROPE AGREEMENTS: LEGAL EQUIVALENT OF SCHUBERT'S "THE UNFINISHED"

\[\text{CHAPTER ONE}\]

ARGUMENTS IN FAVOUR OF DIRECT EFFECT OF THE EUROPE AGREEMENTS AS SUCH
As shown in Part Two, several international agreements concluded by the Community under art. 238 of the Treaty with third countries make provision for the way in which the Member States shall treat third country nationals. The nationals of those countries may either rely on a provision of a Community agreement itself or moreover rely on acts adopted by a joint body that was instituted by that agreement.

The fact that until now no judgment of the Court, nor any pending case or proceedings, has explicitly ruled on the question of direct effect of the EAs makes the issue extremely relevant. Once the issue will be at stake in a specific case of a EA before the Court, this will most probably support their eventual direct effect by analogy with previous judgments of the Court concerning various Association Agreements. There is nevertheless considerable uncertainty, if not refusal or denial at a political level, about the direct effect capacity of the EAs. Due to the consent of the Court admitting, since the Sevinç judgment, that Turkish workers and others who were committed to family reunion could enjoy individual rights conferred in the Community legal order, a political debate has emerged between the advocates of a secure and effective legal position of Turkish workers living within the Community and those who blame the Court for encouraging an imminent mass of Turkish migrant workers and members of their families to Member States of the Community.

Independent of political considerations at stake concerning the justified or unjustified fear of immigration of Central and East European migrant workers to the Community.

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337 supra note 283.
due to the alleged 'judicial activism' of the Court in previous cases, there are several legal arguments in favour of direct effectiveness of the EAs as a whole.

Furthermore, the decision-making power of the Association Council is relevant for direct effectiveness and the current lack of any Association Council decision in the various EAs which would implement and eventually upgrade the current EAs in important fields does not by any means preclude the legal argumentation of their potential direct effect.

Section 1:

Institutional and Substantive similarities with previous Association Agreements

A) The settlement of disputes: arbitration and preliminary references

The EAs as such go beyond the previous Free Trade, Trade and Cooperation Agreements because the former provide for judicial involvement within the legal integration sought thereby; the purpose and nature of the latter Agreements cause them to be legally less integrated into the Community than the EAs. Furthermore, the scope of the Cooperation Councils' decision-making power is more limited than that of the Association Councils of the EAs.

The institutional provisions of the EAs represent an extension and improvement over the previously existing Free Trade and Cooperation Agreements, such as the Free Trade Agreement with Portugal, the EFTA Agreements, the Cooperation Agreements with
Morocco and Algeria or the ACP Convention, in the sense that none of these previous Agreements foresaw a perspective towards accession. The limited and vaguely defined authority of the Cooperation Council or the Association Council illustrates even more the great legal distance and detachment from the then EEC's inner circle.

1. Arbitration Bodies

The Europe Agreements follow the Greek and Turkey Association Agreements' system in which disputes concerning the interpretation or application of the Agreements can go to arbitration\(^{338}\). Indeed, in the event of a dispute relating to the application or interpretation of the EAs, "each of the two Parties *may* refer to the Association Council any dispute [...]" (emphasis added)\(^{339}\). In the event that it is not possible to settle a dispute between the Parties within the Association Council, either Party may notify the other of the appointment of an arbitrator and the other party must then also appoint an arbitrator within two months. The Association Council must appoint a third arbitrator. These arbitrators are then to decide on the dispute by a majority vote.

In Turkey Association Council *Decision No. 1/95* of 22 December 1995 on implementing the final phase of the Customs Union\(^{340}\), the parties used an EEA model for dispute settlement that transcends the dispute settlement system in the EAs. Indeed, the EEA, like the Turkey Customs Union\(^{341}\), allows the parties not only to bring a dispute as to the interpretation or application of the EEA itself before the EEA Joint

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\(^{338}\) Art. 67 of the Association Agreement with Greece.

\(^{339}\) Art. 107 of the Agreement with Hungary and art. 105 of the Agreement with Poland; for instance *Decision No. 3/96* of the EC-Poland Association Council settling the dispute between the European Communities and Poland concerning skins and hides in accordance with art. 105 (1) and (2) of the Europe Agreement, [1996] O.J. No. L 208/31.


\(^{341}\) Arts. 52 and 53 of *Decision No. 1/95* establishing the Customs Union Joint Committee (CUJC).
Committee\textsuperscript{342}, but also to refer the dispute to the Court in the event that it involves a provision identical to primary or secondary Community legislation. In contrast, the EAs merely provide for arbitration through the Association Council for the purpose of interpretation or application of the Agreements themselves.

2. Preliminary references to the Court

The Court has not yet had the occasion to deliver any rulings concerning the Europe Agreements. Nevertheless, there is no doubt that the Court has had competence to interpret the provisions of previous similar Association Agreements and the provisions of the decisions adopted by the Association Councils of these Agreements; a comparison with the Association Agreements concluded with Greece and Turkey is of utmost importance for the legal integration of the EAs in the Community legal system.

The Court has responded to these questions, and especially in response to questions referred to it by national judges of the Member States, through the preliminary ruling procedure under art. 177(1) (b) of the Treaty. It was especially the interpretation of the notion of "acts of the institutions of the Community" in this article which determined, bearing in mind the Haegeman \textit{v. Belgium} saga\textsuperscript{343}, whether a provision of an Association Agreement or a provision of a decision implementing the Agreement and adopted by the Association Council could be subject to review by the Court.

In conjunction with the Turkey Association Agreement, the Court, in its \textit{Demirel} rulings, claimed jurisdiction to give preliminary rulings on the 'interpretation' of the Turkey Association Agreement "in so far as it [was] an act adopted by one of the

\textsuperscript{342} Art. 111 EEA.

\textsuperscript{343} supra note 142.
institutions of the Community”\(^{344}\). Similarly, in the Sevince judgment, which concerned a decision of the Turkey Association Council, the Court held for the first time that 'acts' adopted for the implementation of Community agreements, are, as far as the Community is concerned, an act of one of the institutions within the meaning of art. 177(1) (b) of the Treaty and therefore contain provisions, which from their entry into force form an integral part of the Community legal system.

It was indicated above that the Court used the same reasoning in the Turkey Association Agreement as it used in the Greece Association Agreement in the Haegeman v. Belgium case. Therefore, an extension of the Court's case-law regarding its jurisdiction under art. 177 (1) (b) of the Treaty to the EAs may be a logical and necessary consequence since these ten Association Agreements have been adopted on behalf of the Community by means of a Council Decision which is an act of one of the institutions of the Community, on the basis of art. 238 of the Treaty.

B) Similarities with previous Association Agreements

The EAs are similar to previous Association Agreements in structure and in substance, especially concerning the questions on movement and employment of migrant workers and social security which are evident in the Turkey Association Agreement and to some extent in the Morocco and Algeria Cooperation Agreements. These similarities emphasise the tendency towards accepting as a principle the possibility of direct effectiveness expanded to the EAs.

\(^{344}\) supra notes 218 and 140, at para 15 of the Sevince judgment and at p. 3750, point 7 of the Demirel judgment.
The EAs, like the Association Agreements with Greece and Turkey, provide for the creation of an Association Council, which implements the often programmatic provisions of the Agreement through decisions.

As discussed in Part Two, in most of the cases concerning direct effect in previous Association Agreements, the Court addressed issues of right of establishment, movement of migrant workers, work permits, and social security schemes for workers and members of their families. The EAs as such also provide for rights in these fields but with the important limitation of the decision-making power of the Association Councils for implementation of the provisions in the field of movement of workers.

The legal and political framework of the EAs tends to favour the argument of accepting direct effectiveness to apply to specific provisions of the Agreements themselves as well as to decisions of their Association Councils.

Section 2:

Purpose and Objectives of ultimate membership irrelevant for direct effectiveness

Originally, the EAs did not provide for unconditional membership and the Association Agreement would only help to achieve the objective of membership. In subsequent European Council Decisions, especially during the Copenhagen Summit in 1994, membership was finally considered as a common goal not only for the Associated states but also for the Community.

Arguments of eventual explicit membership can be raised to refuse any possible direct effect of a provision of an EA as a such; in fact, such an argument was raised in the
Polydor case\textsuperscript{345} concerning the Cooperation Agreement with Portugal, in which case the Court held that the ambit and purpose of such an Agreement was to promote a free trade area and overall cooperation with the Community. The fact that ultimate membership was neither in the nature nor in the objective of the Portugal Cooperation Agreement led the Court to refuse direct effectiveness as a principle.

Nevertheless, the argument of ultimate membership as a common goal in an Agreement, either explicitly or implicitly, was rejected afterwards in the Kupferberg case\textsuperscript{346}, which has since been considered as established law. Even if Advocate General Warner correctly stated that "words in different instruments brought into existence for different purposes may mean different things"\textsuperscript{347}, direct effect and legal integration without membership are not necessarily mutually exclusive.

The nature of an Agreement is indeed irrelevant to its capacity to have direct effect; this is especially true for the Free Trade and Cooperation Agreements and the ACP Convention concluded with the Community, which, contrary to the policy of any Association Agreement and with the exception of the EEA Agreement, do not share the common objective of preparing the country for future membership in the Community. Membership has never been foreseen in the ACP Convention and the fact that most of the EEA States have joined the Union cannot be considered as a consequence of the initial objectives of the EEA Agreement itself. It is ironic that most of the EEA countries have joined the Community and that Turkey, whose membership was explicitly included in the Association Agreement\textsuperscript{348}, has not yet joined the Union. Thus, the Court's

\textsuperscript{345} supra note 250.
\textsuperscript{346} supra note 254.
\textsuperscript{348} This was recently considered by Hans van Mierlo, former EU Council President and Dutch Foreign Minister during the 38th EC-Turkey Association Council, when he indicated that Turkey appeared to be eligible for accession and that it would be treated like any other applicant for accession in respect of the Copenhagen criteria; Agence Europe, No 6966, 1 May 1997, pp. 7-8.
approach towards direct effectiveness of some provisions or of provisions of decisions adopted by joint bodies implementing such Agreements is not altered as a result of this phenomenon.

Association Agreements prepare for legal integration of the Community, a fact which only strengthens the argument that favours the possibility of direct effectiveness of the EAs. Preparing for membership does not imply that art. 238 of the Treaty itself foresees membership or even helps to attain membership to the Union; nothing in art. 238 provides for future membership.

Additionally, the question of direct effect concerning the EEA Agreement has created some debate\(^{349}\), and could therefore be a precedent for eventual refusal of direct effect to the EAs as such and to decisions of the Association Council. Art. 1 of the EEA proclaims that the aim of the association agreement is to

"[...] promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area".

Some authors\(^{350}\) have criticised the Court's findings in \textit{Opinion 1/91} and have tried to minimise the apparent conceptual differences which exist between the Community and the EEA in order to accept as a general rule any possible direct effect of the EEA. Indeed, in comparing these differences, which the Court has, in the view of the present authors over-emphasised, one should keep in mind that direct effect has been developed

\(^{349}\) supra note 266.

\(^{350}\) See Walter van Gerven, \textit{supra} note 266.
as a general principle of Community law in connection with the judicial protection of rights that individuals can derive from the fundamental freedoms of Community law.

Therefore, such principles cannot be held to be absent from EEA law, which pursues the same legal integration in a wider geographic area on the basis of references to objectives of Community law; such a solution was implicitly adopted in the Opel Austria case\textsuperscript{351}. The Preamble to the EEA is addressed not only to the government but also to the people and refers explicitly to the possibility of direct effect by stressing that the States are "convinced of the important role that individuals will play in the EEA through the exercise of the rights conferred on them by this Agreement and through judicial defence of these rights".

The EAs, both in their ambit and nature favour direct effectiveness of their provisions or Association Council decisions. An analogy with the Greece and Turkey Association Agreements as such and with the Association Council decisions, where the Court has already ruled on direct effect, only confirms the tendency towards acceptance of their direct effectiveness. The minor conceptual differences between the EEA Agreement and the Community legal system, the institutional and substantive similarities with some previous Associations Agreements and the case-law of the Court all provide a rationale for a presumption of direct effectiveness of the EAs as a such.

\textbf{CHAPTER TWO}

\textbf{THE DECISION-MAKING POWER OF THE ASSOCIATION COUNCIL IN THE EUROPE AGREEMENTS}

\textsuperscript{351} supra note 263.
Section 1:

Legal effects of Association Council decisions in the Community legal order

The question of direct effect of decisions taken by organs instituted in Community agreements has indeed been controversial, and the gradual but slow acceptance in the Community legal order of direct effectiveness of such acts, such as argumentation on the eventual expansion of the Court's judgments to the EAs, evolved only recently.

The Association Council, established in the various EAs supervises the implementation of the Agreements; indeed, for the attainment of the objectives of the Agreements, "the Association Council shall [...] have the power to take decisions in the cases provided for therein. The decisions shall be binding on the Parties which shall take the measures necessary to implement the decisions taken" (emphasis added).

The implications of the Court's decision in the Hellenic Republic v. Commission case became only fully apparent in the Sevince case in which the legal qualification of an Association Council decision inherently included a subsequent issue, namely its capacity to grant direct effect for individuals. The Court stated that,

"[...] since they (i.e. decisions taken by the Association Council) are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system". (emphasis added)

\(^{352}\) supra pp. 48-55.

\(^{353}\) Art. 106 of the Agreement with Hungary and art. 104 of the Agreement with Poland.

\(^{354}\) supra note 137.

\(^{355}\) Ibid, at para 11 of the judgment.
Indeed, the fact that the decisions are part of the Community legal order is crucially relevant for the question of their direct effectiveness. Nevertheless, the direct effect of a provision does not result automatically from the fact that it is part of the Community legal order. If the Agreement as such does not lend itself to direct effectiveness, then the question of direct effect of decisions of the Association Council become superfluous. However, it is clear that only if the provision is part of the Community legal order can the question of its direct effectiveness be raised. It should be asked whether the question of criteria also provides parameters to determine the direct effect of decisions of the Association Council.

The Court's responses have been clear and unequivocal: in acknowledging direct effect with respect to the provisions contained in the decisions of the Association Council, the Court applies the case-law on direct effectiveness of the agreements and their provisions. Here again, as analysed in Part Two, the Court takes into account first the object and purpose of the agreement as such, and only then the object, purpose, nature and wording of the decisions of the Association Council as well as the specific Community features of the obligation, which must be clear, precise and not subordinate to any further act.

Therefore to answer the question, the criteria for direct effect of Community agreements as such identified by the Court in its case-law will be applied and expanded to the decisions of the Association Council. The hierarchy of the criteria will ultimately depend 'functionally' on the category of Agreement concluded. Hence, if an Agreement

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356 See Part Two of the discussion on divergences between direct applicability and direct effect.
as a whole cannot have direct effect, then the decisions of its Association Council will ultimately not have direct effect.

Section 2:

Areas of decision-making power of the Association Councils in the EAs

The Association Council within each EA, assisted by an Association Committee, has the power to take binding decisions "[...] for the purpose of attaining the objectives of this Agreement", and only "in the cases provided for therein". It is already apparent that the Association Council is not free to implement or upgrade provisions of the Agreement through binding decisions, but is granted only the explicit right to take decisions in precise areas. Thus, the mandate of the Association Council is very clear and precise, especially in light of the areas in which it is not supposed to act through decision-making, but rather through mere recommendations.

A) Limitations on the decision-making

The powers of the Association Council are first limited due to the transitional period of each of the 10 EAs, which is "of a maximum duration of ten years divided into two

357 Art. 108 (1) and (2) of the Agreement with Hungary and art. 106 (1) and (2) of the Agreement with Poland provide that "the Association Council shall be assisted in the performance of its duties by an Association Committee [...]. The Association Council may delegate to the Association Committee any of its powers. In this event the Association Committee shall take its decisions in accordance with the conditions laid down in Article 106." (emphasis added) Furthermore, arts. 13 and 14 of the Decision 1994 of the Association Council of the Agreement with Hungary of 7 March 1994 adopting its rules of procedure provide that "The Association Committee shall prepare the meetings and the deliberations of the Association Council, implement the decisions of the Association Council where appropriate and, in general, ensure continuity of the association relationship and the proper functioning of the Europe Agreement. [...] It shall submit proposals or any draft decisions/recommendations for adoption to the Association Council. [...] The subcommittees and working groups [...]shall continue to exist. They shall be considered to work under the authority of the Association Committee [...]", [1994] O.J. No. L 242/25.

358 Art. 106 of the Agreement with Hungary and art. 104 of the Agreement with Poland.
successive stages, each in principle lasting five years. In some areas, it will be in the second stage only that the Association Council "shall meet to decide [...] on any possible changes to be brought about as regards measures concerning the implementation of the provisions concerning the second stage." The timing issue is both important and very sensitive as far as the potential rights of migrant workers and rights of establishment of companies and self-employed persons are concerned; nevertheless, as far as Title III on free movement of goods is concerned, this transitional period in two stages does not apply and the Association Council may adopt decisions immediately after the entering into force of each EA. Regarding the competition rules, the Association Council shall adopt by decisions the necessary rules in order to implement the competition provisions "within three years of entry into force" of each Agreement.

A second and important hurdle to the eventual decision-making power of the Association Council is the question of mixity in each of the EAs, which grants, for instance, a preemptive power to the Member States' immigration policy concerning the entry, residence and movement of migrant workers in and between Member States and implies that the margins of an Association Council measure become valid "subject to the conditions and modalities applicable in each Member State." The provisions on the movement of migrant workers clearly indicate that by signing the various EAs, the Community has not itself instituted quantitative rules at a Community level concerning the sensitive issue of migrant workers' mobility, but instead has delegated the question of quotas for migrant workers to Member State competence.

359 Art. 6 of the Agreements with Hungary and Poland.
360 Art. 106 of the Agreement with Hungary and art. 104 of the Agreement with Poland.
361 The transitional period in art. 6 refers both to provisions of movement of workers, social security systems and establishment, See arts. 42 and 44 (1) (i) of the Agreement with Hungary.
362 Art. 6 (4) of the Agreements with Hungary and Poland.
363 Art. 62 (3) of the Agreement with Hungary and art. 63 (3) of the Agreement with Poland.
364 Art. 37(1) of the Agreements with Hungary and Poland.
The question of mixity has become particularly important due to which Member States have competence in specified fields, such as immigration policy. Consequently, the scope of the decision-making power of the Association Council becomes more limited; for instance, in the sphere of social security systems the decisions adopted "shall not affect any rights or obligations arising from bilateral agreements [...] where those agreements provide for more favourable treatment of nationals [of Hungary/ of Poland] or of the Member States". The assumption of power of the Association Council, which will require an additional transitional period for the three Baltic States, will be limited to a mere recommendation procedure as far as "[...] further ways of improving the movement of workers" (emphasis added) are concerned, and it will be obliged to take "into account the labour market situation in the Member State, subject to its legislation and to the respect of rules in force in that Member State in the area of mobility of workers".

One can see that the provisions on movement of workers do not achieve the goal of freedom of movement which was initially foreseen in the Turkey Association Agreement itself which was further implemented by Association Council decisions. The provisions in the various EAs reflect an obvious protectionism and a Community's and Member State's fear of mass flux to labour markets. This 'meagre' amount of support of access to the Community's labour market evident in the EAs is due to the difference of the labour market of the Union compared to that which it was the case during the 1960s, when the

365 Art. 40 of the Agreements with Hungary and Poland.
366 Art. 41 of the Agreement with the three Baltic States provides as follows "From the end of 1999 or sooner if socio-economic conditions [...] have been largely aligned on those of the Member States and if the employment situation in the Community permits [...]" (emphasis added).
367 Art. 42 of the Agreements with Hungary and Poland.
368 Art. 41 (1) of the Agreements with Hungary and Poland.
Community needed to import the labour force from outside. It is nevertheless an inherent paradox when one considers, despite the improbable accession of Turkey to the Union, the vast and elaborate rights of Turkish migrant workers under the Ankara Agreement compared to the Associated states' poor rights for migrant workers from CEECs, with their forthcoming accession to the Union.

B) Actual and Potential decision-making power

Hence, the power to take decisions is limited to areas of free movement of goods, social security systems for migrant workers and selected provisions on implementation of competition rules. In other important areas, such as provisions relating to the reduction of customs duties in trade, which is part of the chapter on free movement of goods, or relating to the improvement of establishment of migrant workers, the powers of the Association Council have been reduced to a mere role of providing recommendations, which have no legal effects on individuals and which only give rise to guidelines of specific objectives to be attained in the future.

Regarding the movement of industrial products that originate in the Community and in the Associated state\(^{370}\), the Association Council may preventively take decisions to put an end to movement of goods in such increased quantities and under such conditions as to cause or threaten to cause "serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, or serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region"\(^{371}\).

\(^{370}\) Art. 8 of the Agreements with Hungary and Poland; the provisions on industrial products are listed in Chapters 25 to 97 of the combined nomenclature with the exception of sensitive products listed in ANNEX I.

\(^{371}\) Art. 30 of the Agreements with Hungary and Poland.
Thus far, the Association Councils of the various EAs, which have already entered into force, have adopted decisions in different areas and have gradually adopted their own rules of procedure\textsuperscript{372}. Other Association Council decisions have helped to implement the Agreements, especially those decisions concerning the export of certain steel products from the Associated states to the Community\textsuperscript{373}, the determination of the duties applicable to imports of listed processed agricultural products originating in the Community to the Associated states\textsuperscript{374} and other related matters\textsuperscript{375}.

In addition, the Association Council is required "within three years of the entry into force"\textsuperscript{376} of the Agreement, to adopt, by decisions, the necessary rules for the implementation of competition policy. Thus far, a small number of decisions have been adopted concerning the implementation of rules for the application of the competition provisions\textsuperscript{377}. In contrast to the EEA Agreement, the Associated countries in the EAs were not originally 'explicitly' required to adopt EC legislation in the field of competition rules, but rather gave the Association Councils a deadline of three years within which


\textsuperscript{375} Art. 62 (3) of the Agreement with Hungary and art. 63 (3) of the Agreement with Poland.

\textsuperscript{376} Art. 62 (3) of the Agreement with Hungary and art. 63 (3) of the Agreement with Poland.

they had to adopt implementing rules. The Association Councils have now agreed to have virtually identical implementing rules\textsuperscript{378} but will only treat, at a later stage the more complex rules on state aids and public undertakings. They have also provided for overlapping competence of the Commission and the Associated states' national authorities in competition cases\textsuperscript{379}.

CHAPTER THREE

POSSIBLE AREAS OF DIRECT EFFECT IN THE EUROPE AGREEMENTS

Section 1:

Competition rules and State aids

The EAs incorporate or otherwise refer to competition policy, including state aids. In addition to stating the principles themselves in the provisions, they provide limited guidance as to how these rules will be implemented and what effects on the Community legal system they may have.

Approximation of law is an important precondition of the Associated states' economic integration into the Community. Explicit rules on competition in the EAs\textsuperscript{380}, among other fields, are required to be implemented by the Association Councils on a voluntary


\textsuperscript{379} A variant to the EFTA Surveillance Authority might be applied in each of the EAs in the long term.

\textsuperscript{380} Art. 68 of the Agreement with Hungary and art. 69 of the Agreement with Poland.
harmonisation basis. More specifically, the EAs provide that restrictive practices by undertakings, abuses of a dominant position and "public aid", which all can distort competition, are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and the Associated state\textsuperscript{381}. The EAs require that any of these practices shall be assessed on the basis of criteria arising from the application of the rules of arts. 85, 86, and 92 of the Treaty\textsuperscript{382}.

According to a Joint Declaration on the provisions of competition rules concluded with Poland, the "Parties may request the Association Council at a later stage, and after the adoption of the implementing rules referred to in Article 63 (3), to examine to what extent and under which conditions certain competition rules may be directly applicable, taking into account the progress made in the integration process between the Community and Poland"\textsuperscript{383} (emphasis added).

It is interesting in the outset to note that the parties have decided in the Joint Declaration what the effects some competition rules should have in the Community legal system. Therefore, if national courts of the Associated countries and of the Member States are to apply the competition rules in the Agreements themselves and those adopted by Association Council decisions and implement these provisions, such national courts will be expected to do so with regard to the case-law of the Court. In fact, the wording of these provisions is practically identical to the wording of arts. 85, 86 and 92 of the Treaty and their interpretation "shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty [...]" (emphasis added)\textsuperscript{384}. The Joint Declaration emphasises that which one author recently pointed out,

\textsuperscript{381} Art. 62 (1) of the Agreement with Hungary and art. 63(1) of the Agreement with Poland.
\textsuperscript{382} Art. 62 (2) of the Agreement with Hungary and art. 63 (2) of the Agreement with Poland.
\textsuperscript{383} Annex of the Agreement, Joint Declaration art. 11 on article 63 of the EC-Poland Europe Agreement, [1993] O.J. No. L 348/180.
\textsuperscript{384} Art. 62 (3) of the Agreement with Hungary and art. 63 (3) of the Agreement with Poland.
i.e. that "[...] at least, they (i.e. the national courts of the Associated states) may need to take account of that case law which defines direct applicability and its legal effects."  

The principles of applicability of EC competition law are established Community law and have been elaborated in different instances by the Court. In the event that the Associated states' national courts apply the competition provisions contained in the EAs, they will most certainly take into account the case-law of the Court in analogous if not identical issues at Community level.

Direct applicability by national courts of the Associated countries and direct effect of the competition rules of the EAs in the Community legal system are therefore likely. The various EAs, through their "voluntary legislative and judicial harmonisation" process, favour the eventual direct applicability of competition rules, and both the Community and the Associated states "may request the Association Council, at a later stage" to lay down the conditions and criteria for direct applicability. The provisions of the EAs themselves and in the provisions of the decisions of the Association Council are both subject to legal and political arguments for eventual judicial enforcement of these competition rules by the Member States' courts. Nevertheless, for the moment, the application and interpretation of certain competition rules proposed in the Joint Declaration are only at a very early stage; the implementation of the Association Council is merely and vaguely requested "at a later stage." Furthermore, the issue to be discussed

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385 See Andrew Evans, supra note 335, p. 208.
386 For instance Case 43/69 Brauerei A. Bilger Söhne v. Heinrich and Martha Jehle, Rec 1970 pp 127-144; Case 127/73 BRT v. SABAM [1974]Ecr 51, especially at 62 stating that "as the prohibitions of articles 85 (1) and 86 tend by their very nature to produce direct effects in relation between individuals, these articles create direct rights in respect of the individuals concerned which national courts must safeguard".
387 See Andrew Evans, supra note 335, pp. 204-206.
388 Art. 11 of the Joint Declaration, supra note 383.
will be to know whether the will of the parties in the Joint declaration will, if at all, influence the Court's own findings in future cases.

Section 2:

Rights of Associated country nationals: movement and employment of migrant workers

Art. 48 of the Treaty secures free movement of workers within the Community and entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". This includes the right, among others, to seek employment, to accept offers of employment and to remain in the territory of a host Member State after being legally employed in that State, subject to certain national conditions. Analysis of previous Association or Cooperation Agreements and their Acts of Accession clearly show that in this sensitive sphere the Community is rather reluctant to extend these rights to nationals of new Member States. Indeed, the transitional provisions of the Greek, Spanish and Portuguese documents suspended for seven years the regulation of free movement of workers. In this respect, the EEA Agreement surpasses the level of liberalisation provided by the former Acts of Accession in the transitional period and reiterated art. 48 of the Treaty, and orders the application of Regulation 1612/68.

The understandable lack of generosity in the EAs becomes particularly clear through the legal and political hesitations which relate to the prospect of population movements.

389 Art. 28 EEA prescribes the abolition of any discrimination based on nationality between workers of the EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.
"seeking economic salvation"\textsuperscript{390} in the Community, which currently faces an unprecedented high rate of unemployment. Highlighting a major difference between the EEA Agreement and the EAs, which were negotiated and signed during a similar period, will provide evidence. The EAs, contrary to the EEA, seek to improve the situation of those nationals of the Associated states who are already established in the Community; there exists neither the right for an individual to freely move between the Member States nor the right to seek work in the Community. In this respect, the EAs are identical to the right of migrant workers in the Ankara Agreement which also did not grant a right of entry into the Community. In fact, no Community agreement as such has granted rights of entry into the Community directly except the EEA Agreement, which has extended rights of free movement to EEA nationals\textsuperscript{391}. It has been only through progressive stages that the Association Council in the Ankara Agreement implemented the provisions securing the freedom of movement of Turkish migrant workers by adopting a decision\textsuperscript{392}.

The separate status of third country nationals has given rise to a range of provisions in the Ankara Agreement as such and in decisions by the Association Council, which govern their legal position within the Community. The EAs as such for their part provide a number of separate rights, which will be described below: (1) rights of entry including the question of free circulation within the Community, (2) rights of residence and access to legal employment within the Member States and (3) the right to equality of treatment for legally resident third country nationals in matters of employment conditions and social security.

\textsuperscript{392} See Decisions 2/76 and 1/80 of the Association Council, supra note 87.
The discussion will be limited to the sensitive issue of natural persons for both the Member States and Associated countries and will focus on the possibly enforceable rights of migrant workers under the various EAs. Furthermore, due to the limited scope of this discussion, the more specific questions of competence and mixity between the Community and the Member States, especially in the fields of immigration and visa policy, which remain contentious issues, will not be treated in depth.

A) Immigration and circulation rights

The EAs do not grant any right of entry into the Community and therefore the prerogatives of the Member States that control and regulate immigration policy are maintained as their chasse gardée. As seen in Part One, the powers of the Association Council are limited to merely providing recommendations for the improvements of the movement of workers during the second stage of the transitional period of the various EAs. As in the Association Agreement with Turkey, the entry of Central and East European nationals into the Member States remains a matter for existing national law, a principle which has been confirmed repeatedly by the Court. Indeed, the Court stated in the Kus case that only Turkish workers duly registered as belonging to the labour force of the Member States could profit from Decision No 1/80 of the Association Council; this Decision grants rights only to workers already legally resident in one Member State, rights on which legally employed workers may then rely upon in a national court of the Union.

393 See, especially pages 18-22.
394 Art. 42 of the Agreements with Hungary and Poland.
395 supra note 284, at para 25.
The Court confirmed that under the current state of law, the different approaches of national laws of the Member States could give rise to differences of treatment for Turkish nationals within the Community.

"Decision 1/80 does not encroach on the power of the Member States to regulate the entry of Turkish nationals into their territory and the conditions of their first employment. Article 6 of the Decision only regulates the situation of Turkish workers who are already duly registered as belonging to the labour force of the Member States". (emphasis added)

Contrary to what has been the situation for the Turkish migrant workers in the Turkey Association Agreement\(^{396}\), and spelled out more completely in the Additional Protocol of 1970\(^{397}\), the decision-making power of the Association Council in the EAs can only improve the movement of workers that are legal residents in one of the Member States of the Community by making recommendations. It is important to note that this power cannot grant rights to individuals and cannot be directly relied on by an individual migrant worker before a national court of a Member State. Therefore, the situation of migrant workers is less elaborated and generous than in the previous Ankara Agreement, concluded at a time where labour force from third countries was needed in the Community.

Even if a worker is legally resident in one Member State, there is no direct right of free circulation for third country nationals between the Member States under Community

\(^{396}\) Art. 12 of the Association Agreement with Turkey envisages eventual free movement of persons, and states that "the parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them", [1973] O.J. SPEC. ED. 1.

\(^{397}\) Under art. 36 of the Protocol, freedom of movement is achieved by progressive stages through decisions of the Council of Association. See especially Decisions 2/76 and 1/80 of the Association Council, supra note 87.
law. There exist only derived rights for family members of migrant workers who are legally resident in a Member State or free circulation between the Schengen Agreement countries.

B) Residence and Access to employment

The rights of employment under the EAs are much less developed than in the EEA Agreement and in the Turkey Association Agreement. Decision 1/80 of the Turkey Association Council contains provisions which grants rights to individuals and which can be granted directly effective rights. This decision essentially grants to Turkish workers, who are already legally resident in that state, free access to employment within a Member State after four years of employment in that State. Although initially Decision 1/80 only explicitly conferred the right to work, the Court has implied a right of residence from the right of employment. Indeed, in the Kol case, the Court held that,

"[...] legal employment within the meaning of the first indent of Article 6 (1) presupposes a stable and secure situation as a member of the labour force of a Member State and, by virtue of this, implies the existence of an undisputed right of residence." (emphasis added)

Decision 1/80 also grants certain rights to members of the family of legally resident Turkish workers, which have also been held to be directly effective.

Under the EAs, initial access to the labour market within the Community remains firmly in the hands of the competence of the Member States, and legal residents have no

398 Belgium, Germany, France, Luxembourg, The Netherlands, Portugal and Spain.
399 supra note 2, at para 21.
right to a work permit. The question of mixity favours the Member States' national policy and they have only consented to "examine the possibility of granting work permits to [...] nationals already having residence permits in the Member State concerned [...]" (emphasis added)\(^{400}\). The situation is thus clear; there are no Association Council decisions that may grant a right to work continuously nor are there any that implicitly grant a residence permit after specified periods of employment. Nor is it clear that the Association Council is envisaged as being able to grant directly enforceable rights, since Member States have the ultimate discretion to improve third country nationals' access to the labour market.

Again, in contrast to the Ankara Agreement's provisions and Association Council decisions on migrant workers, the EAs do not automatically extend the rights of residence to members of the family of any Associated state worker legally employed within a Member State. Indeed, only "with the exception of seasonal workers and of workers coming under bilateral agreements"\(^{401}\) can the worker's spouse and children have the right to access to the labour market of the host Member State. The Member States thus maintain under previous bilateral agreements the right to refuse access to the labour market. The saturated situation of the labour market within the Community is a factor which has clearly been taken into consideration in the drafting of the EAs.

Furthermore, as a corollary of the right of establishment, the EAs secure improvements in the sphere of key personnel, providing that "the beneficiaries of the rights of establishment granted [...] shall be entitled to employ, or have employed by one of their subsidiaries, in accordance with the legislation in force in the host country of establishment, in the territory of [Hungary/Poland] and the Community respectively,

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\(^{400}\) Art. 41 (3) of the Agreement with Poland, and a similar provision is absent in the Agreement with Hungary and in other eight EAs.

\(^{401}\) Art. 37 (2) of the Agreements with Hungary and Poland.
employees who are nationals of Community Member States and [Hungary/Poland] respectively, provided that such employees are key personnel [...]. The residence and work permits of such employees shall only cover the period of such employment\textsuperscript{402}.

C) Equality of Treatment

It is important to take note of the extremely cautious and protectionist attitude of the Community and the Member States towards the rights of legally resident migrant workers and family members in the EAs as well as the lack of judicial enforcement in the national courts of the Member States. Nevertheless, a certain amount of progress can be traced in relation to the integration of these legally resident migrant workers and this reflects the desire on the part of the Community to avoid any possible accusations of discriminatory treatment of migrant workers of CEECs within the Community.

The Additional Protocol to the Turkey Association Agreement contains a provision that has the objective of non-discriminatory treatment for Turkish workers within the Community without requiring full national treatment. Similarly, Decision No 1/80 of the Association Council\textsuperscript{403} establishes a full non-discrimination clause regarding remuneration and other conditions of work. Furthermore, Decision No 3/80 of the Association Council deals with social security schemes, a complex agreement which substantially incorporates Regulation 1408/71, but with some minor amendments\textsuperscript{404}.

Recently, Decision No 3/80 has been refused direct effect\textsuperscript{405}. Indeed, in the Taflan-Met case\textsuperscript{406}, the Court, in order to refuse direct effect, held that,

\textsuperscript{402} Art. 52 of the Agreements with Hungary and Poland.
\textsuperscript{403} Art. 10 of Decision 1/80.
\textsuperscript{406} supra note 201, at paras 26 and 30 of the judgment.
"the purpose of Decision No 3/80 is to coordinate the Member States' social security schemes with a view to enabling Turkish workers employed or formerly employed in the Community, members of their families and their survivors to qualify for benefits in the traditional branches of social security, [...] comparison of Regulations Nos. 1408/71 and 574/72, on the one hand, and Decision No 3/80, on the other, shows, however, that the latter does not contain a large number of precise, detailed provisions [...]."

(emphasis added)

*Taflan-Met* can nevertheless not be considered as overruling the previous case-law of the Court; Decision 3/80, contrary to Decision 1/80, is largely programmatic and lacks precise and clear provisions. Additionally, the question of direct effect in *Taflan-Met* was only of secondary importance. Indeed, Advocate General La Pergola in his Opinion stated that,

"[...] Decision No 3/80 does not specify the date on which it is to enter into force. [...] On that view, the rules contained in Decision No 3/80 are anything but complete and it requires appropriate implementing measures before it can be brought into force. [...] If, for the reasons already explained, the decision is not yet applicable-and does not therefore constitute an integral part of the Community legal order-it cannot be seen what legal effects it can have".

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407 *supra* note 201, at points 6 and 15 of the Opinion.
Since Decision 3/80 has not yet become part of the Community legal order, it cannot have any effect in that legal order; the question of direct effect becomes superfluous.

Ironically, the Cooperation Agreements with Morocco, Tunisia and Algeria have objectives of legal integration that are less elaborate than the Ankara Agreement and yet the provisions themselves on social security in these Agreements which prohibit discrimination against workers and members of their families living with them have been held to grant rights to individuals and to be directly effective. The provision on non-discrimination regarding social security was held to be directly effective for the first time in the *Kziber* case\(^{408}\), and this has been recently confirmed in the *Hallouzi-Choho* decision\(^{409}\), both cases forming part of the Morocco Cooperation Agreement\(^{410}\). In both cases, the Court concluded that the provision granted rights to individuals and that persons to whom it applied were entitled to rely on it before national courts of the Union.

As described above in Part Two, the Court's granting of direct effect for the provisions on social security in these Cooperation Agreements illustrates that its decision was based neither on the objectives of the Agreements as such, namely on mere cooperation and economic development, nor on the spirit of the Agreements.

The rights explicitly mentioned in the Cooperation Agreements include the following: aggregation of periods of insurance, employment and residence in different Member States, the right to family allowances for family members resident in the Community and the right to transfer pensions and other benefits to the state of origin. It is important to

\(^{408}\) *supra* note 256, at para 17.

\(^{409}\) *supra* note 258, at para 21.

\(^{410}\) Art. 41 (1) of the Agreement contains a principle of non-discrimination providing that workers of Moroccan nationality and any members of their families living with them are to enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed.
note that the concept of 'social security' is limited not only to these rights. Indeed, in the Krid\textsuperscript{411} and Yousfi\textsuperscript{412} cases, the Court defined the concept of 'social security' contained in the provision of the Morocco Cooperation Agreement as analogous to the identical concept in Regulation 1408/71. Therefore 'social security' must include, although not expressly mentioned in the provision, unemployment benefits and disability allowances. Furthermore, in contrast to that which has been the case in Turkish Association Council Decision 1/80, the concept of 'worker' also included those who have left the labour force permanently as a result of retirement, illness or injury, or even the children to whom these rights can be transferred.

Under the EAs, the equal treatment provisions are applicable to "working conditions, remuneration or dismissal"\textsuperscript{413}. In contrast, with respect to the directly applicable and directly effective social security provisions in the Cooperation Agreements, the EAs contain no general equal treatment clause. Only specific social security benefits are addressed in the provisions of the EAs\textsuperscript{414}, namely the following: aggregation of periods worked in different Member States for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care, the transfer of benefits such as any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or invalidity resulting therefrom, with the exception of non-contributory benefits, and, finally, family allowances for members of the family legally resident in the Member State in which the worker is legally employed. The only fact that they are more specific does not prevent in appropriate cases that they could be directly applicable and directly effective.

\textsuperscript{411} supra note 260, at para 25.
\textsuperscript{412} supra note 257, at paras 26-28.
\textsuperscript{413} Art. 37 (1) of the Agreements with Hungary and Poland.
\textsuperscript{414} Art. 38 (2) of the Agreements with Hungary and Poland.
The objectives of these different provisions are to be implemented "by decision" of the Association Council\textsuperscript{415}. It will only be in these very specific and explicitly foreseen areas that direct effect may be granted but only once the Association Councils have implemented these provisions through their decision-making power.

The fact that the equal treatment clause in the EAs is not general but only applies to 'working conditions, remuneration, or dismissal' for legally employed workers from CEECs, is indicative of a different treatment for migrant workers and members of their family in the CEECS compared to the previously described general social security provisions which have been interpreted in the previous Cooperation Agreements with Morocco, Tunisia and Algeria.

Section 3:

Free movement of goods

The area in which certain rights might be granted more willingly and rapidly to the Associated country nationals and on which they then might be able to rely on before a national court of the Union, is the Title III on "Free movement of goods". We have seen that the Title on Movement of workers makes it difficult and sometimes impossible for migrant workers to rely on rules in the EAs as such or even, in small areas, on decisions of the Association Council. The situation which concerns the movement of goods differs and is more likely to be at the advantage of nationals from CEECs.

In fact, some provisions of Title III resemble in substance and in wording to provisions of the Treaty, which already, on several occasions, have been granted direct effectiveness. Due to the highly complex and elaborated chapters within Title III and due

\textsuperscript{415} Art. 39 of the Agreements with Hungary and Poland.
to additional listed Annexes concerning specific sensitive goods to whom more specific
and more stringent rules apply, the main content of this analysis is to focus on products
which are not specifically listed in these Annexes and which fall under Chapter IV
"Common provisions"\(^{416}\). The common provisions "shall apply to trade in all products
except where otherwise provided herein"\(^{417}\).

A) Provisions on customs duties on imports and exports

Arts. 9 and 12 of the Treaty prohibit the introduction of any new customs duties on
imports or exports, or any charges of equivalent effect, and provide for the establishment
of a customs union in which such duties and charges are prohibited. The EAs also
prohibit new customs duties and charges having an equivalent effect\(^{418}\); the only major
difference with art. 9 of the Treaty is that the EAs provide merely that they "[...] shall
gradually establish a free trade area [...]"\(^{419}\) and the purpose is not to create a customs
union.

Already at a very early stage in the legal development of the Community, and even
while the gradual elimination of customs duties was proceeding, the Court held in the
Van Gend & Loos saga that art. 12 of the Treaty had direct effect. In the
Diamentarbeiders case\(^{420}\), the Court furthermore held that in conjunction arts. 9 and 12
of the Treaty had direct effect.

If therefore, by analogy, an importer or exporter from a CEEC is faced with a charge
which conflicts with the identical worded provisions in his EA, he may either refuse to
pay and then defend his granted rights in a national court of the Union against any action

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\(^{416}\) Arts. 24-36 of the Agreements with Hungary and Poland.
\(^{417}\) Art. 24 of the Agreements with Hungary and Poland.
\(^{418}\) Art. 25 of the Agreements with Hungary and Poland.
\(^{419}\) Art. 7 of the Agreements with Hungary and Poland.
\(^{420}\) Joint Cases 2 and 3/69 [1969] ECR 211, at p. 223
arising out of that refusal, or simply pay up and then sue for repayment, or take whatever other remedy which may be open to him in that national court.

Additionally, if an individual from a CEEC considers that he is being taxed in contravention of the similar worded provision of art. 95 of the Treaty\textsuperscript{421}, he has also a right of action in the national courts of the Union, considering the solution adopted by the Court, in the \textit{Lüttike}\textsuperscript{422} and \textit{Molkerei}\textsuperscript{423} cases, dealing with intra-Community trade, in which it granted direct effect to the tax provisions.

B) Quantitative restrictions on imports and exports

Art. 30 of the Treaty contains a general prohibition in trade between Member States of restrictions on imports and of all measures having equivalent effect. Art. 31 of the Treaty prohibits any new quantitative restrictions or equivalent measures. Art. 34 prohibits quantitative restrictions on exports and equivalent measures. All these provisions, as we have seen, have their counterparts in the field of customs duties.

The EAs on their side include these arts. 30, 31 and 34 in a single and similar worded provision; indeed, art. 25 (2) of the Agreements with Hungary and Poland provides that, "No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced nor shall those existing made more restrictive in trade between the Community and [Hungary/Poland] from the date of entry into force of this Agreement".

\textsuperscript{421} Art. 26 (1) and (2) of the Agreements with Hungary and Poland. The wording of the fiscal or tax prohibition only differs slightly with the Treaty provision. The positive obligation in art. 95 “shall impose” becomes in the EAs “shall refrain from”.
\textsuperscript{422} Case 57/65 [1966] ECR 205.
\textsuperscript{423} Case 28/67 [1968] ECR 143.
Art. 30 of the Treaty has been granted direct effect by the Court in several occasions\textsuperscript{424}; since the \textit{lannelli v. Meroni} case, the Court rigorously held that because art. 30 was mandatory and explicit, and its implementation did not require any subsequent action by the Member States or the Community institutions, it therefore had direct effect. By analogy to art. 30 of the Treaty, the nearly identically worded art. 25 (2) of the Agreements with Hungary and Poland should also lend itself to direct effectiveness. The normal situation in which the principle of direct effect could be invoked under the EAs would be where persons from CEECs seek to challenge the lagality of some act of a national government of the Union or other public agencies, with delegated powers, of the Union which infringes the EAs.

Since art. 30 of the Treaty was accorded direct effect, it has been inevitable that the exemption under art. 36 had also similar effect\textsuperscript{425}. The EAs have adopted an identical provision\textsuperscript{426} and have additionally considered understandable exceptional protective measures in the Associated states for "infant industries, or certain sectors undergoing restructuring or facing serious difficulties"\textsuperscript{427}.

\textsuperscript{426} Art. 35 of the Agreements with Hungary and Poland.
\textsuperscript{427} Art. 28 of the Agreements with Hungary and Poland.
**Concluding Remarks**

The Europe Agreements' experiment is a new-born experience in the framework of a *new generation* of Association Agreements concluded with the Community; they have not yet had a real opportunity to test both their legal dynamism and legal integration in the Community order.

Association Agreements with Central and Eastern European countries raise both dangers and costs, but neither is totally unavoidable nor unmanageable in the long run. Some costs of association, and eventually of enlargement, must be simply accepted as the price of locking these countries back into the European integration process and the expected costs may ultimately be counterbalanced by the overall benefits of association. The benefits of association can be compared to similar previous agreements concluded
with the Community, which have arisen in different forms of market integration. Furthermore, the Europe Agreements can be upgraded by several additional measures with the result of creating more dynamic effects of market integration through an extended association with CEECs. As far as the legitimate fear of ever growing unemployment within the Union is concerned, it can be treated by appropriate economic policy measures where the negative consequences can be reduced to a tolerable level.

It is very important to stress that an association is not automatically beneficial, and comprehensive integration strategies and measures are to be developed through the framework of the Europe Agreements, both at Community and domestic policy levels. It is nevertheless important to note that an association, and eventually membership with CEECs, could provide great but yet intangible benefits and extensive business and market opportunities for the Member States of the Union. It is not too farfetched to suppose that in CEECs, as a result of substantial ongoing structural modernisation and market expansion, there are good reasons and prospects for economic growth.

However, dynamic market integration goes hand in hand with prerequisite dynamic legal integration; the reasons for the yet untested experience of the Europe Agreements in the Community legal system are pertinent to the more specific but not less relevant questions of their possible direct effect in Community law, by analogy to previous international agreements. The balance which the Community has struck over the years in order to grant direct effect to various existing Community agreements is unlikely to prove satisfactory if the Court continues, for instance, to refuse to grant direct effect as it did in the case of the WTO rules. The criteria that the Court has chosen are inconsistent and and its underlying policy is far from coherent. The twofold test which it has used over the years has not evolved in an organic manner; the different types of agreements
that the Community has thus far concluded has also influenced the Court's considerations for its method of interpretation. The case-law has proven to be incoherent, and the discussion has attempted to highlight such an ambivalence. In addition, any attempt at standardisation or rationalisation of that sparse and unruly case-law for future cases will not be an easy task.

By virtue of their number and their political and legal importance, it is difficult for the Community and more particularly for the Court, in the light of what it has done before in similar international agreements, to be an unequal and less favourable partner for the Associated states from Central and Eastern Europe. The fact that until now the issue of the possible direct effectiveness of the Europe Agreements in various important areas has not yet been ruled by the Court has been the starting point and overall motivation to investigate that important and still untested field. A coherent and thorough discussion on this question with regard to previous Community agreements has helped to support the argumentation of the eventual granting of direct effect to both provisions of the Europe Agreements as such and to provisions of decisions adopted by the Association Council.

It is already apparent and evident, in the light of the provisions in the EAs, that the Court will be less generous with Central and East European migrant workers than it has been the case, for instance, in the Ankara Agreement; therefore, the attempted analogy with previous Association or Cooperation Agreements has proven to be unsustainable. The Community's current and overall unemployment rate and fear of immigration has undoubtedly been taken into consideration in the drafting of the Europe Agreements.

Furthermore, the spheres in which direct effect could be successfully invoked before a national court of the Union are certain provisions on competition and free movement of

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428 Case-law of the Court updated to September 28 1997.
goods, even if political considerations in the area of competition and the complexity of exemptions and special treatment of some listed goods may render such an argumentation more doubtful.

The practical consequences of granting direct effect to certain provisions in the EAs or in Association Council decisions are clearly important for the legal integration of the EAs as a whole in the Community legal system and eventually in the various legal orders of the Associated states; a private applicant will be able to raise issues which are granted to him in the EAs that the Court can integrate into Community law or that a court from a CEEC may integrate, in the light of probable forthcoming accession to the Union, into the national legal system of that country.

Generally, the Europe Agreements are to be welcomed. They have established a legal and political framework for the development of a much deeper and more structured cooperation between the Community and the Associated states from CEECs than has hitherto been possible and envisagable. They have also laid the foundations for an expanded European Union. Ultimately, it will not be a long time before the Court decides on the very issue discussed herein, and it will be of the utmost importance to verify if and to what extent the Court will apply its current balance to the new Europe Agreements.
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Case C-395/95, Geotronics SA, judgment of 22 April 1997, not yet reported
ANNEX I

CONSEIL DE L'UNION EUROPEENNE
BUREAU DES ACCORDS

28/07/97

Accord européen établissant une association entre les Communautés européennes et leurs États membres, d'une part, et la République de Pologne, d'autre part

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28/07/97

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Accord européen établissant une association entre les Communautés européennes et leurs États membres, d'une part, et la République d'Estonie, d'autre part

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| CE |  |
| LETTONIE | 28/09/95 |

**DATE D'ENTREE EN VIGUEUR**
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Accord européen établissant une association entre les Communautés européennes et leurs Etats membres, agissant dans le cadre de l'Union européenne, d'une part, et la République de Slovénie, d'autre part.

| DATE DE SIGNATURE | 10/06/96 |
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ANNEX II

European Council: Conditions and Requirements of Enlargement

Copenhagen, June 1993
- Each application is to be considered on its own merits
- CEEC acid meeting shall become members
- stability of institutions
- democracy
- rule of law
- human rights
- protection of minorities
- functioning of market economy
- ability to cope with competition in the Union
- Structured relationship, multilateral dialogue
- Capacity of EU to absorb new members

Corfu, June 1994
- Cyprus and Malta to be involved in next phase of enlargement
- CEEC implementation of Europe Agreements is essential condition for accession
- IGC must ensure proper functioning of EU; Conclusion IGC before accession negotiations begin

Essen, December 1994
- Confirmation involvement of Cyprus and Malta in next phase of enlargement
- CEEC strategy to prepare them for accession:
  - structured relationship
  - greater trade access
  - adoption of internal market measures
  - trans-European networks
- Commission to analyze effect of enlargement on EU

Cannes, June 1995
- Accession negotiations with Cyprus and Malta to begin six months after the IGC on the basis of Commission proposals in view of outcome IGC
- CEEC: preparation of accession important, especially integration in internal market

Madrid, December 1995
- Enlargement is politically necessary, an historic opportunity and offers new prospects for growth
- Applicants are treated on an equal basis
- Accession negotiations with Cyprus and Malta will commence six months after the IGC
- Hopes preliminary stage of negotiations with CEEC coincides
- Commission to prepare:
  - composite paper on enlargement
  - advice on applications to be submitted after the IGC
  - studies on the effects on agriculture, structural policies and finances (after the IGC)

Turin, March 1996
- Enlargement is a historic mission and a great opportunity
- EU must:
  - preserve capacity for action
  - maintain acquia communautaire
  - sustain the nature of European construction based on:
    - democracy
    - efficiency
    - solidarity
    - cohesion
    - transparency
    - subsidiarity

Florence, June 1996
- Assuming good functioning of institutions, while respecting their balance and the efficiency of the decision-making process.
- Commission’s opinions and reports on enlargement should be available as soon as possible after the completion of the 1996 IGC, in order for the initial phase of negotiations of the Associated countries to coincide with the beginning of negotiations with Cyprus and Malta.
- Importance of strategy for preparing the Associated countries for accession emphasized.