An Analysis of Direct Effect and Judicial Review Pre- and Post-Lisbon

ZIPPERLE, NADINE

Nadine Christine Zipperle
EU International Agreements
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Abstract

The aim of this dissertation is to investigate the institutional and legal effects of international agreements. It is structured in three chapters. The first chapter will be concerned with the Court's case law on direct effect of international agreements (GATT/WTO, free trade associations with EFTA and with non-EFTA countries, accession associations, development associations and EEA). The second chapter will be concerned with the general issues and practice on international agreements in the CFSP and FSJ, and will integrate sections on direct and indirect effect. The chapter will be thus organised as follows: Section 1 will deal with the international legal personality of the Union; Section 2 will deal with the practice on EU agreements; Sections 3 and 4 will deal respectively with direct effects and indirect effects and will address a vertical dimension (*vis-à-vis* national legislation). The third chapter will give an overview of the jurisdiction of the Court on EU international agreements. The chapter will be thus organised as follows: Section 1 will look at the jurisdiction of the Court on EC agreements (by now EU) before and after the Lisbon Treaty reforms; Section 2 will look at the jurisdiction of the Court on agreements concluded in the fields of CFSP and PJC (by now FSJ) before and after the Lisbon Treaty reforms; Section 3 will consider the standard of review in general.

The findings of this study are that the notion of direct effect as applied by the Court in cases involving international law cannot be transposed to international agreements in the CFSP and FSJ; arguments in favour of direct effect seem less thorough and less elaborated on. Article 40 TEU, as one of the heads of the jurisdiction that the Court had and now has on a reformed basis, could be relevant for giving the Court *ex post* jurisdiction on an international agreement, at least as far as the competence question is concerned. Article 218 (11) TFEU is a potential inroad into the CFSP exemption. Article 275 (2) TFEU is again one of the potential inroads into the CFSP for the Court.

Overall, the interests and rights of private parties would be better served by a more extensive role of the CJEU.

EU International Agreements

An Analysis of Direct Effect and Judicial Review Pre- and Post-Lisbon

Nadine Christine Zipperle

Submission for the degree of Doctor of Philosophy

Department of Law
Durham University
2015

For my parents.

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List of Abbreviations

General

AA - Association Agreement
Acc. - Accession
ACP - African, Caribbean and Pacific countries
AG - Advocate General
ALTHEA - European Union military crisis management operation in Bosnia and Herzegovina
AMM - Aceh Monitoring Mission
ATBT - Agreement on Technical Barriers to Trade
BiH - Bosnia and Herzegovina
CA - Cooperation Agreement
CCP - Common Commercial Policy
cf. - *confer*, compare
CFSP - Common Foreign and Security Policy
ch. - chapter
CISA - Convention implementing the Schengen Agreement
CJ – Court of Justice
CJEU - Court of Justice of the European Union
CJH - Justice and Home Affairs
CSDP - Common Security and Defence Policy
DA - Development Agreement
DCT - Draft Constitutional Treaty
DHS - United States Department of Homeland Security
DSB - Dispute Settlement Body (WTO)
DSU - Understanding on Rules and Procedures Governing the Settlement of Disputes
EA - Europe Agreement
EAC - European Atomic Energy
EC - European Community
ECHR - European Convention on Human Rights and Fundamental Freedoms
ECJ – European Court of Justice (see also CJEU - Court of Justice of the European Union)
ECOWAS - Economic Community of West African States

ECSC - European Coal and Steel Community

ECtHR - European Court of Human Rights

ed(s) - edition, editor(s)

EEA - European Economic Area

EEC - European Economic Community

EFTA - European Free Trade Association

e.g. - *exempli gratia*, for example

ESA - European Space Agency

ESDP - European Security and Defence Policy

E.T.A. - Euskadi Ta Askatasuna

et al - *et alii*, and others

etc. - *et cetera*, and so forth

et seq - *et sequens/sequentes*, and following page/pages

EU - European Union

EUF - European Union Forces

EUFOR - European Union`s Military Force

EUFOR RD Congo - European Union Force Democratic Republic of Congo

EUFOR Tchad/RCA - European Union Force Chad/Central African Republic

EUJUST THEMIS - EU Rule of Law Mission to Georgia

EULEX - European Union Rule of Law Mission

EULEX KOSOVO - EU Rule of Law Mission in Kosovo

EUMM - European Union Monitoring Mission

EUNAVOR - European Union-led naval force

EUPM - European Union Police Mission

EUPOL - European Union Police Mission

EUPOL AFGHANISTAN - European Union Police Mission in Afghanistan

EUPOL Kinshasa - European Union Police Mission in Kinshasa

EUPOL Proxima - European Police Mission in the former Yugoslav Republic of Macedonia

EU SSR - European Union Security Sector Reform

FRs - fundamental rights

FRY - Federal Republic of Yugoslavia

FSJ - Area of Freedom Security and Justice

FTA - Free Trade Agreement

FYROM - Former Yugoslav Republic of Macedonia

GATT - General Agreement on Tariffs and Trade

GC - General Court

GOI - Government of Indonesia

ibid - *ibidem*, in the same location

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICJ - International Court of Justice

id - *idem*, same author

IDA - International Dairy Arrangement

IHL - international humanitarian law

JHA - Justice and Home Affairs

MLA - mutual legal assistance

MONUC - United Nations Organisation Mission in the Democratic Republic of the Congo

n (or fn) - footnote

NATO - North Atlantic Treaty Organization

no(s) - numbers

OECD - Organization for Economic Co-operation and development

OMPI - Organisation des Modjahedines du peuple d'Iran

PA - Partnership Agreement

para/paras - paragraph(s)

PJCC - Police and Judicial Co-operation in Criminal Matters

PNR - Passenger Name Records

PNR I Agreement - Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security (DHS)

PNR II Agreement - Following the ECJ judgment, the agreement was adopted under rules of the previous second and third pillars

RCA - Central African Republic

SIS - Schengen Information System

SOFA - Status of Forces Agreement

SOMA - Status of Mission Agreement

TEC - Treaty Establishing the European Community

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

TFTP - Terrorist Finance Tracking Program

TL - Treaty of Lisbon

TRIPs - Trade-Related Aspects of Intellectual Property

UK - United Kingdom

UNCLOS - United Nations Convention on the Law of the Sea

US - United States of America

VCLT - Vienna Convention on the Law of Treaties

vs. - *versus*, against

WTO - World Trade Organisation

Publications

AdV - Archiv des Völkerrechts

A.F.D.I. - Annuaire Français de Droit International

AJIL - American Journal of International Law

CJEL - Columbia Journal of European Law

CLJ - Cambridge Law Journal

C.L.S. Rev. - Computer Law & Security Review

CMLR - Common Market Law Review

Crim.L.F. - Criminal Law Forum

CUP - Cambridge University Press

DS - Recueil Dalloz Sirey

ECR - European Court Reports

Edward Elgar - Edward Elgar Publishing

E.F.A.Rev. - European Foreign Affairs Review

EHRLR - European Human Rights Law Review

EHRR - European Human Rights Reports

E.J.I.L. - European Journal of International Law

ELJ - European Law Journal

ELRev. - European Law Review

EPL - European Public Law

ERA - ERA Forum

EuConst - European Constitutional Law Review

Eur.J.Migration&L - European Journal of Migration and Law

EuropaR - Europarecht

Hart - Hart Publishing

HRL Rev. - Human Rights Law Review

ICLQ - International & Comparative Law Quarterly

ICON - International Journal of Constitutional Law

Int Economic Law - Journal of International Economic Law

IOLR - International Organizations Law Review

J.C.&S.L. - Journal of Conflict and Security Law

JCMS - Journal of Common Market Studies

JDE - Journal de droit européen

JECL - Journal of European Criminal Law

J.I.E.L. - Journal of International Economic Law

JLS - Journal of Legal Studies

JWT - Journal of World Trade

L.I.E.I. - Legal Issues of Economic Integration

Millenium J.Int'l Stud. - Millennium: Journal of International Studies

NQHR - Netherlands Quarterly of Human Rights

NYIL - Netherlands Yearbook of International Law

OJ - Official Journal (EU)

OJLS - Oxford Journal of Legal Studies

OUP - Oxford University Press

Publius - Publius: The Journal of Federalism

RIW - Recht der Internationalen Wirtschaft

RMCUE - Revue du marché commun et de l'Union européenne

RTD eur. - Revue trimestrielle de droit européen

TMC - TMC Asser Press

YEL - Yearbook of European Law

ZaöRV - Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

ZeuS - Zeitschrift für Europarechtliche Studien

ZöR - Zeitschrift für öffentliches Recht

Statement of Copyright

Acknowledgements

First and foremost, I would like to express my sincerest gratitude and special thanks to my principal supervisor, Professor Robert Schütze, for the continued support offered to me. I truly feel privileged to have had a supervisor dedicating so much of his time and enthusiasm to the project.

Furthermore, I would like to thank my second supervisor, Professor Eleanor Spaventa, for comments, suggestions and constructive discussions, which have been invaluable throughout the process of writing this dissertation.

I would also like to acknowledge the financial support of Durham University. In particular, the award of the Doctoral Fellowship has enabled me to undertake the research for this project.

Durham Law School gave me a chance to be involved in teaching. This has provided me with the necessary experience, which I would not have otherwise. I am very grateful for that.

In addition, I am indebted to many friends and colleagues for their valuable support and encouragement.

Last, but certainly not least, I would also like to extend my appreciation and thanks to my family for their love and unconditional support.

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GENERAL INTRODUCTION

A. Setting the problem

In recent years the European Union (EU) has entered into an increasing number of international agreements. Due to lack of parliamentary and judicial scrutiny, EU international agreements raise serious human rights concerns. This may be illustrated by reference to the agreements on extradition/mutual legal assistance between the EU-US,[1] the treaty on the transfer of Passenger-Name-Record data to Homeland Security[2] or the agreement on the transfer of persons suspected of piracy off the Somali coast.[3] The framework is complex:[4] following the de-pillaristaion of the Treaty of Lisbon (TL), and the assimilation of Police and Judicial Co-operation in Criminal Matters to the "Community" model of the former first pillar, the acquis that has been built up under Police and Judicial Co-operation in Criminal Matters merges with that of the

1 Agreements on mutual legal assistance between the European Union and the United States of America [2003] OJ L181/34 and on extradition between the European Union and the United States of America [2003] OJ L181/27.

2 Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) [2007] OJ L204/18.

3 Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 and the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) [2009] OJ L202/84.

4 Intergovernmentalism/supranationality and consequences of international co-operation for individuals, Bernd Meyring, 'Intergovernmentalism and supranationality: two stereotypes for a complex reality' (1997) 22 ELRev. 221, 242.

"Community", changing the structure of the Treaties,[5] and turning Police and Judicial Co-operation in Criminal Matters into an entirely supranational affair.[6] In contrast to the integration logic (supranational model), decision-making in the area of Common Foreign and Security Policy is "subject to specific rules and procedures" (Article 24 TEU), a manifestation of executive politics,[7] and remains dominated by intergovernmental elements,[8] with the use of an intergovernmental method of cooperation.[9]

Despite their growing importance,[10] EU agreements (CFSP and PJC (by now FSJ) agreements) and their tendency to generate derogations from fundamental rights safeguards have received surprisingly little academic attention.[11] Their legal effects are largely unknown;[12] while the amount of studies exploring fundamental rights and Police and Judicial Co-operation in Criminal Matters has seen an enormous increase in the past years,[13] less academic attention has been paid to the notion of fundamental rights in the external policies of the European Union.[14]

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5 See, generally, Steve Peers, 'EU criminal law and the Treaty of Lisbon' (2008) 33 ELRev. 507 and id., 'Finally 'Fit for Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order' (2008) 27 YEL 47.

6 Member States may invoke fundamental aspects of their national systems, e.g. criminal matters and social security, known as the emergency-brake procedure to accommodate national diversity. Articles 48, 82 and 83 TFEU and Article 31 TEU. See, generally, Estella Baker and Christopher Harding, 'From past imperfect to future perfect? A longitudinal study of the third pillar' (2009) 34 ELRev. 25, 26 and 44.

7 To a certain extent supranationalised, '(...) A "sellout of the state's very own competences" is alleged to have taken place. The Common Foreign and Security Policy is alleged to be supranationalised because measures in this area are assigned to the European Union, which is vested with its own legal personality and is no longer represented on the international level by the foreign ministers of the Member States but by the High Representative of the Union for Foreign Affairs and Security Policy (...)'. 2 BvE 2/08 *Gauweiler v Treaty of Lisbon* (Judgment of 30 June 2009), para 103.

8 Please note that the abolition of the possibility of constitutional reservations (Article 24 (5) TEU) challenges the notion of a purely intergovernmental co-operation in CFSP.

9 Paul Craig, 'The Treaty of Lisbon, process, architecture and substance' (2008) 33 ELRev. 137, 149; Laurent Pech, ' "A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 EuConst 359, 389.

10 Editorial Comments, 'The Union, the Member States and international agreements' (2011) 48 CMLR 1 and the synthesis by Christine Kaddous, 'Effects of International Agreements in the EU Legal Order' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Essays in European law, Hart, Oxford 2008) 291.

The research aims therefore at investigating the institutional and constitutional effects of EU agreements (CFSP and PJC (by now FSJ) agreements) with a particular focus on their potential effects on individuals. This doctoral thesis addresses these issues also having regard to the developments contained in the TL, it focuses on primary and secondary sources, including German/French scholarship, and EU and national case law.[15]

[11] The literature on direct effect (self-executing nature) of WTO rules is voluminous. For comprehensive studies: Judson Osterhoudt Berkey, 'The European Court of Justice and direct effect for the GATT: a question worth revisiting' (1998) 9 E.J.I.L. 626-657; Thomas Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 CMLR 325, 367-369; Piet Eeckhout, 'The domestic legal status of the WTO Agreement: Interconnecting legal systems' (1997) 34 CMLR 11, 29-32; Miquel Montañá I Mora, '*Equilibrium*: A Rediscovered Basis for the Court of Justice of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?' (1996) 30 JWT 43-59; Philp Lee and Brian Kennedy, 'The Potential Direct Effect of GATT 1994 in European Community Law' (1996) 30 JWT 67-89; Pieter Jan Kuijper, 'The New WTO Dispute Settlement System—The Impact on the European Community'(1995) 29 JWT 49, 62-65. The problem of direct effect of EU agreements (CFSP and PJC (by now FSJ) agreements) is well known, yet unresolved. For a general analysis (direct effect and interpretation): Robert Schütze, 'European Community and Union, Decision-Making and Competences on International Law Issues' in Wolfrum, Rüdiger (et al, eds), *Encyclopedia of Public International Law* (OUP, Oxford 2011), paras 22-23 and id., 'European Community and Union, Party to International Agreements' in Wolfrum, Rüdiger (et al, eds), *Encyclopedia of Public International Law* (OUP, Oxford 2011), paras 36-39. Francis G. Jacobs, 'Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations: salient features of a changing landscape* (CUP, Cambridge 2008) 13-33 for a constitutional evaluation that the Court is favourably disposed towards direct effect. In his study, Francis G. Jacobs examines the following cases: Case C-63/99 *Gloszczuk* EU:C:2001:488, [2001] ECR I-6369 (Europe Agreement (EA) with Poland); Case C-235/99 *Kondova* EU:C:2001:489, [2001] ECR I-6427 (EA with Bulgaria); Case C-257/99 *Barkoci and Malik* EU:C:2001:491, [2001] ECR I-6557 (EA with the Czech Republic); Case C-268/99 *Jany and Others* EU:C:2001:616, [2001] ECR I-8615 (EA with Poland and the Czech Republic); Case C-162/00 *Pokrzeptowicz-Meyer* EU:C:2002:57, [2002] ECR I-1049 (EA with Poland); Case C-502/04 *Torun* EU:C:2006:112, [2006] ECR I-1563 (EEC-Turkey Association); Case C-265/03 *Simutenkov* EU:C:2005:213, [2005] ECR I-2579 (Communities-Russia Partnership Agreement); Case C-23/02 *Alami* EU:C:2003:89, [2003] ECR I-1399 (EEC-Morocco Cooperation Agreement); Case C-97/05 *Gattoussi* EU:C:2006:780, [2006] ECR I-11917 (Association Agreement with Tunisia). His analysis relies most heavily on *Pokrzeptowicz-Meyer* and *Simutenkov.*

[12] Christine Kaddous (n 10) 299 '[t]he legal effects of such agreements are largely unknown because of the lack of relevant case law. The Court has not rendered rulings similar to those of *Haegeman* or *Commission v Ireland*'; Thym does provide a useful insight when states that: 'rechtliche Parallele besteht nur dahin gehend, dass Verträge der Gemeinschaft und der Union gleichermaßen ein integrierender Bestandteil der Gemeinschafts- bzw. Unionsrechtsordnung sind [legal parallel exists only to the extent that agreements concluded by the Community and the Union equally form an integral part of the Community, or Union legal order]' Daniel Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 ZaöRV 863, 900-01.

[13] For a detailed analysis, Steve Peers, 'Human Rights and the third pillar' in Philip Alston (ed), *The EU and Human Rights* (OUP, Oxford 1999) 167. The question of the bite of fundamental rights – the institutional scheme of the Treaties and a critical view of the judicial arrangements in pre-Lisbon's third pillar: Eleanor Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 EuConst 5, 6-8; and Steve Peers, 'Salvation outside the Church: Judicial protection in the third Pillar after the *Pupino* and *Segi* judgments' (2007) 44 CMLR 883, 885-902. The status of fundamental rights in EU law, before and after Lisbon, Dorota Leczykiewicz, '"Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law?' (2010) 35 ELRev. 326-348. Fundamental rights gap(s) created by the exercise of powers by executives, Eleanor Spaventa, 'Counter-terrorism and Fundamental Rights: judicial challenges and legislative changes after the rulings in *Kadi* and *PMOI*' in A Antoniadis, R Schütze & E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart, Oxford/Portland 2011) 105-123 with a focus on the EU regimes (both the UN-derived and the EU-own). See, further, Alicia Hinarejos, 'Recent human rights development in the EU courts: the Charter of Fundamental Rights, the European Arrest warrant and terror lists' (2007) 7 HRL Rev. 793, 795-811.

[14] E.g. Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 E.J.I.L. 468, 469. For a general analysis, Martine Fouwels, 'The European Union's Common Foreign and Security Policy and Human Rights' (1997) 15 NQHR 291.

[15] The selection of languages (English, German, French) mirrors those the author is able to read.

B. *Incurse*

This *Incurse* applies a comparative law approach. The United States, like the European Union, has different types of agreements. It distinguishes in treaties (Article II, s. 2 of the US Constitution provides that the President has the power by and with the advice and consent of the Senate to make treaties) and Executive Agreements. Some are made by joint authority of the President and Congress and some are made on his own authority. Two main conclusions are drawn. Firstly, treaties with requiring Senate consent (Article II, s. 2 of the US Constitution referred to as "Article II treaties"), 'Congressional-Executive agreements' made by joint authority of the President and Congress and sole Executive agreements follow same constitutional principles. Secondly, CFSP agreements are similar to sole executive agreements concluded by the executive branch and not submitted to the Senate.

1. Typology of the existing agreements

Issues in treaty-making are between the President and the Senate (one chamber of Congress), acting in an executive capacity. For agreements that qualify as 'treaties' the President needs the consent of the Senate. International agreements exist in two categories:

a) Treaties with requiring Senate consent (Article II, s. 2 of the US Constitution referred to as "Article II treaties"), and

b) Executive agreements (Congressional-Executive agreements and sole Executive agreements).

Treaties with requiring Senate consent; that is, the President can make (bind the US to) the international agreement if the Senate has consented to it (serves to limit and diffuse the treaty power).[16]

Congressional-Executive agreements; that is, agreements made by the President if authorised (or approved) by both houses of Congress (approval by simple majority of both houses), are available for wide use. For instance, used regularly for trade and postal agreements. Congressional-Executive agreements give both houses equal authority to advise and consent, thus to veto or modify the agreement. In the case of a treaty made with Senate consent both houses are obligated to enact required implementing legislation and to appropriate the necessary funds for implementation.[17]

Sole Executive agreements; that is, the President can make (bind the US to) some international agreements on his own authority, without consent of the Senate. For instance, used at least for agreements related to recognition of a foreign government, or establishing or resuming diplomatic relations, or agreements to settle claims. Such agreements do not engage executive responsibility.[18]

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16 Article 2, Section 2, of the Constitution (that is, the constitutional provision conferring power to make international agreements) provides: '[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.' The U.S Constitution entrusted making agreements with other states – bilateral or multilateral – to the President (that is, a principal Presidential power to make international agreements).

17 See Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs "Essays … from the Cooley lectures delivered at the University of Michigan Law School in November 1988" – Pref.* (Columbia University Press, New York 1990) 60.

18 See Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn OUP, Oxford 1996) 219-224. As indicated by Henkin, the President's power to make sole executive agreements is not without limits – Limits are difficult to determine and to state: 'The Supreme Court has not held any sole executive agreement to be *ultra vires* the President and, as indicated, has upheld several agreements of particular character, but it has not laid down principles or given general guidance to define the President's power to act alone' (at 222).

2. Status of International Agreement in the US legal order

a) The place and the effect of treaties in the law of the US

Article VI, clause 2 reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, clause 2 assures the supremacy of treaties to state law. As indicated by Henkin, treaties and other agreements and arrangements are generally the law of the land; they are also subject to the US Constitution, a non-self-executing promise is exceptional.[19] Tendencies in the Executive and the courts to interpret treaties and treaty provisions as non-self-executing run counter to Article VI, clause 2 and the language of Chief Justice John Marshall (doctrine of the self-executing treaty). He wrote in his opinion in the *Foster & Elam v. Neilson* case:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United Sates a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[20]

[19] Louis Henkin (n 18) 198-204. Henkin discusses the difference between self-executing (that is, a treaty that 'operates of itself'. Executive and the courts give effect to the treaty without awaiting Congressional action) and non-self-executing treaties; whether a treaty is self-executing or not, it is legally binding on the US and it is supreme law of the land (see at 203).

[20] *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

John Marshall read an exception into Article VI, clause 2 in respect of treaties that by their character cannot be self-executing.[21]

b) The place and the effect of Congressional-Executive agreements in the law of the US

Like treaties, Congressional-Executive agreements are the law of the land, superseding inconsistent state laws and inconsistent provisions in earlier or other international agreements or in acts of Congress.[22] Such agreements also eliminate issues about self-executing and non-self-executing agreements; that is, whether an agreement is in itself law or is promising to enact law, and about the consequences of inconsistency between international agreements and statutes.

c) The place and the effect of sole Executive agreements in the law of the US

As Henkin has described, in a sense – and in principle – sole Executive agreements have been less controversial than agreements made by joint authority of the President and Congress (Congressional-Executive agreements). Issues arise only as to whether a particular international agreement is within the President's sole authority. For instance, agreements to settle claims and agreements related to recognition of a foreign government or establishing or resuming diplomatic relations can be concluded as sole Executive agreements.[23]

The issue of whether sole Executive agreements, like treaties, are self-executing; that is, they can be given effect by the courts and they do supersede inconsistent state law, remains unresolved; it has been argued that "check by the Senate" is no compelling reason for giving less effect to agreements that President has authority to make without the

21 Louis Henkin (n 18) 202.

22 *Ibid*, at 215-218.

23 *Ibid*, at 219-224.

Senate.[24]

d) Limitations on the international obligations which the US has assumed

Over two hundred years, there have been tensions between the President and the Senate over international agreements.[25]

The Constitution itself does not prescribe or expressly impose limits on the treaty-power. Justice Black resolved.

> no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. (…) The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[26]

It is now settled case law that treaty-power is subject to constitutional limitations, principally the prohibitions of the Bill of Rights.[27]

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24 *Ibid*, at 225. Henkin deals here with suggested limitations on the power to make executive agreements (related limitations on the status of executive agreements in national law are considered at 177, 226-8).

25 Louis Henkin (n 17) 51.

26 *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

27 Louis Henkin (n 18) 185-189 (that is, 'Limitations on Treaties'). The role of the Court in Constitutional interpretation was firmly established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). See Michael A. Genovese, *The Supreme Court, the Constitution and Presidential Power* (University Press of America, 1980 Washington) 45-82. *Marbury v. Madison* rested on two principles. The first principle which the Court tried to establish was the Court's duty to interpret the law. The second principle which the Court tried to establish was that the Constitution was the supreme law of the land, see at 45-51.

C. Laying out the structure

The aim of this dissertation is to investigate the institutional and legal effects of international agreements. In the first chapter, I start with an analysis of the Court's case law on direct effect of international agreements (GATT/WTO, free trade associations with EFTA and with non-EFTA countries, accession associations, development associations and EEA). This part primarily serves the aim of providing an overview. The Court denied direct effect of the GATT. This is because, GATT-obligations are imprecise and not 'capable of conferring on citizens of the Community rights which they can invoke before the courts' (*International Fruit Company*, para 27). The Court continued to follow its approach set out in the *International Fruit Company* case in *Portugal v Council*. *Portugal v Council* has settled the question of the reception of WTO rules within the EC. Further, in this chapter, I look at the technical aspects of the question of indirect effects – which will be an *Incurse* in Chapter 1.

In the second chapter, I then turn to the general issues and practice on EU agreements (CFSP and PJC (by now FSJ) agreements). First I consider the international legal personality of the Union. The Maastricht provisions did not explicitly grant international legal personality to the Union. Neither did the Amsterdam provisions nor the Nice provisions. Article 47 TEU makes the legal personality of the European Union explicit and designates the Union as a contracting party; as such the debate on the question of whether ex-Article 24 TEU conferred implicitly legal personality to the European Union becomes obsolete. Further, I consider the practice on EU agreements. I then turn respectively to the direct effects and indirect effects of EU agreements (CFSP and PJC (by now FSJ) agreements) and will address a vertical dimension (*vis-à-vis* national legislation). The purpose is to give an overview of arguments against and in favour of direct effects pre- and post TL. In analysing direct effects two dimensions have to be distinguished. The first dimension concerns CFSP and individual enforcement. The second dimension is related to FSJ and individual enforcement. Arguments in favour of individual enforcement seem less thorough and less elaborated on.

In the third chapter, I give an overview of the jurisdiction of the Court on EU international agreements before and after the TL reforms and consider the standard of review in general. I conclude that, Article 40 TEU is one of the heads of the jurisdiction that the Court had and now has (on a reformed basis). This could be relevant for giving it *ex post* jurisdiction – at least as the competence question is concerned. Article 218 (11) TFEU is a potentially revolutionary inroad into the CFSP exemption. Article 275 (2) TFEU again is one of the potentially revolutionary inroads into the CFSP for the Court. The inclusion of Article 275 (2) TFEU indicates that the Constitution-makers wanted to reinforce judicial review and this can be taken as a break with the pre-TL status quo.

Purpose and scope of the appendices is to provide an overview of the treaty-making activity of the EU pre-Lisbon. The descriptive repository establishes that a number of EU agreements incorporate fundamental rights guarantees.

CHAPTER I: THE COURT'S CASE LAW ON DIRECT EFFECT OF INTERNATIONAL AGREEMENTS (FREE TRADE ASSOCIATIONS, ACCESSION ASSOCIATIONS, DEVELOPMENT ASSOCIATIONS AND EEA) AND STATUS OF WTO LAW

A. Introduction

This chapter aims at investigating the symmetries and invariances of the Court's case law on direct effect in order to suggest a conceptual framework for the recognition or denial of the possibility of direct effect of international agreements in the EU legal order. The chapter is divided into five sections. Section 1 examines the concept of direct effect, and deals with the formula for direct effect. Section 2 considers the Court's different approaches towards the (absence of) direct effect of GATT rules and WTO agreements and towards the possible direct effect of provisions of free trade associations, accession associations, development associations, and of provisions of the EEA Agreement.[1] Section 3 establishes that the 'wording, purpose and nature' component of the two-fold test for direct effect is a method to interpret the objective intention of the contracting parties, which is relevant when considering whether an agreement is capable of having direct effect. Also, the section establishes that the European Courts distinguish between relevant and irrelevant parameters when interpreting the objective intention of the contracting parties. Section 4 suggests that only a holistic approach is adequate to identify the objective intention of the contracting parties, and argues that the Court's case law on direct effect is a symmetrical phenomenon, as the Court's different approaches on direct effect can be reconciled. Section 5 turns to the technical aspects of the question of indirect effects – which is an *Incurse* in Chapter 1.

[1] For a recent contribution see Nicolas Rennuy and Peter van Elsuwege, 'Integration without membership and the dynamic development of EU law: *United Kingdom v. Council (EEA)*' (2014) 51 CMLR 935-954.

B. Theoretical framework

1. The concept of direct effect

Before considering the Court's case law on direct effect, the concept of direct effect will be explored. It is argued that there is neither a nexus between direct effect and the constitutional situation in each Member State, nor a nexus between direct effect and the dualistic /vs. monsistic philosophy towards international law. It is, moreover, highlighted that direct effect and direct applicability are two distinct and different legal concepts.

a) Constitutional situation in each Member State

At the start, direct effect was established in a monist context (that is, the Dutch Court that made the reference was operating in a monist country) to ensure uniform application of Union law:

> (…) a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.
>
> Independently of the legislation of Member States, [Union] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the [Union].[2]

[2] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, [1963] ECR 1.

Van Gend en Loos seems to indicate that the application of direct effect does not depend on the constitutional situation in each Member State (monism vs. dualism).[3] That has been cleared by the Court in subsequent case law.

The extension of the concept of direct effect to EU international agreements implies that there is no nexus between direct effect and the constitutional situation in each Member State; that is, direct effect applies regardless of national constitutional systems, both in monistic and dualistic Member States of the European Union.[4]

b) The Union's dualistic /vs. monistic philosophy towards international law (*Haegeman)*

The correlation between the Unions's dualistic /vs. monsistic philosophy towards international law and direct effect needs consideration. In this regard *Haegeman*[5] may indicate jurisprudential orientation.[6]

In the main action, *Haegeman*, a Belgian wine importer, sought to recover countervailing charges paid for the import of Greek wine (when Greece was not an EEC member) into the Belgium-Luxembourg Economic Union. The Tribunal de Première Instance of

[3] See, however: Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* EU:C:1976:3, [1976] ECR 129, Opinion of AG Trabucchi, para 5, who was reluctant to accept, without reservation, the extension of the concept of direct effect (*Van Gend en Loos*) and supremacy (*ENEL*) to any international agreement.

[4] For the opposite view: Pieter Jan Kuijper, 'Epilogue: Symbiosis?' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine; Proceedings of the Annual Colloquium of the G. K. van Hogendorp Centre for European Constitutional Studies* (The Hogendorp Papers, Europa Law Publ. Groningen 2002) 255.

[5] Under Lisbon pillar three merged with pillar one. Please note, however, that *Haegema*n was a first pillar case *pre*-Lisbon: Case 181/73 *Haegeman v Belgian State* EU:C:1974:41,[1974] ECR 449.

[6] Transformation and implementation of international agreements are two different legal terms that need to be distinguished. I. MacLeod, I.D. Hendry and Stephen Hyett *The External Relations of the European Communities: A Manual of Law and Practice* (Clarendon Press, Oxford 1996) 128 *Haegeman* is linked to the term 'transformation'.

Brussels asked for a preliminary ruling from the Court. The Court was requested to interpret certain provisions of the Association Agreement with Greece (the Athens agreement) to which the EEC was then party. Further, the Court was asked for an interpretation on the validity of the countervailing charge[7] paid for the import of Greek wines into Benelux territory.

In *Haegeman* the Court addressed the question of jurisdiction. It held that:

> The Athens agreement was concluded by the Council under Articles 228 and 238 of the Treaty [now Articles 217 and 218 TFEU] as appears from the terms of the decision dated 25 September 1961.
>
> This agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177 [now Article 267 TFEU].
>
> The provisions of the agreement, from the coming into force thereof, form an integral part of Community law.[8]

The Athens agreement was concluded by the Council under Articles 217 and 218 TFEU. This agreement was therefore an act of one of the institutions of the Community within the meaning of Article 267 TFEU. The Court held that provisions of the agreement, from the coming into force thereof, constituted an integral part of Community law and the Court had jurisdiction to give preliminary rulings concerning the interpretation. In subsequent judgments the Court has consistently held that the provisions of international

7 Imposed by Article 9 (3) of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine [1970] OJ L99.

8 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449, paras 3-5.

agreements 'form an integral part of [Union] law'.[9]

'Integral part of Union law'[10] is synonymous with 'part of the EU legal order'.[11] 'Incorporated into the Union's legal order' (*Haegeman* doctrine) is a necessary pre-condition for direct applicability.[12] The fact that an agreement formed integral part[13] of the internal legal order of the European Union 'reveals [however] little as to whether or not it is capable of conferring rights on individuals';[14] hence, there seems to be no nexus between the dualistic /vs. monistic philosophy towards international law and the question

[9] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 13; Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719, para 7; Case 30/88 *Greece v Commission* EU:C:1989:422, [1989] ECR 3711, para 12; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 41; Case C-321/97 *Andersson v Svenska staten* EU:C:1999:307, [1999] ECR I-3551, para 26; Case C-459/03 *Commission v Ireland* EU:C:2006:345, [2006] ECR I-4635, para 82; Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* EU:C:2006:10, [2006] ECR I-403, para 36; Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* EU:C:2007:496, [2007] ECR I-7001, para 31.

[10] There is a debate on whether the Court adopted a dualistic /or a monsistic philosophy towards international law, e.g. Jacques H.J. Bourgeois *Trade Law Experienced: Pottering about in the GATT and WTO* (Cameron May, London 2005) 171–172. Jacques Bourgeois argues that the Court adopted from *Haegeman* (Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449) to *Racke* (Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655) a monistic approach. In the same vein, Robert Schütze, 'On 'Middle Ground' The European Community and Public International Law' (2007) EUI Working Paper No. 2007/13.

[11] Further there is a debate in literature on what 'integral part' means (monism vs. dualism): Olivier Jacot-Guillarmod *Droit communautaire et droit international public: Etudes des sources internationales de l'ordre juridique des Communautés européennes* (Georg, Genève 1979) 104–106 and Ramses A. Wessel 'Reconsidering the relationship between international and EU law: towards a content-based approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 7-33 extensively consider the notions of monism and dualism.

[12] An international agreement incorporated into the Union's legal order is, however, not *per se* directly applicable. *Cf.* J.A. Winter, 'Direct Applicability and Direct Effect-Two Distinct and Different Concepts in Community Law' (1972) 9 CMLR 425, 427.

[13] Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449, para 5; Case C-321/97 *Andersson v Svenska staten* EU:C:1999:307, [1999] ECR I-3551, para 26; Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* EU:C:2007:496, [2007] ECR I-7001, para 31.

[14] Gerhard Bebr, 'Agreements Concluded by the Community and their Possible Direct Effect: from *International Fruit Company* to *Kupferberg*' (1983) 20 CMLR 35, 40.

of direct effect of international agreements.

c) Direct effect vs. direct applicability

Semantic issues. J.A. Winter has argued that direct effect and direct applicability are two distinct and different legal concepts:[15]

> As the various notions denote different legal phenomena, it will readily appear that it is dangerous and unwarranted to use them indiscriminately. (…) the term "direct applicability" should be reserved for the method of incorporation (...) . The problem as to when a (...) provision is susceptible of receiving judicial enforcement is best described as the question of "direct effect".[16]

The concept of direct applicability addresses the fundamental question of how an international agreement is incorporated into the municipal legal order so as to become 'the law of the land'.[17] According to Hinarejos, the EU meaning of direct applicability refers to the substance of the legal instrument: whether the measure in question requires further legislative development to be properly enforced or applied, or whether its contents are detailed enough to make further legislative implementation unnecessary.[18]

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15 Occasionally, the Court used the terms interchangeably. On direct applicability and direct effect e.g. Jörg Gerkrath, 'Direct Effect in Germany and France; a Constitutional Comparison' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine; Proceedings of the Annual Colloquium of the G. K. van Hogendorp Centre for European Constitutional Studies* (The Hogendorp Papers, Europa Law Publ. Groningen 2002) 131–133.

16 J.A. Winter (n 12) 425.

17 *Ibid.*

18 Alicia Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme?' (2008) 14 ELJ 620, 625. This distinction between direct applicability and direct effect has been backed by the Court in its case law e.g. Case 41/74 v*an Duyn v Home Office* EU:C:1974:133, [1974] ECR 1337.

The answer to the question if agreements are directly applicable[19] is therefore related to the issue of 'transformation/adoption'.[20] The concept of direct effect addresses, in contrast, the problem of the conditions under which a private individual can invoke provisions of an international agreement before national courts. Having direct effect is therefore synonymous to enforceability;[21] the concept of direct effect is, thus, separated from the question of 'transformation/adoption'. The chapter will focus on direct effect as defined above and will leave the question of direct applicability aside.

2. The formula for direct effect

After having set out the concept of direct effect the section now turns to the formula for direct effect. It is settled case law that a provision of a free trade, accession or

[19] Direct applicability in cases where the agreement is implemented through national legislation seems problematic: the direct applicability of international treaties may lead the national courts to modify the scope of the implementing legislation by extending or restricting their scope of application; any such extension or restriction might affect the manner in which the national parliament exercises its legislative competences: Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* EU:C:1991:91, [1991] ECR I-935, para 46 (impact of the notion of direct applicability on the division of powers).

[20] On the domestic applicability of international treaties (with GATT and the European Social Charter as examples): Albert Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge: Versuch einer allgemeinen Theorie des self-executing treaty auf rechtsvergleichender Grundlage* (Schriften zum Öffentlichen Recht, Duncker & Humblot, Berlin 1970); Arnold Koller, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich* (Schweizerische Beiträge zum Europarecht, Stämpfli, Bern 1971); Manfred Zuleeg, 'Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der europäischen Sozialcharta' (1975) 35 ZaöRV 341, 341–361.

[21] "Enforceability" is broader than the notion of creating rights, and allows to successfully rely upon provisions, which do not as such create rights. See Sacha Prechal, 'Does direct effect still matter?' (2000) 37 CMLR 1050–51. For further discussion, Thomas Eilmansberger, 'The relationship between rights and remedies in EC Law: In search of the missing link' (2004) 41 CMLR 1199, 1202-06; W. van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 CMLR 501; Matthias Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 CMLR 307, 312. See also, for example, Case C-128/92 *Banks v British Coal* EU:C:1993:860, [1994] ECR I-1237, Opinion of AG Van Gerven, para 27. According to Advocate General van Gerven the 'direct effect' test is whether the provision is 'sufficiently operational in itself to be applied by a court.'

development association agreement must be regarded as being directly effective 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.[22]

The Court has therefore adopted a two-fold test which consists of a 'wording, purpose and nature' component and a 'clear, precise and unconditional' component; the two-tier test applies to provisions of free trade, accession or development associations, and to provisions of GATT/ WTO law.[23]

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[22] *Cf.* Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 22-23 (FTA with Portugal). The quotation stems from: Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719, para 14 (EEC-Turkey AA). Confirmed in: Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 15 (EEC-Morocco CA); Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* EU:C:1994:277, [1994] ECR I-3087, para 23 (EEC-Cyprus AA); Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 31 (EEC-Yugoslavia CA); Case C-262/96 *Sürül v Bundesanstalt für Arbeit* EU:C:1999:228, [1999] ECR I-2685, para 60 (EEC-Turkey AA); Case C-416/96 *El-Yassini v Secretary of State for Home Department* EU:C:1999:107, [1999] ECR I-1209, para 25 (EEC-Morocco CA); Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* EU:C:2000:224, [2000] ECR I-2927, para 39 (EEC-Turkey AA); Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk* EU:C:2001:488, [2001] ECR I-6369, para 30 (EA with Poland); Case C-235/99 *The Queen v Secretary of State for the Home Department, ex parte Kondova* EU:C:2001:489, [2001] ECR I-6427, para 31 (EA with Bulgaria); Case C-257/99 *The Queen v Secretary of State for the Home Department, ex parte Barkoci and Malik* EU:C:2001:491, [2001] ECR I-6557, para 31 (EA with the Czech Republic); Case C-162/00 *Nordrhein-Westfalen v Pokrzeptowicz-Meyer* EU:C:2002:57, [2002] ECR I-1049, para 19 (EA with Poland).

[23] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 20; Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 110 (spirit, general scheme and terms of GATT agreements); Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 47 (nature and structure of WTO agreements).

C. Asymmetry (variance) – the Court's different approaches to direct effect

The Court has consistently refused to recognise the direct effect of GATT rules[24] and WTO agreements.[25] The possibility of direct effect was, however, accepted for provisions of free trade associations,[26] accession associations,[27] development associations[28] and EEA[29] agreements. The concern of this section is the investigation of the Court's approach towards direct effect of international agreements.

[24] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 27; Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 110.

[25] Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 48.

[26] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 26.

[27] Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* EU:C:1982:129, [1982] ECR 1331, paras 25-27; Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* EU:C:2000:224, [2000] ECR I-2927, para 54; Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk* EU:C:2001:488, [2001] ECR I-6369, para 38; Case C-235/99 *The Queen v Secretary of State for the Home Department, ex parte Kondova* EU:C:2001:489, [2001] ECR I-6427, para 39; Case C-257/99 *The Queen v Secretary of State for the Home Department, ex parte Barkoci and Malik* EU:C:2001:491, [2001] ECR I-6557, para 39; Case C-268/99 *Jany and Others v Staatssecretaris van Justitie* EU:C:2001:616, [2001] ECR I-8615, paras 26 and 28; Case C-162/00 *Nordrhein-Westfalen v Pokrzeptowicz-Meyer* EU:C:2002:57, [2002] ECR I-1049, para 30; Case C-438/00 *Deutscher Handballbund eV v Kolpak* EU:C:2003:255, [2003] ECR I-4135, para 30; Case C-327/02 *Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* EU:C:2004:718, [2004] ECR I-11055, para 18.

[28] Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* EU:C:1976:18, [1976] ECR 129, para 25; Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 23; Case C-58/93 *Yousfi v Belgian State* EU:C:1994:160, [1994] ECR I-1353, paras 16-19; Case C-469/93 A*mministrazione delle Finanze dello Stato v Chiquita Italia* EU:C:1995:435, [1995] ECR I-4533, paras 34-35; Case C-126/95 *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* EU:C:1996:368,[1996] ECR I-4807, paras 19-20; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 34; Case C-416/96 *El-Yassini v Secretary of State for Home Department* EU:C:1999:107, [1999] ECR I-1209, para 32; Case C-179/98 *Belgian State v Fatna Mesbah* EU:C:1999:549, [1999] ECR I-7955, para 14; Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213*,* [2005] ECR I-2579, para 29.

[29] Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, paras 100-102.

1. The (absence of) direct effect of GATT/WTO law in the Community legal order

This section aims to explore the Court of Justice's approach towards the (absence of) direct effect of GATT and WTO law. First, spirit, wording and scheme of the General Agreement on Tariffs and Trade (GATT 1947) will be explored. Then, the transition from GATT 1947 to WTO agreement and GATT 1994 will be ascertained, to deal with the legal effects of the provisions of the Agreement Establishing the World Trade Organization and of the General Agreement on Tariffs and Trade (GATT 1994).

a) *International Fruit Company* line of reasoning (GATT 1947)

In *International Fruit Company*[30] the Court established the legal effects of GATT 1947 in the legal order of the Community. In issue was the compatibility of EEC Regulations[31] which restricted the import of apples into the Netherlands with Article XI of the General Agreement on Tariffs and Trade (GATT).

In deciding whether the applicant could rely on the incompatibility of a Community measure, with a provision of GATT international law, the Court held that (i) the Community must be bound by the provisions of GATT, and (ii) that the provision must be capable of conferring rights on individuals. The Court found that the Community was (and is) bound by the provisions of the General Agreement on Tariffs and Trade,[32] as the Community had assumed, under the EEC Treaty, the powers previously exercised by the

30 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

31 Commission Regulations (EEC) Nos 459/70 [1970] OJ L57/20, 565/70 [1970] OJ L69/33 and 686/70 [1970] OJ L84/21, respectively.

32 Before the establishment of the WTO system only the Member States of the Community were formal GATT contracting parties.

Member States in the area governed by GATT 1947.[33] When the Court considered 'the spirit, the general scheme and the terms of the General Agreement'[34] to determine whether the provisions of the GATT were capable of having direct effect, it found that the provisions of GATT are 'special' in nature and are, therefore, not capable of conferring rights on individuals. The Court concluded that Article XI of the General Agreement on Tariffs and Trade (GATT) could, thus, have no direct effect and could not be invoked before the national court.[35]

Why are provisions of GATT special in nature?

The Court of Justice denied direct effect of GATT and WTO Law due to their special nature. But why are provisions of GATT special in nature?

GATT 1947 agreements are based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements'. Great flexibility, the possibility of derogation, safeguard measures and the settlement of disputes are features of the provisions of GATT.[36] GATT 1947 agreements are, due to these features, special and not unconditional in nature.[37] A further indication of the special, not unconditional, nature of GATT decisions is the fact that (only) 'sympathetic consideration' has to be given to recommendations or proposals and contracting parties are empowered to

33 Reaffirmed in: Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 105.

34 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, paras 19 and 20.

35 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 27.

36 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 21; Joined Cases 267/81, 268/81 and 269/81 *Amministrazione delle Finanze dello Stato v SPI and SAMI* EU:C:1983:78,[1983] ECR 801, para 23; Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 106; Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA* EU:C:1995:435, [1995] ECR I-4533, para 26.

37 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 110.

suspend certain obligations assumed under GATT unilaterally.[38] Depending on the case, the settlement of conflicts includes:

> (...) written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under GATT and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.
>
> (…) where, by reason of an obligation assumed under GATT or of a concession relating to a preference, some producers suffer or are threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation.[39]

[38] Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 107 and 108. *Cf.* Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 26 fn 42.

[39] Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 107 and 108 those features preclude individuals from invoking provisions of the GATT 47 before the national courts; and reaffirms as to why the GATT 47 should not be given direct effect.

Since *International Fruit* the Court has consistently held that the provisions of GATT 1947 have no direct effect.[40]

According to Advocate General Tesauro in *Hermès*, the content of the provision had never been investigated, in that the Court had not taken steps to ascertain whether the provision at issue was clear, precise and unconditional, in accordance with the traditional criteria the Court had used in deciding whether or not to attribute direct effect to measures or to provisions contained in international agreements. This is because, the Court had never gone beyond its initial investigation, which was concerned with the principal features of the GATT system, with the result that it had always come down against direct effect.[41]

b) Transition from GATT 1947 to WTO agreement and GATT 1994

The Agreement Establishing the World Trade Organization and the new General Agreement on Tariffs and Trade (GATT 1994) introduced a new system. Thus it has to be considered whether the *International Fruit Company* line of reasoning continues to apply to provisions of the WTO Agreement and GATT 1994.

aa) Characteristics of the WTO system

The flexibility characterising all the provisions of GATT and the excessively loose,

[40] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, paras 19-27; Case 9/73 *Carl Schlüter v Hauptzollamt Lörrach* EU:C:1973:110, [1973] ECR 1135, paras 28-30; Case 266/81 *SIOT v Ministero delle finanze, Ministero della marina mercantile, Circoscrizione doganale di Trieste and Ente autonomo del porto di Trieste* EU:C:1983:77, [1983] ECR 731, para 28; Joined Cases 267/81, 268/81 and 269/81 *Amministrazione delle Finanze dello Stato v SPI and SAMI* EU:C:1983:78, [1983] ECR 801, para 26.

[41] Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 26.

negotiated, mechanism for the settlement of disputes are characteristics attributed to the old GATT system.[42] Waivers, exceptional measures and measures of a similar sort were 'loopholes' in the old GATT system.[43] The new WTO system, which has the structure of an international organisation, is however different from GATT 1947: the relationship between rules and exceptions (waivers, exceptional measures etc.) has been reversed and the procedural and substantive conditions for granting waivers are now very strict.[44] Moreover, the dispute settlement system[45] has improved:

> (…) the new GATT 1994 contains a new system for the settlement of disputes between Members along the lines of the judicial model, which offers more certainty in the sphere of application of the recommendations and decisions of the Dispute Settlement Body …[46]

The reversal of the consensus requirement for approving panel reports in the General Council has changed the mechanism for the settlement of disputes significantly. In cases where the panel suggests a solution to the General Council,[47] which needs approval, the veto by the unsuccessful party accused of breaching a WTO provision is no longer able to block the adoption of panel reports.[48]

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42 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 28.

43 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 29.

44 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 29.

45 The new system for the settlement of disputes is set out in: Uruguay Round of Multilateral Trade Negotiations (1986- 1994) - Annex 2 - Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) [1994] OJ L336/234.

46 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, para 119 fn 92.

47 Responsible for dispute settlement: Article IV(3) WTO Agreement.

48 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 29. On the adoption of panel reports: Article 16 (4) of the Understanding on the Settlement of Disputes.

However, in terms of flexibility the possibility to modify or withdraw commitments continues to be available.[49] Further, the possibility of adopting provisional safeguard measures is maintained[50] and there is still the possibility of compensation instead of compliance.[51] Pursuant to Article 22 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreement)[52] compensation is 'available in the event that the recommendations and rulings [of the dispute settlement body] are not implemented within a reasonable period of time'. There is however the preference for full implementation of the recommendation of the dispute settlement body to bring the measure, found to be inconsistent with a WTO agreement, into compliance with the WTO agreement.[53]

In cases where the Member concerned fails to bring the inconsistent measure into compliance with the WTO agreement, within a reasonable period of time, there is the requirement to enter into negotiations with a view to developing mutually acceptable compensation.[54] Compensation and the suspension of concessions are temporary measures. Temporary instruments are not a method of settling disputes and shall, said Advocate General Tesauro in *Hermès,* therefore, not encourage the contracting party (defaulting party) to persist indefinitely in its failure to comply.[55]

49 Article XXI of the General Agreement on Trade in Services (GATTS), Uruguay Round of Multilateral Trade Negotiations (1986- 1994) - Annex 1 - Annex 1B - General Agreement on Trade in Services (WTO) [1994] OJ L336/191.

50 Article 6 of the Agreement on Safeguards, Uruguay Round of Multilateral Trade Negotiations (1986- 1994) - Annex 1 - Annex 1A - Agreement on Safeguards (WTO-GATT 1994) [1994] OJ L336/184. The total period of application of a safeguard measure shall not exceed eight years, Article 7 (3) of the Agreement on Safeguards.

51 Compensation and the suspension of concessions continue to be available: see Article 22 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO) and Article 22 (2) for the possibility to conclude agreements on mutually acceptable compensation.

52 Abbreviated: DSU.

53 Article 22 (1) DSU.

54 Article 22 (2) DSU.

55 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 29.

bb) Different views on the legal effects

After the WTO Agreement had entered into force, Advocate General Cosmas,[56] Advocate General Elmer[57] and Advocate General Tesauro[58] offered their views on the legal effects of the provisions of the Agreement Establishing the World Trade Organization and those of the new General Agreement on Tariffs and Trade (GATT 1994). The Advocates General disagreed on whether the *International Fruit Company* line of reasoning had ceased to apply following the conclusion of the WTO Agreement and GATT 1994.

Advocates General Cosmas and Elmer both argued that the *International Fruit Company* line of reasoning continued to apply to provisions of those agreements. Whilst Advocate General Tesauro argued that provisions of the Agreement Establishing the World Trade Organization are different in nature from GATT 1947 and recommended that the Court should reconsider its GATT 1947 case law.

In his Opinion in *Affish* Advocate General Cosmas addressed the new system and its modifications. He highlighted that great flexibility is still a feature of the provisions of the WTO Agreement and GATT 1994[59] and argued that 'the weighty reasons which led the Court to hold that no direct effect could be conferred on GATT 1947 (...) have not ceased to apply with the conclusion of GATT 1994 and the WTO Agreement'[60]:

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56 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, paras 119-128.

57 Joined Cases C-364/95 and C-365/95 *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* EU:C:1997:312, [1998] ECR I-1023, Opinion of AG Elmer, paras 27-30.

58 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, paras 22-37.

59 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, para 119.

60 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, para 127.

> (...) the spirit of negotiations, which characterized the old GATT, is not altogether absent from the new GATT (…) That spirit of flexibility is (...) exemplified by Article XX of the Agreement, under which each Member may set out in a schedule the specific commitments which it undertakes with regard to market access for services and service suppliers of another Member (…)[61]

Moreover, Advocate General Cosmas argued that provisions of the WTO Agreement and GATT 1994 are not capable of producing direct effect (not sufficiently precise), in his opinion, most of the provisions of the contested articles were addressed to the Members of the WTO and although they contained obligations to act or to refrain from acting, they also required supplementary implementing measures.[62]

Hence Advocate General Cosmas suggested that provisions of the WTO Agreement and GATT 1994 are not capable of producing direct effect and recommended a continuation of the GATT 1947 case law.

Likewise, Advocate General Elmer argued that the *International Fruit Company* line of reasoning had not ceased to apply with the conclusion of the WTO Agreement and GATT 1994.[63] The Advocate General referred to the eleventh recital in the preamble to Council Decision 94/800/EC,[64] which is worded as follows:

> (...) by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.

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61 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, para 119 fn 92.

62 Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* EU:C:1996:480, [1997] ECR I-4315, Opinion of AG Cosmas, para 120.

63 Joined Cases C-364/95 and C-365/95 *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* EU:C:1997:312, [1998] ECR I-1023, Opinion of AG Elmer, paras 27-30.

64 Council Decision 94/800 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L336/1.

In the light of this recital, Advocate General Elmer argued that the WTO Agreement and GATT 1994 are not capable of producing direct effect and recommended that the GATT 1947 case law should be transposed to GATT 1994.[65]

In contrast to the previous opinions, Advocate General Tesauro took a different approach.[66] The Advocate General reviewed the GATT 1947 case law on direct effect, and considered whether the grounds on which the *International Fruit Company* line of reasoning is based are equally valid.[67] The Advocate General argued that scale and scope of the system and nature and effectiveness of the mechanism for the settlement of disputes have changed from the GATT 1947 system. Differences that have occurred are in particular: the reversed relationship between rules and exceptions (the relationship between rules and exceptions appears to be functional), the mechanism for the settlement of disputes showed improvement in that the results have more binding force, strict substantive and procedural conditions for granting waivers, and panel reports, which formerly required a consensus in favour in order to be approved by the Council (under GATT 1947), now require a consensus against acceptance in order to be rejected; that is,

65 Joined Cases C-364/95 and C-365/95 *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* EU:C:1997:312, [1998] ECR I-1023, Opinion of AG Elmer, para 29. Critics have argued that Advocate General Elmer did not examine the possible reasons for reconsidering the pre-Uruguay case law, or acknowledged that such reasons existed; e.g. Steve Peers, 'Constitutional principles and international trade' (1999) 24 ELRev. 185, 191 and 192; an issue which has been extensively discussed – e.g. Judson Osterhoudt Berkey, 'The European Court of Justice and direct effect for the GATT: a question worth revisiting' (1998) 9 E.J.I.L. 626-657 -a thorough exploration of the legal, political and economic issues involved in analysing the issue of direct effect and attempt to illustrate the competing considerations facing the Court (that is, opposing views of Advocate General Cosmas and Advocate General Tesauro) in deciding whether to grant direct effect to GATT 94; its purpose is not to advocate a particular position.

66 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, paras 22-37. In issue was the direct effect of a provision of the TRIPs Agreement.

67 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 25. In this context the Advocate General could not refrain from criticising the GATT 1947 case law. In his opinion the characteristics of GATT are not very different from those provisions of agreements to which the Court has attributed direct effect (para 27).

previously, the unsuccessful party could block the adoption, now it can not.[68] Advocate General Tesauro concluded that these perceptible differences, between provisions of GATT 1947 and provisions of the WTO agreements, changed the factors on which the Court based its decision that the GATT provisions are not directly effective (*International Fruit Company* line of reasoning). He recommended, therefore, that the Court should reconsider its GATT 1947 case law.[69]

cc) *Portugal v Council* line of reasoning

After the transition from GATT 1947 to the WTO agreement and GATT 1994 the Court of Justice has dealt with the legal effects of the new system.

In *Portugal v Council,*[70] Portugal brought an action for annulment against a Council decision on the conclusion of Memoranda of Understanding between the European Community and Pakistan and between the European Community and India on arrangements in the area of market access for textile products.[71] In its action for annulment Portugal relied on breach of fundamental principles of the Community legal order and on breach of rules and fundamental principles of the WTO. The WTO

68 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, paras 28-29.

69 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 30. This approach is also reflected in literature: Pieter Jan Kuijper, 'The New WTO Dispute Settlement System—The Impact on the European Community' (1995) 29 JWT 49, 63; Miquel Montañá I Mora, '*Equilibrium*: A Rediscovered Basis for the Court of Justice of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?' (1996) 30 JWT 43, 51; and Philp Lee and Brian Kennedy, 'The Potential Direct Effect of GATT 1994 in European Community Law'(1996) 30 JWT 67, 78. Philp Lee and Brian Kennedy provide a thorough examination of the changes concerning the provisions relied upon to deny direct effect in *International Fruit*.

70 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395.

71 Council Decision 96/386 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products [1996] OJ L153/47.

agreements in issue included GATT 1994, the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures.

The Advocate General persuasively argued in his Opinion that the Court has to be careful to distinguish between the criteria for direct effect and the general question of an objective legality review:

> (…) in principle, the right to review the legality of a Community act does not depend on whether the rules invoked as a criterion for determining the legality of that act have direct effect, in cases where it is claimed that the Community act infringes rules of international law other than the GATT. (…) privileged persons, such as Member States, may not invoke the provisions of the GATT as a criterion of legality in direct actions (...). It is not clear why the functioning of an international agreement, as a criterion of legality for Community acts, should be subject to the conditions normally required, in a specifically Community context, for the direct effect of the provisions of international agreements concluded by the Community to be recognised. (...) [A]n international agreement, by virtue of its clear, precise and unconditional terms, can in principle constitute a criterion of legality for Community acts. This does not mean (…) that a rule displaying those characteristics necessarily confers on individuals rights on which they may rely in actions before the courts. For this result to be achieved (...), this is, for individuals to be entitled to rely on a provision in an agreement before the courts, it must be implicit in the general context of the agreement that its provisions may be invoked before the courts. That being so, (...) a provision of an agreement may be held not to have direct effect but that does not justify failing to recognise it as binding on the Community institutions and thence excluding it as a criterion of legality (for the Community).[72]

The case would therefore not raise the problem of direct effect. The Court did not follow its Advocate General.

[72] Case C-149/96 *Portugal v Council* EU:C:1999:92, [1999] ECR I-8395, Opinion of AG Saggio, para 18.

Instead the Court confirmed its *International Fruit Company* line of reasoning,[73] when it held that:

> (…) having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.[74]

This interpretation corresponds, also, with the eleventh recital in the preamble to Council Decision 94/800[75] concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), according to which 'by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.'[76]

dd) Grounds for denying direct effect in the case of WTO/ GATT

The (old) GATT 1947 and the WTO agreement and GATT 1994 do not confer rights on

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73 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, paras 34-48.

74 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 47, as referred to by: Case C-301/97 *Netherlands v Council* EU:C:2001:621, [2001] ECR I-8853, para 53; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307, para 44; Case C-377/98 *Netherlands v European Parliament and Council* EU:C:2001:523, [2001] ECR I-7079, para 52 (the Rio de Janeiro Convention on Biological Diversity was contrasted with WTO law); Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld* EU:C:2001:438, [2001] ECR I-5851, para 53; Case C-307/99 *OGT Fruchthandelsgesellschaft mbH v Hauptzollamt Hamburg-St. Annen* EU:C:2001:228, [2001] ECR I-3159, para 24; Joined Cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569, para 93; Case C-76/00 *P Petrotub SA and Republica SA v Council* EU:C:2003:4, [2003] ECR I-79, para 53; Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* EU:C:2002:741, [2002] ECR I-11453, para 154.

75 [1994] OJ L336/1.

76 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 48.

citizens: there is no right to rely directly on such provisions.[77] There are several grounds for denying direct effect:

In *Portugal v Council* the Court argued that although the transition from GATT 1947 to the WTO agreement and GATT 1994 has strengthened the mechanism for resolving disputes and the system of safeguards, the negotiation between the parties is still of considerable importance.[78]

The Court, then, turned to the mechanism of resolving disputes. It argued that in cases where judicial organs are required to refrain from applying the rules of national law, which are inconsistent with the WTO agreements, there would be no possibility to enter into negotiated arrangements even on a temporary basis. The requirement to refrain from applying the rules of national law, which are inconsistent with the WTO agreements, would therefore render the possibility of entering into negotiated arrangements, afforded by Article 22 DSU, inapplicable.[79]

Moreover, the Court addressed the possibility of disuniform application of the WTO rules. This issue has already been addressed by Advocate General Tesauro in *Hermès*.[80]

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77 The Court has attracted criticism for denying direct effect to WTO rules: Nikolaos Lavranos, 'The *Chiquita* and *Van Parys* Judgments: An Exception to the Rule of Law' (2005) 32 L.I.E.I. 449, 462.

78 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 36.

79 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 40.

80 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro.

The Advocate General argued that there is lack of reciprocity among the WTO members. The United States, Canada and Japan declared, for instance, that provisions of the WTO agreements may not have direct effect.[81] This absence of reciprocity may have serious consequences. Foreign competitors would be able to invoke provisions of the WTO agreements before the courts of the EC Member States. In cases where WTO members do not recognise direct effect, EU traders would however not be able to do so. The absence of reciprocity would therefore place EU traders at a disadvantage.[82] In *Portugal v Council* the Court was singing from the same hymn sheet: it argued that the absence of reciprocity may lead to disuniform application of the WTO rules.[83] One further reason for the denial of direct effect was the impact of the notion of direct effect on the division of powers:

> To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.[84]

Omega,[85] was a reference for a preliminary ruling on the validity of a provision of an EC regulation. That EC regulation concerned noise emissions from airplanes. Omega alleged the incompatibility with the Agreement on Technical Barriers to Trade (ATBT) of the EC

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81 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 31.

82 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 31. Moreover, the Advocate General considered if the lack of reciprocity in the recognition of direct effect leads to an absence of reciprocity in the implementation of WTO agreements, but left it to the Court to undertake an abstract evaluation (paras 34 and 35). On that issue see further: Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 44.

83 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 45.

84 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 46.

85 Joined Cases C-27/00 and C-122/00 T*he Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569.

regulation. According to Advocate General Alber, the decisive point was that legal disputes on the content of the law of the WTO were based on negotiations between governments. In his view, the withdrawal of unlawful measures was indeed the solution given preference in WTO law. Yet the law of the WTO did also authorise other solutions. For instance, settlement, payment of compensation or suspension of concessions. The Court set this out in detail in its judgment in *Portugal v Council*. He argued that the position of the EC in those negotiations would be seriously affected if EC law recognised a unilateral direct effect of obligations under the law of the WTO. He further argued that direct reliance on rules of the law of the WTO as against measures taken by WTO members appeared not appropriate from the point of view of the law of the WTO. Regardless of their wording, all provisions of the law of the WTO were subject to a general reservation, which accorded the States affected different possibilities of reacting to a breach. According to Advocate General Alber, it was thus not for the Court but for the WTO, or its members, to ensure observance of the law of the WTO in the legal systems affected. Direct effect of WTO rules was clearly not part of their legislative content. Such content, in his view, may not be ascribed, at EU level, to the law of WTO in its original form but in the form of transposition measures. In that context the law of WTO became indirectly significant. In his opinion, direct effect of the law of the WTO in the legal systems of its members could not, on the other hand, sensibly be brought about by individual legal systems, but only at the level of the WTO. He suggested that the reasoning in *Portugal v Council,* namely that the WTO agreements were not in principle among the rules in the light of which the Court was to review the lawfulness of measures adopted by EC institutions, should be maintained. He explained that the fact that the provisions of the ATBT were perhaps sufficiently precise and unconditional in their wording to be amenable to direct effect did not lead to another conclusion. They were subject to the general condition of WTO law that WTO members were to comply with their obligations not by direct effect in their legal systems but exclusively by specific

transposition of those obligations.[86]

Snyder described that Advocate General Alber's Opinion placed the earlier case law on direct effect of GATT/WTO law in a new context and can be regarded as having altered the terms of the debate. The Advocate General made original contributions to the direct effect debate. First, he broadened the terms of the debate beyond the ambit of the Community. He took account of the standpoint of the WTO (para 94 of his Opinion in *Omega*) and repeated the long-standing view of the Court about the flexibility of the GATT/WTO system. In analysing the relation between the EU and the WTO he purported to express the perspective of the other side. Second, he suggested that the decision of direct effect of WTO law should not be taken by each WTO member unilaterally but instead on a multilateral basis (para 95). Third, he placed the issue of institutional choice on a different plane by focusing not only on Community institutions *inter se* but also on relations between sites. Fourth, he contributed to changing the terms of the debate about what impact WTO law should have in Community law and how.[87]

Koutrakos described that the judgment in *Omega* was interesting for the direct attack on the line of reasoning underpinning the ruling in *Portugal v Council* by the applicant.[88] In *Omega*, the applicant attacked the *Portugal v Council* line of reasoning, arguing that the distinction of whether an agreement is based on reciprocal and mutually advantageous arrangements or not (paragraph 42 of *Portugal v Council*) is unhelpful.[89] The Court

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86 Joined Cases C-27/00 and C-122/00 T*he Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2001:470, [2002] ECR I-2569, Opinion of AG Alber, paras 92-96.

87 See Francis Snyder, 'The gatekeepers: The European courts and WTO law' (2003) 40 CMLR 313-367, at 329-335.

88 See Panos Koutrakos, *EU international relations law* (Hart, Oxford/Portland 2006) 271.

89 Joined Cases C-27/00 and C-122/00 T*he Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569, para 86.

answered that Omega misunderstood the basis of the Court's case law and held that:

> (…) The decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions are also authorised, for example settlement, payment of compensation or suspension of concessions (see, to that effect, *Portugal v Council*, paragraphs 36 to 39).[90]

The Court repeated the arguments in Case C-149/96 and reiterated the *Portugal v Council* holdings, in line with the submissions of the United Kingdom Government, the Irish Aviation Authority, the Commission and the Council, according to which a possible conflict with WTO law cannot affect the validity of an EC regulation (it was submitted in the alternative that provisions of the ATBT were not infringed), and the Advocate General's Opinion. The Court further reiterated that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means to be applied in good faith in the national legal order of the contracting parties.[91]

ee) Continuation of the *Portugal v Council* line of reasoning

The reasoning of the Court in *Portugal v Council* has provoked a lively debate in legal doctrine.

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[90] Joined Cases C-27/00 and C-122/00 T*he Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569, para 89.

[91] Joined Cases C-27/00 and C-122/00 T*he Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569, para 91.

Views were expressed on both sides. Criticism emerged with Griller's contribution.[92] Griller suggested that the Court has misinterpreted the DSU provisions. In view of Griller, the alleged lack of a categorial obligation flowing from a WTO Dispute Settlement Decision was the cornerstone for the denial of judicial enforceability and of WTO law as such. This argument, in view of Griller, implied that there is an alternative to immediate compliance with adopted panel reports. The insinuation was that there is an option for an alternative arrangement. Griller's critique is that by interpreting DSU provisions the Court wrongly concluded that compensation as well as retaliation are, at least temporary, alternatives to full compliance.[93]

The lack of reciprocity was, along with the contended alternative of compensation the second cornerstone for the denial of judicial enforceability and of WTO law as such.[94] The WTO agreement, according to its preamble, is founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements'.[95] Griller put forward that every interpretation of the judicial reasoning advanced for precluding review has to face the regrettable fact that the Court did not elaborate on the underlying concept of reciprocity.[96]

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92 Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, *Portugal v. Council*' (2000) 3 J.I.E.L. 441-472, at 450-467. Similar arguments have been brought forward by others. See especially Naboth van den Broek, 'Legal Persuasion, Political Realism, and Legitimacy: the European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order' (2001) 4 J.I.E.L. 411-440; Geert A. Zonnekeyn, 'The status of WTO Law in the Community Legal Order: Some Comments in the Light of the Portuguese Textiles Case' (2000) 25 ELRev. 293-302.

93 See Griller, above (n 92), at 450-54. The DSU provides that retaliation as well as compensation are mere temporary measures in cases of non-implementation of recommendations and rulings within a reasonable time.

94 AG Saggio in para 23 of his conclusions in Case C-149/96 *Portugal v Council* EU:C:1999:92, [1999] ECR I-8395 referred to the reciprocity principle also there is a detailed reasoning on reciprocity in paras 31-35 of AG Tesauro's conclusion in Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603.

95 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 42.

96 See Griller, above (n 92), at 458.

Griller argued that the reasoning leading to the denial of internal enforceability of WTO law seemed not only inevitably to imply elements not consistent with the rule of law, but also to include an option to break WTO law. This seemed irreconcilable with Article 300 (7) of the then EC Treaty, according to which agreements concluded by the Community are binding on the Community institutions and on the Member States.[97] In his opinion the Court was not consistent in its approach to the question of direct effect of international agreements, in particular that the Court did not succeed in establishing a differentiation between agreements which are 'reciprocal and mutually advantageous', such as the WTO Agreement, and the agreements to which the Court had accorded direct effect.[98]

Cremona's analysis of the Court's approach is that the relationship between the multilateral obligations under the WTO Agreements and subsequent bilateral agreements between WTO Members was not discussed by the Court. This is because of the position it had taken on the legal status of the WTO agreements with respect to the legality of EC acts. This question was considered by the Advocate General. He pointed to the fact that there was no hindrance to two parties to a multilateral agreement to conclude between themselves a subsequent bilateral treaty, which alters their respective bilateral commitments (in that case, the EC with India and Pakistan, respectively), as long as the conclusion of the subsequent bilateral agreement does not affect the rights of other contracting parties to the earlier multilateral agreement or makes it impossible to fulfil the aims or objectives of that agreement. Conforming to Cremona, Saggio raised the question, but did not follow through the consequences of a real conflict, understandably, since there was no third country interest at issue in that case.[99]

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97 *Ibid*, at 462.

98 *Ibid*.

99 See Marise Cremona, 'Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context' (2001) 38 CMLR 359-396, at 371-377.

Rosas described, compared to *International Fruit Company* (paragraph 21) and *Germany v Council*, there was in the Court's reasoning a shift of emphasis from the flexibility of GATT provisions in general; that is, the substantive contents of the GATT (possibilities of derogation and safeguard measures), and the system for the settlement of disputes towards the nature of the WTO as a system of reciprocal and mutually advantageous arrangements. The Court did neither refer (but in Rosas' view could have done so) to the additional fact that the Dispute Settlement Understanding favoured solutions mutually acceptable to the parties (even as a preference to the withdrawal of WTO-incompatible measures) nor did the Court refer to the possibility for the member whose measure had been found to be incompatible with the WTO to accept the suspension of concessions instigated by the other party. The Court, apparently as an answer to the criticism that it had treated the GATT differently from other international agreements, had emphasised that the WTO Agreements are distinct from those agreements which implied a certain asymmetry of obligations (Lomé Convention) or established special relations of integration like the Free Trade Agreement between the Community and Portugal interpreted in *Kupferberg*. In the view of Rosas, this comparison made between the WTO and cooperation agreements was not useful as the special nature of the WTO system (in particular, stricter rules on safeguard measures and the improvements in the dispute settlement mechanism) would have sufficed as a reasoning.[100]

Perhaps the most sustainable defences apart from those of Rosas came from Mendez and Eeckhout. Mendez pointed to the fact that the core of the reasoning of the Court in *Portugal v Council* was premised on the proposition the DSU permitted at least temporary alternatives other than full implementation and that judicial intervention (ensuring that EC law complies with rules of WTO) deprived the Community of the DSU sanctioned room for manoeuvre enjoyed by their counterparts. Mendez submitted that the core of the

[100] See Allan Rosas, 'Case C-149/96, *Portugal v. Council.* Judgment of the Full Court of 23 November 1999, nyr.' (2000) 37 CMLR 797-816, at 808-815.

reasoning of the Court in *Portugal v Council* for precluding review was sound.[101]

Eeckhout took issue with the critiques of that reasoning and defended the Court's exclusion of full direct effect. He described that reciprocity was at the centre of the Court's concerns (para 45), but in his view ultimately it was not reciprocity as such which led the Court to deny direct effect, rather it was the impact of this type of effect on the EU's political institutions. The room for manoeuvre for the EU's political institutions which they currently have with respect to the implementation of the law of the WTO, especially in the context of disputes with other WTO Members, would be much reduced if the direct effects of WTO law were accepted.[102]

Koutrakos also offered an analysis of the Court's approach and defended the Court's reasoning against full-scale direct effect. According to him it is not the binding character of WTO obligations which have lain at the core of the reasoning, but rather the extent to which the contracting parties were allowed to choose the method of enforcement of WTO obligations; that is, the discretion enjoyed by the EU's executive and legislative bodies and its Member States to negotiate mutually acceptable arrangements according to the DSU that the Court seeks to ensure.[103]

101 See Mario Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques.* (Oxford Studies in European Law, OUP, Oxford 2013) 203-217; id., 'The Enforcement of EU Agreements: Bolstering the effectiveness of Treaty law?' (2010) 47 CMLR 1719-1756, at 1743-1747; id., 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 E.J.I.L. 83-104, at 95-97.

102 See Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections' (2002) 5 J.I.E.L. 91-110 at 92-101 and id. 'The domestic legal status of the WTO Agreement: Interconnecting legal systems' (1997) 34 CMLR 11-58; id., *EU External Relations Law* (2nd edn OUP, Oxford 2011) 323-383, at 343-350 and 375-378. UNCLOS was a second case of an important multilateral agreement which cannot be relied upon in EU litigation. The Advocate General's arguments in the discussion of the direct effect of UNCLOS were derived from WTO case law. Eeckhout described that the case law of the Court continued to show openness towards international law, but in his view less than before (the majority of cases which had come before the Courts had been recognised as capable of being directly effective; and were indeed effectively applied in litigation). See at 350-355.

103 See Koutrakos, above (n 88), 271-280, in particular at 274.

After *Portugal v Council* the Court was concerned with the direct effect of WTO law in *Schieving-Nijstad*[104] and *Dior*.[105] In *Dior* national courts asked whether Article 50 (6) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)[106] has direct effect. The Court held that TRIPs does not have direct effect and confirmed the *Portugal v Council* line of reasoning.[107] The same question was raised in *Schieving-Nijstad*. The Court took the same approach and held that Article 50 (6) of TRIPs is not capable of having direct effect.[108] Hence, one may conclude that, in the light of their nature and structure, the WTO Agreement and the agreements and understandings annexed to it do not have direct effect.[109]

104 Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld* EU:C:2001:438, [2001] ECR I-5851.

105 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307.

106 The provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights are an annex to the WTO agreements.

107 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307, paras 44 and 45. Please note that the German Government found that TRIPS may have direct effect: Deutscher Bundestag 12. Wahlperiode BT-Drucksache 12/7655 (neu), 344.

108 Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld* EU:C:2001:438, [2001] ECR I-5851, paras 51-55.

109 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, paras 42-47. This line of reasoning has since been repeated in: Case C-307/99 *OGT Fruchthandelsgesellschaft mbH v Hauptzollamt Hamburg-St. Annen* EU:C:2001:228, [2001] ECR I-3159, paras 22-26 (as regards GATT 1994). As regards the Agreement on Technical Barriers to Trade (ATBT): Joined Cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* EU:C:2002:161, [2002] ECR I-2569, para 93. As regards the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS): Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307, para 44 and Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld* EU:C:2001:438, [2001] ECR I-5851, para 53.

c) Rulings by the WTO Dispute Settlement Body (DSB)

A different issue is the question of whether the *Portugal v Council* line of reasoning may also apply to WTO panel or Appellate Body reports. The Court has not ruled on the legal significance of DSB decisions in Community law for long.[110] Advocate General Alber provided arguments for recognising the direct effect of DSB decisions,[111] e.g. the fundamental right of freedom to pursue an economic activity.[112]

However, as the errors of law made by the General Court[113] did not invalidate the contested judgment,[114] the Court did not rule on the matter and addressed the issue of direct effect of DSB decisions only in form of an *obiter dictum*:

> (…) the Community (...) stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the Understanding it was granted a period of 15 months for that purpose, which expired on 13 May 1999.
>
> (...) for the period prior to 13 May 1999, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, (...) without rendering ineffective the grant of a reasonable

110 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, para 72.

111 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, paras 70-119.

112 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, para 110.

113 With regard to direct effect the General Court held that: 'The purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals.' Case T-174/00 *Biret International SA v Council* EU:T:2002:2, [2002] ECR II-17, para 62.

114 '[E]rrors of law (…) [made by the GC] as regards the duty to state reasons and the scope of the judgment in Atlanta v European Community do not invalidate the contested judgment, if the operative part thereof and in particular the rejection of the plea at first instance concerning the SPS Agreement, appears founded on other legal grounds (...)' Case C-93/02 P *Biret International SA v Council* EU:C:2003:517, [2003] ECR I-10497, para 60.

> period for compliance with the DSB recommendations or rulings, as provided for in the dispute settlement system put in place by the WTO agreements.[115]

The Court thus held that only for the period prior to 13 May 1999 there is no direct effect.

However, for the period thereafter, the Court left open the possibility of direct effect, which may indicate that direct effect might apply to DSB decisions. From the point of view of Union law, there are generally persuasive arguments against direct effect of WTO law embodied in DSB recommendations or rulings after the expiry of the period of time allowed to comply with them:

- WTO Members are accorded discretion in complying with DSB recommendations and rulings (power to agree a waiver).[116]

- Direct effect would be contrary to the notion of reciprocity, a feature of WTO relations; that is, WTO rules would acquire an effect not accorded to them in the legal orders of the Union's trading partners.[117]

- The purpose of the WTO agreements; WTO agreements -primarily concerned with interests of a general nature, to govern relations between WTO Members- are by their nature not intended to establish rights for individuals.[118]

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115 Case C-93/02 P *Biret International SA v Council* EU:C:2003:517, [2003] ECR I-10497, paras 61 and 62.

116 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, para 82.

117 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, para 97.

118 Case C-93/02 P *Biret International SA v Council* EU:C:2003:291, [2003] ECR I-10497, Opinion of AG Alber, para 115.

As mentioned above, the Court has not ruled on this point of law for long. In *Atlanta* the Court has not been able to pronounce on the issue of the internal effect of the WTO DSB decisions on factual grounds.[119] The possibility to address the issue of the internal effect of the WTO DSB decisions came with *Chiquita* and *Van Parys*.[120] In *Chiquita* the GC dismissed the applicant's use of the *Nakajima* case law.[121] The following *Van Parys* case has put an end to this insecurity with regard to the scope of the *Nakajima* principle that would have afforded direct effect to the WTO DSB decisions in pre-Lisbon's Community legal order. In *Van Parys* the Court repeated its foregoing settled case law that the WTO law in general did not have direct effect in pre-Lisbon's Community legal order except for the *Nakajima* and *Fediol* principles and determined the applicability of the afore-mentioned principles. The Court, did not follow Advocate General Tizzano's views, concluding that the *Nakajima* principle was not applicable in *Van Parys*. In its judgment, the Court reiterated the arguments that were presented in *Portugal v Council*.[122] The implications left by the Court in *Biret* were not confirmed in *FIAMM* and *Fedon*. In that case the Court confirmed the above constant line of jurisprudence, finding that WTO substantial rules and WTO DSB decisions lack direct effect.[123]

119 Case C-104/97 P *Atlanta AG and Others v Commission and Council* EU:C:1999:498, [1999] ECR I-6983.

120 Case T-19/01 *Chiquita Brands International Inc v Commission* EU:T:2005:31, [2005] ECR II-315 and the following Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* EU:C:2005:121, [2005] ECR I-1465.

121 Case T-19/01 *Chiquita Brands International Inc v Commission* EU:T:2005:31, [2005] ECR II-315, para 167.

122 Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* EU:C:2005:121, [2005] ECR I-1465, para 53. For detailed analyses of the relevant case law see, for example, Oksana Tsymbrivska, 'WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts' (2010) 37 L.I.E.I. 185-202, at 189-196. This article, *inter alia*, examined the internal effect and status of the WTO DSB decisions within the EU legal order and the relevant case law from the *Biret* cases to *Van Parys* as well as the arguments that were accepted as a basis for it.

123 Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council and Commission* EU:C:2008:476, [2008] ECR I-6513, paras 128 and 129.

2. The possible direct effect of provisions of FTAs (EFTA/non-EFTA), accession/ development associations and the GC's case law on the EEA Agreement

The previous survey of the case law has made clear that, having regard to their nature and structure, provisions of the WTO agreement and GATT 1994 have, due to their special features, not an unconditional nature.[124] The Court reached the conclusion that there is no right to rely directly on such provisions. We will now see from the survey of the case law presented below that provisions of association agreements and provisions of the EEA Agreement are, in contrast, potentially directly effective.

Before considering the possible direct effect of provisions of association agreements it is necessary to reflect on the concept of association. The concept of association has a very wide scope and embraces various forms of relationship.[125] Free trade, accession and development associations are association agreements that pursue different aims: free trade associations provide for the liberalisation of trade; development associations seek to promote the development of the associated States; and accession associations prepare the associating State for an EU membership. The survey of the case law will categorise the cases according to their aim.[126]

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124 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 47. In a GATT 1947 context Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 110.

125 Report for the Hearing Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719, 3730.

126 See also: Andrea Ott, 'Thirty Years of Case-Law by the European Court of Justice on International Law – a Pragmatic Approach towards its Integration' in Vincent Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (TMC Asser Press, The Hague 2001) 113 et seq. On the different types of association agreements see: Kirsten Schmalenbauch, 'Article 310 EC' in Christian Calliess and Matthias Ruffert (eds), *EUV/EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta; Kommentar* (3rd edn Beck, München 2007), para 35. See further, Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP, Oxford 2010) 402-04.

It will distinguish between the possible direct effect of provisions of free trade associations (subdivided in provisions of free trade agreements with EFTA[127] and with non-EFTA countries[128]); accession associations; development associations; and provisions of the EEA Agreement.

a) Effects of FTAs: *Kupferberg* line of reasoning (FTAs with EFTA countries)

Free trade agreements with EFTA countries. In *Kupferberg*[129] the Court addressed, for the

[127] The European Free Trade Association (EFTA) was established in 1960 (Stockholm Convention) as a reaction against the formation of the EEC. Founding members were: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. Finland became an associate member (1961) and later a full member of EFTA (1986). Iceland became a member of EFTA (1970). Liechtenstein acceded in 1991. Denmark and the UK (1972), Portugal (1985), Austria, Finland and Sweden (1995) left EFTA to join the EEC/EU. Iceland, Liechtenstein, Norway and Switzerland remain members of EFTA. Three EFTA members - Liechtenstein, Iceland and Norway- join the EEA. On 1 June 2002 the updated EFTA Convention (Vaduz Convention) entered into force. For more information: <http://www.efta.int/>. When the UK and Denmark left EFTA to become a Member of the EEC (1972) bilateral free trade agreements with the remaining EFTA States were concluded to maintain trade liberalisation (Agreement between the EEC and Austria [1972] OJ L300/2; Sweden [1972] OJ L300/97; Switzerland [1972] OJ L300/189; Liechtenstein [1972] OJ L300/281; Iceland [1972] OJ L301/2; Portugal [1972] OJ L301/165; Norway [1973] OJ L171/2; Finland [1973] OJ L328/2). For a comprehensive review see: E.P. Wellenstein, 'The Free Trade Agreements between the Enlarged European Communities and the EFTA-Countries' (1973) 10 CMLR 137.

[128] E.g. the former free trade Agreement with Spain [1970] OJ L182/2; with accession to the EEC/European Union the free trade agreements with Spain, Portugal, Austria, Finland, Sweden were terminated; End of validity: 31/12/1985 (Spain and Portugal); 31/12/1994 (Austria, Finland, Sweden). The Agreement between the EEC and Switzerland likewise became applicable to Liechtenstein: Article 1 of the Additional Agreement concerning the validity, for the Principality of Liechtenstein, of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 [1972] OJ L300/281. Free trade agreements with Switzerland, Liechtenstein, Iceland and Norway remain in force. Article 120 EEA limits the scope of the FTAs with EEA countries, as provisions of the EEA Agreement 'shall prevail over provisions in existing bilateral or multilateral agreements binding the European Economic Community, on the one hand, and one or more EFTA States, on the other, to the extent that the same subject matter is governed by this Agreement'.

[129] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641.

very first time,[130] the issue of whether provisions of free trade agreements with EFTA countries are directly effective. *Kupferberg* concerned an international agreement between the EEC and Portugal (then not a Member State). The German Bundesfinanzhof referred questions to the Court asking it to interpret Article 21 of the Portuguese free trade agreement. The Court held that Article 21 of the Portuguese free trade agreement had direct effect,[131] even though Advocate General Rozès and several Member States suggested to transpose the *International Fruit Company* line of reasoning (GATT/WTO law)[132] to free trade agreements. When considering whether the free trade Agreement between the EEC and Portugal was directly effective, Advocate General Rozès pointed in *Kupferberg* to the different structure, content and objectives of the agreement, compared to the EEC Treaty. The Advocate General argued that the wording of Article 21 (1) of the Portuguese free trade agreement would differ 'appreciably' from the corresponding provisions of Article 95 (1) of the then EEC Treaty (now Article 110 TFEU) so that the reasons for recognising direct effect of Article 95 (1) of the then EEC Treaty could not apply *mutatis mutandis* to Article 21 (1) of the Portuguese free trade agreement.[133]

After having considered a *mutatis mutandis* application of the reasons for recognising direct effect in the context of the EEC Treaty, she drew a comparison between provisions of the free trade Agreement with Portugal and those of GATT. The free trade Agreement

130 In Case 270/80 *Polydor Limited v Harlequin Records Shops Limited and Simons Records Limited* EU:C:1982:43, [1982] ECR 329, which concerned the protection of industrial and commercial property rights, the Court was asked whether Article 14 (2) of the FTA with Portugal (at that time not a Member State but a Member of EFTA) was directly effective within the Community. In view of the replies given to the other questions of substance the Court considered it not necessary to reply to this question (see para 23).

131 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 26.

132 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

133 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3673. The EUR-Lex database refers to her as Mr.!

between the EEC and Portugal, which aimed at creating a free trade area,[134] had established an autonomous framework in order to settle disputes.[135] Hence provisions of the FTA were:

> (...) like those of GATT, (…) less rigid than those of the EEC Treaty; (…) [and contain] a number of derogating clauses of wide scope and finally it may be denounced, whereupon the Agreement ceases to be in force 12 months after the date of notification …[136]

In the light of the similarities to GATT, and taking into consideration that the free trade Agreement with Portugal was based on the principle of strict equality,[137] Advocate General Rozès suggested to transpose the *International Fruit Company* line of reasoning[138] to free trade agreements based on reciprocity.[139] Her overall conclusion was, therefore, that Article 21 (1) of the free trade Agreement with Portugal was, like provisions of GATT, not capable of having direct effect.[140]

The governments of Denmark, Germany, France and the UK argued equally against direct effect. They argued that the distribution of powers between Community organs in external matters; the institutional framework established for settling disputes between the

134 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3675.

135 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3674.

136 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3674.

137 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3673.

138 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

139 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3674.

140 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3673.

contracting parties; the principle of reciprocity; and the provision for safeguard clauses, permitting derogations from the agreement, would prevent free trade agreements from having direct effect.[141]

As said above, the Court did not follow Advocate General Rozè's suggestion to transpose the GATT 1947 case law to free trade agreements, which are based, as GATT, on reciprocity. Nor did it agree with the Member States governments' arguments against direct effect.

The Court applied its two-fold test for direct effect:[142] after first examining the nature and structure of the free trade Agreement with Portugal, the Court held that provisions of the free trade agreement were capable of being applied directly.[143] In the light of object and purpose of the agreement, which aimed at eliminating rules restricting commerce,[144] Article 21 (1) of the Portuguese free trade agreement was held to be a clear, precise and unconditional rule against discrimination in taxation matters and could be relied on before the national courts.[145]

When examining the nature and structure of the free trade agreement the Court addressed the question of whether judicial reciprocity, the institutional framework and safeguard clauses of the agreement may prevent direct effect.

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141 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 15-16.

142 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 17-22 (nature and structure of the FTA with Portugal) and paras 23-27 (clear, precise and unconditional).

143 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 22.

144 In particular the abolition of customs duties and charges of an equivalent effect and the elimination of quantitative restrictions and measures of equivalent effect. Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 24.

145 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 23-27.

First, the Court pointed to judicial reciprocity. The Court stressed that the fact that the courts of one of the contracting parties may recognise direct effect, whereas the courts of the other contracting party deny direct effect, does not constitute a lack of reciprocity in the implementation of the agreement; nor does it preclude provisions of a free trade agreement from having direct effect.[146]

Second, the Court considered whether the autonomous institutional framework to settle disputes may prevent direct effect: Article 32 et seq of the free trade agreement did not provide for the possibility of submitting the matter to any kind of court. Instead, there was only a political procedure of a Joint Committee.[147] These Committees were responsible for the proper implementation and administration of agreements, made recommendations and could, where expressly provided for, take decisions.[148] The Court made clear that the application of an unconditional and precise obligation by a national court of one of the contracting parties without any prior intervention on the part of the Joint Committee would not affect the powers conferred on the Joint Committees.[149] The Court's answer was, therefore, that the autonomous institutional framework to settle disputes does not prevent direct effect.

Third, the Court pointed to the provision of safeguard clauses. Safeguard clauses enable the contracting parties to derogate from certain provisions of the free trade agreements. The Court emphasised that they apply only in specific situations and only 'after consideration within the Joint Committee in the presence of both parties', and did not

146 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 18.

147 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:137, [1982] ECR 3641, Opinion of AG Rozès, 3674.

148 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 19.

149 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 20.

affect the provisions prohibiting tax discrimination. It held, therefore, that the existence of safeguard clauses was not 'sufficient in itself' to affect the direct enforceability of certain provisions of free trade agreements.[150]

It appears from the foregoing that, in the given instance, neither the lack of judicial reciprocity nor the establishment of a special institutional framework; nor the provision for safeguard clauses, may prevent the possibility of direct effect of free trade agreements. With regard to WTO law the Court arrived at a different conclusion. There, the Court considered the flexibility of the provisions: the provision for safeguard clauses and measures in the event of exceptional difficulties, lack of reciprocity and the establishment of an autonomous institutional framework to settle disputes by consultation and negotiation, sufficient to prevent the possibility of direct effect.[151]

b) Continuation of the *Kupferberg* line of reasoning (FTAs with non-EFTA countries, accession/ development associations and the GC's case law on the EEA Agreement)

More than twenty years later, Kuijper and Bronckers argue that the *Kupferberg* case law is inconsistent,

> (…) where the problem of the balance between the Community institutions is swept aside with the comment that the Community institutions are free to reach an agreement with the institutions of a third

150 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362,[1982] ECR 3641, para 21.

151 It is argued that this is the most striking aspect of *Kupferberg:* Christian Tietje, 'The Status of International Law in the European Legal Order: the Case of International Treaties and Non-binding International Instruments' in Jan Wouters, Andre Nollkaemper and Wet Erika de (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (T.M.C. Asser Press, The Hague 2008) 61. On the question of why *Kupferberg* is so different from *International Fruit* see also: Gerhard Bebr (n 14); Sara Dillon, *International Trade and Economic Law and the European Union* (Hart, Oxford 2003) 363–365.

> State as to what effect the provisions of a treaty will have in the internal legal order of the contracting parties. That might have been possible for the first and second generation of judges in Luxembourg, some of whom had laid down in the EC Treaty that regulations would be directly applicable in every Member State, but anyone who has negotiated an ordinary international treaty, knows that the question of the effect in the internal legal order does not normally play an important part in the negotiations (…).[152]

However, there is -beyond WTO law (that is, rejection of direct effect in relation to WTO agreements)- no indication in the Court's case law that *Kupferberg* is no longer good case law.[153]

In fact there are, post *Kupferberg,* several cases where the Court presumed direct effect without discussing the issue.[154] This may be seen as a 'silent' continuation of the *Kupferberg* line of reasoning.

Moreover, *Kupferberg* was also the first case that accepted that association agreements are potentially directly effective. In this connexion one may argue, that the Court's case law on the possible direct effect of provisions of (i) non-EFTA free trade agreements; (ii) accession and development associations; and (iii) the General Court's case law on the EEA Agreement, continue to build upon *Kupferberg*.

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152 Pieter Jan Kuijper and Marco Bronckers, 'WTO Law in the European Court of Justice' (2005) 42 CMLR 1313, 1320.

153 Christian Tietje (n 151) 62, who also argues that Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213, [2005] ECR I-2579 (Communities-Russia PA) builds upon *Kupferberg*.

154 Case C-163/90 *Administration des Douanes et Droits Indirects v Léopold Legros and others* EU:C:1992:326, [1992] ECR I-4625, paras 26-27 (Article 6 of the FTA EEC-Sweden); Case C-207/91 *Eurim-Pharm GmbH v Bundesgesundheitsamt* EU:C:1993:278, [1993] ECR I-3723, para 21 et seq (Articles 13 and 20 of the FTA EEC-Austria); Joined Cases C-114/95 and C-115/95 *Texaco A/S v Middelfart Havn* EU:C:1997:371, [1997] ECR I-4263, para 33 (Article 18 of the FTA EEC-Sweden).

aa) Direct effect of provisions of non-EFTA free trade agreements

The wording of Article 3 of the former free trade Agreement between the EEC and Spain is identical to Article 21 (1) of the former free trade Agreement with Portugal,

> The considerations set out above also apply to Article 3 of the Agreement between the EEC and Spain since the wording of that Article is identical to that of the first paragraph of Article 21 of the Agreement with the Portuguese Republic and the subject-matter and the scope of the two Agreements are comparable.[155]

The interpretation of Article 21 (1) of the free trade Agreement with Portugal likewise became applicable to Article 3 of the free trade Agreement with Spain. This interpretation implies direct effect.

The Community was also a signatory to agreements establishing an Association between the EEC and Cyprus[156] and Malta[157] with the aim to eliminate obstacles to trade. The Court held that provisions of the 1977 Protocol, annexed to the Additional Protocol to the Agreement establishing an Association between the EEC and the Cyprus, lay down clear, precise and unconditional obligations and may have direct effect,

> The relevant rules in the 1977 Protocol concerning the origin of products play an essential role in determining which products can be covered by the Agreement and thus benefit from preferential treatment. In that regard they lay down clear, precise and unconditional obligations. (…) It follows that the relevant provisions in the 1977 Protocol have direct effect and may be relied upon in proceedings before a national court.[158]

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155 Case 253/83 *Kupferberg & Cie KG a.A. v Hauptzollamt Mainz* EU:C:1985:8 [1985] ECR 157, para 20.

156 [1973] OJ L133/2.

157 [1971] OJ L61/2.

158 Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* EU:C:1994:277, [1994] ECR I-3087, paras 25 and 27.

In sum, the nature of non-EFTA free trade agreements seems to allow for direct effect; that is, the Court's case law on the possible direct effect of provisions of non-EFTA free trade agreements continues to build upon *Kupferberg*.

bb) Direct effect of provisions of accession and development associations

It is settled case law that provisions of accession associations are capable of conferring rights on individuals.[159] In *Pabst & Richarz KG* e.g. the Court applied *mutatis mutandis* the reasons for recognising direct effect of Article 95 of the then EEC Treaty (now Article 110 TFEU) to Article 53 (1) of the former Association Agreement with Greece

[159] Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* EU:C:1982:129, [1982] ECR 1331, paras 25-27. In Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719, paras 16, 23 and 25 the Court pointed to the programmatic nature of provisions of the EEC-Turkey AA with the final objective of acceding to the EU, [1964] OJ 217/3687 Recital 3 of the Preamble, and denied direct effect, as the provisions in question, were neither sufficiently precise nor unconditional. In Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* EU:C:2000:224, [2000] ECR I-2927, para 42 the Court held that Article 13 of the EEC-Turkey AA did not establish precise rules. However, Article 41 (1) of the Additional Protocol was sufficiently precise and unconditional to have direct effect (para 54). Also, certain provisions of the Europe Agreements (EAs) establishing an association with countries of Central and Eastern Europe with the final objective to become a member of the Community (Hungary [1993] OJ L347/2 (Recital 15 of the Preamble); Poland [1993] OJ L348/2 (Recital 15); Romania [1994] OJ L357/2 (Recital 17); Bulgaria [1994] OJ L358/3 (Recital 17); Slovak Republic [1994] OJ L359/2 (Recital 18); Czech Republic [1994] OJ L360/2 (Recital 18); Latvia [1998] OJ L26/3 (Recital 22); Lithuania [1998] OJ L51/3 (Recital 22); Estonia [1998] OJ L68/3 (Recital 22); Slovenia [1999] OJ L51/3 (Recital 21)) were sufficiently clear, precise and unconditional to be applied by national courts: Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk* EU:C:2001:488, [2001] ECR I-6369, para 38 (EA with Poland); Case C-235/99 *The Queen v Secretary of State for the Home Department, ex parte Kondova* EU:C:2001:489, [2001] ECR I-6427, para 39 (EA with Bulgaria); Case C-257/99 *The Queen v Secretary of State for the Home Department, ex parte Barkoci and Malik* EU:C:2001:491, [2001] ECR I-6557, para 39 (EA with the Czech Republic); Case C-268/99 *Jany and Others v Staatssecretaris van Justitie* EU:C:2001:616, [2001] ECR I-8615, paras 26 and 28 (EA with Poland and the Czech Republic); Case C-162/00 *Nordrhein-Westfalen v Pokrzeptowicz-Meyer* EU:C:2002:57, [2002] ECR I-1049, para 30 (EA with Poland); Case C-438/00 *Deutscher Handballbund eV v Kolpak* EU:C:2003:255, [2003] ECR I-4135, para 30 (EA with Slovakia); Case C-327/02 *Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* EU:C:2004:718, [2004] ECR I-11055, para 18 (EA between the Communities and, respectively, Bulgaria, Poland and Slovakia).

with the final objective of acceding to the Community:[160]

> (...) [Article 53 (1) of the Association Agreement with Greece], the wording of which is similar to that of Article 95 of the Treaty [now Article 110 TFEU], fulfils (…) the same function as that of [now Article 110 TFEU]. It 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 harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law.
>
> It accordingly follows from the wording of Article 53 (1) (…) and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation (…). In those circumstances Article 53 (1) must be considered as directly [effective] (…).[161]

Measures adopted by a body provided for by an accession agreement are, in so far as they implement the objectives set by the agreement, 'directly connected' with the agreement.[162] Provisions of a decision of the Council of Association must satisfy the same requirements as those applicable to the provisions of association agreements,[163] and might therefore be directly effective. The Court recognised direct effect of Articles 2 (1) (b) and 7 of Decision No 2/76[164], of Articles 6 (1), 7, 9, 10 (1) and 13 of Decision No

160 [1963] OJ 26/294 Recital 4 of the Preamble.

161 Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* EU:C:1982:129, [1982] ECR 1331, paras 26 and 27.

162 Case C-277/94 *Taflan-Met and Others* EU:C:1996:315, [1996] ECR I-4085, paras 17 and 18.

163 Case C-192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, [1990] ECR I-3461, para 14. Confirmed in Case C-277/94 *Taflan-Met and Others* EU:C:1996:315, [1996] ECR I-4085, para 25.

164 Case C-192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, [1990] ECR I-3461, para 26.

1/80[165] and of Article 3 (1) of Decision No 3/80[166] of the EEC-Turkey Association Council. Since obligations are specific, and not subject to any implied or express reservation, development associations are also capable of conferring rights on individuals.[167] The case law on the direct effect of accession and development associations builds upon *Kupferberg*.

[165] Direct effect of Article 6 (1) of Decision No 1/80: Case C-192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, [1990] ECR I-3461, para 26; Case C-237/91 *Kus v Landeshauptstadt Wiesbade*EU:C:1992:527, [1992] ECR I-6781, paras 28 and 36; Case C-355/93 *Eroglu v Land Baden-Württemberg* EU:C:1994:369, [1994] ECR I-5113, para 11; Case C-434/93 *Bozkurt v Staatssecretaris van Justitie* EU:C:1995:168, [1995] ECR I-1475, para 31; Case C-171/95 *Tetik v Land Berlin* EU:C:1997:31, [1997] ECR I-329, paras 22, 24 and 48; Case C-285/95 *Kol v Land Berlin* EU:C:1997:280, [1997] ECR I-3069, paras 21 and 29; Case C-386/95 *Eker v Land Baden-Württemberg* EU:C:1997:257, [1997] ECR I-2697, para 18; Case C-36/96 *Günaydin v Freistaat Bayern* EU:C:1997:445, [1997] ECR I-5143, paras 24 and 61; Case C-98/96 *Ertanir v Land Hessen* EU:C:1997:446, [1997] ECR I-5179, para 24; Case C-1/97 *Birden v Stadtgemeinde Bremen* EU:C:1998:568, [1998] ECR I-7747, paras 19 and 67; Case C-340/97 *Nazli v Stadt Nürnberg* EU:C:2000:77, [2000] ECR I-957, para 28; Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* EU:C:2002:694, [2002] ECR I-10691, para 26; Joined Cases C-317/01 and C-369/01 *Abatay and Others and Nadi Sahin v Bundesanstalt für Arbeit* EU:C:2003:572, [2003] ECR I-12301, para 78; Case C-136/03 *Dörr v Sicherheitsdirektion Kärnten and Ibrahim Ünal v Sicherheitsdirektion Vorarlberg* EU:C:2005:340, [2005] ECR I-4759, para 66; Case C-230/03 *Sedef v Freie und Hansestadt Hamburg* EU:C:2006:5, [2006] ECR I-157, para 33. On the interpretation of Article 6 (2) of Decision No 1/80: Case C-434/93 *Bozkurt v Staatssecretaris van Justitie* EU:C:1995:168, [1995] ECR I-1475, para 38; Case C-171/95 *Tetik v Land Berlin* EU:C:1997:31, [1997] ECR I-329, para 35. Direct effect of Article 7 of Decision 1/80: Case C-355/93 *Eroglu v Land Baden-Württemberg* EU:C:1994:369, [1994] ECR I-5113, para 17; Case C-351/95 *Kadiman v Freistaat Bayern* EU:C:1997:205, [1997] ECR I-2133, para 28; Case C-210/97 *Akman v Oberkreisdirektor des Rheinisch-Bergischen-Kreises* EU:C:1998:555, [1998] ECR I-7519, para 23; Case C-329/97 *Ergat v Stadt Ulm* EU:C:2000:133, [2000] ECR I-1487, para 34; Case C-65/98 *Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* EU:C:2000:336, [2000] ECR I-4747, para 25; Case C-275/02 *Ayaz v Land Baden-Württemberg* EU:C:2004:570, [2004] ECR I-8765, para 48; Case C-467/02 *Cetinkaya v Land Baden-Württemberg* EU:C:2004:708, [2004] ECR I-10895, para 31. Direct effect of Article 9 of Decision No 1/80: Case C-374/03 *Gürol v Bezirksregierung Köln* EU:C:2005:435, [2005] ECR I-6199, paras 26 and 43. Direct effect of Article 10 (1) of Decision No 1/80: Case C-171/01 *Wählergruppe Gemeinsam* EU:C:2003:260, [2003] ECR I-4301, paras 66 and 94. Direct effect of Article 13 of Decision No 1/80: Case C-192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, [1990] ECR I-3461, para 26. In Case C-277/94 *Taflan-Met and Others* EU:C:1996:315, [1996] ECR I-4085, para 30 the Court held that Decision No 3/80 of the EEC-Turkey Association Council does 'not contain a large number of precise, detailed provisions'. By its nature, supplementary rules were needed. As the Council had, at the time of the ruling, not adopted such supplementary measures, the Court has held that Articles 12 and 13 of Decision No 3/80 lacked direct effect (paras 23-38, in

cc) Direct effect of provisions of the EEA Agreement

The European Economic Area (EEA) promotes a strengthening of trade and economic relations with Iceland, Liechtenstein and Norway. The EEA Agreement[168] creates rights and obligations (participation in the single market), but does not restrict the treaty-making power or decision-making autonomy of the contracting parties.[169] Provisions of the EEA Agreement form an integral part of the Community legal order, and are capable

particular paras 33, 37 and 38).

166 Case C-262/96 *Sürül v Bundesanstalt für Arbeit* EU:C:1999:228, [1999] ECR I-2685, para 74; Joined Cases C-102/98 and C-211/98 *Kocak v Landesversicherungsanstalt Oberfranken und Mittelfranken and Ramazan Örs v Bundesknappschaft* EU:C:2000:119, [2000] ECR I-1287, para 35; Case C-373/02 *Öztürk v Pensionsversicherungsanstalt der Arbeiter* EU:C:2004:232, [2004] ECR I-3605, para 60.

167 In Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* EU:C:1976:18, [1976] ECR 129, para 25 the Court reached the conclusion that Article 2 (1) of the Yaoundé Convention (association with the African States and Madagascar) conferred the right on individuals not to pay to a Member State a charge having an effect equivalent to customs duties. In Case C-469/93 A*mministrazione delle Finanze dello Stato v Chiquita Italia* EU:C:1995:435, [1995] ECR I-4533, paras 34-35 the Court held that the Fourth ACP-EEC Convention (Lomé Convention), which promotes economic, social and cultural development of the ACP States, confers, like the Second AA between the EEC and the African States and Madagascar (Yaoundé), rights on individuals. Provisions of the former EEC-Morocco [1978] OJ L264/2 and Algeria [1978] OJ L263/2 CAs also had direct effect (the Euro-Mediterranean AAs with Algeria [2005] OJ L265/2 and with Morocco [2000] OJ L70/2 replaced the 1970s CAs). Direct effect of Article 41 (1) of the EEC-Morocco CA: Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 23; Case C-58/93 *Yousfi v Belgian State* EU:C:1994:160, [1994] ECR I-1353, paras 16-19; Case C-126/95 *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* EU:C:1996:368,[1996] ECR I-4807, paras 19-20; Case C-179/98 *Belgian State v Fatna Mesbah* EU:C:1999:549,[1999] ECR I-7955, para 14. Direct effect of Article 40 (1) of the EEC-Morocco CA: Case C-416/96 *El-Yassini v Secretary of State for Home Department* EU:C:1999:107, [1999] ECR I-1209, para 32. See further: Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 34 (Article 22 (4) of the EEC-Yugoslavia CA is directly effective); Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213, [2005] ECR I-2579, para 29 (Article 23 (1) of the Communities-Russia PA is directly effective).

168 [1994] OJ L1/3 as adjusted by [1994] OJ L1/572 (Protocol adjusting the Agreement on the EEA). On the compatibility of the EEA Agreement with the Treaty: *Opinion 1/91 re EEA Agreement* EU:C:1991:490, [1991] ECR I-6079 (negative Opinion); *Opinion 1/92* EU:C:1992:189, [1992] ECR I-2821 (positive Opinion on the revised EEA Agreement).

169 See the Preamble of the Agreement on the European Economic Area.

of having direct effect, if unconditional and sufficiently precise:[170]

> (...) the Court observes that nothing in the case-file suggests that the EEA Agreement (...) was not concluded in conformity with the Treaty. It follows that since the Agreement entered into force on 1 January 1994 the provisions of the Agreement form an integral part of the Community legal order. 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. The second sentence of that article provides that, without prejudice to the arrangements set out in Protocol 5, customs duties of a fiscal nature are likewise prohibited. 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 Article 10 has had direct effect.[171]

The General Court expressly refers to *Kupferberg,*[172] so that the General Court's case law on the possible direct effect of provisions of the EEA Agreement might be seen as a continuation of the *Kupferberg* line of reasoning.

3. Concluding remarks on the apparent asymmetry

As seen above, the Court dealt with different kinds of agreements and seems to take different approaches. The Court referred to the nature and structure of WTO agreements and drew a comparison to agreements concluded by the Community. It held that WTO agreements are reciprocal and mutually advantageous arrangements and need to be distinguished from Community agreements which introduce a certain asymmetry of

170 Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, paras 100-102 (Article 10 of the EEA Agreement has direct effect). See also: Walter van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (1992-1993) 16 Fordham Int'l L.J. 955, 955–989.

171 Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, para 102.

172 Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, para 101.

obligations, or create special relations of integration with the Community:

> (…) the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.[173]

The Court's different approaches; that is, creation of a certain dualism (denying direct effect in respect of WTO agreements), have been criticised severely:

> (…) I cannot refrain from observing in this connection that it does not seem to me that the characteristics of GATT were very different from those of other agreements, with regard to which the Court has ruled, without much explanation and despite the flexibility of some of their provisions and the element of negotiation involved in the mechanism for the settlement of disputes, that individuals could rely on them directly in proceedings before the national courts, as their provisions were sufficiently clear, precise and unconditional.[174, 175]

However, if the structural differences between WTO law and other agreements may not justify recognition or denial of direct effect, what is then the decisive parameter for direct effect of the respective agreements in question?

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173 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 42.

174 For critique: Jan Wouters and Dries van Eeckhoutte, 'Giving Effect to Customary International Law Through European Community Law, (2002) K.U. Leuven Institute for International Law Working Paper No. 2002/25, 37 (note 155 and references therein) and 40-41. See also: Naboth van den Broek, 'Legal Persuasion, Political Realism, and Legitimacy: the European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order' (2001) 4 J.I.E.L. 411, 411 who argues that the structural differences between WTO law and other agreements do not justify denial of direct effect.

175 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 27.

D. Symmetry (invariance) - the demarcation between relevant and irrelevant parameters for the recognition of direct effect

After having considered the Court's different approaches (dualism) towards the possible direct effect of provisions of GATT rules and WTO agreements, free trade associations, accession associations, development associations, and of provisions of the EEA Agreement, this section turns the spotlight on the demarcation between relevant and irrelevant parameters for the recognition of direct effect.

It is argued that the Court's reasoning for denying direct effect of GATT/WTO law, and the case law on the possible direct effect of provisions of free trade, accession and development associations and the EEA Agreement, indicates that there are relevant, and irrelevant, parameters for the recognition of direct effect.[176] That is, the 'wording, purpose and nature' component of the two-fold test for direct effect is a method to interpret the (objective) intention of the contracting parties,[177] relevant when considering whether an agreement is capable of having direct effect; this method of interpretation, where the Court seeks to establish the "objective" intention of the contracting parties relies on relevant and irrelevant parameters that are used to identify the "objective" intention of the contracting parties with regard to direct effect.

After the identification of relevant and irrelevant parameters, it is argued that the selection of relevant parameters facilitates the general assessment of international agreements. However, the relevant parameters *as such* do not offer a framework that is adequate to identify whether an international agreement is capable of having direct effect. It is, therefore, argued that a hidden symmetry provides, firstly, an answer to the question

[176] The case law seems not conclusive with regard to reciprocity on the implementation of an agreement (lack of judicial reciprocity) and the autonomous institutional framework to settle disputes (*International Fruit Company* line of reasoning vs. *Kupferberg* line of reasoning).

[177] In absence of an express provision in the agreement.

why the Court's case law on direct effect seems inconsistent and provides, secondly, a conceptual framework for the possible direct effect of international agreements.

1. Intention of the contracting parties in absence of an express provision in the agreement

In the light of public international law, contracting parties are free to decide what legal effect the provisions of an international agreement shall have in the domestic order of the contracting parties; only in cases where that question has not been settled by the agreement it is for the courts to determine the legal effect within their jurisdiction.[178] Therefore, the Court may address, in absence of an express provision in the agreement and after having taken the international origin of the provisions into account, the question of direct effect.

As mentioned above,[179] the Court has adopted a two-fold test for direct effect which consists of a 'wording, purpose and nature' component and a 'clear, precise and unconditional' component. The 'wording, purpose and nature' component of the two-fold test for direct effect is a method to interpret the objective intention of the contracting parties.[180] The intention of the contracting parties is, therefore, relevant when considering whether an agreement is capable of having direct effect.

178 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 17; Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 35.

179 Section 1 (the formula for direct effect).

180 Jörg Gerkrath (n 15) 132.

2. 'Wording, purpose and nature' component - relevant and irrelevant parameters for the recognition of direct effect

For the identification of the (objective) intention of the contracting parties the European Courts seem to distinguish between relevant and irrelevant parameters.

a) Similarity of terms

The similarity of terms might be relevant when considering the (objective) intention of the contracting parties. The Court has considered in several cases whether it is appropriate to apply the interpretations given in the context of the Treaty, by way of analogy, to provisions of international agreements worded in a similar way.[181] According to the Court's case law the similarity of terms is not a sufficient reason for applying the interpretation given in the context of the Treaty to similar provisions.[182]

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[181] In Case 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* EU:C:1982:43, [1982] ECR 329, para 18 and Case C-312/91 *Procedural issue relating to a seizure of goods belonging to Metalsa Srl.* EU:C:1993:279,[1993] ECR I-3751, para 21 the Court has considered it not appropriate to transpose the interpretation given in the context EEC Treaty to provisions of free trade agreements with Portugal and Austria respectively (because the agreement on free trade and the EEC Treaty pursue different objectives). In Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* EU:C:1982:129, [1982] ECR 1331, paras 26-27 (accession association EEC - Greece) and Case C-163/90 *Administration des Douanes et Droits Indirects v Léopold Legros and others* EU:C:1992:326, [1992] ECR I-4625, paras 23-27 (free trade agreement EEC-Sweden) the Court has considered it appropriate to transpose the interpretation given in the context EEC Treaty to similar provisions of agreements concluded between the Community and non-Member countries.

[182] Case 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited* EU:C:1982:43, [1982] ECR 329, para 15: 'The provisions of the Agreement on the elimination of trade between the Community and Portugal are expressed in terms which in several respects are similar to those of the EEC Treaty on the abolition of restrictions on intra-Community trade. (…) However, such similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement the above-mentioned case-law, which determines in the context of the Community the relationship between the protection of industrial and commercial property rights and the rules on the free movement of goods. The scope of that case-law must indeed be determined in the light of the Community's objectives (…)'.

Provisions of agreements must rather be interpreted according to their terms and in the light of their objectives.[183] Hence the similarity of terms is irrelevant when considering direct effect.

b) Imbalance between obligations (non-reciprocity) and the ability of the contracting parties to preserve and pursue interests

In *Bresciani,* a case of conflict between a national law of a Member State and Article 2 (1) of the Yaoundé Convention of 1963, the Court pointed to the imbalance between the obligations assumed and stated emphatically that:

> (…) the Convention was not concluded in order to ensure equality in the obligations (…), but in order to promote (…) development (…)
>
> This imbalance between the obligations assumed (…), 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.[184]

It would appear therefore that the imbalance between the obligations assumed does not prevent provisions from having direct effect; this interpretation is also confirmed by later case law of the Court.[185]

Closely linked with the question of the imbalance between the obligations assumed is the ability of the contracting parties to preserve and pursue their interests. In examining the

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183 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 30-31.

184 Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* EU:C:1976:18, [1976] ECR 129, paras 22-23.

185 Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 21; Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia* EU:C:1995:435, [1995] ECR I-4533, para 34; Case C-262/96 *Sürül v Bundesanstalt für Arbeit* EU:C:1999:228, [1999] ECR I-2685, para 72; Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* EU:C:2000:224, [2000] ECR I-2927, para 53.

question of whether the Union's ability to preserve and pursue its interests (that is, the question of whether the Union is in a position to dominate the framing of the agreement or not)[186] is relevant when considering the (objective) intention of the contracting parties, it must be borne in mind that the "position to dominate the framing of the agreement" might lead to a "certain imbalance" between obligations assumed.[187]

Imbalance between obligations, as mentioned above, is in itself not a conclusive factor to recognise direct effect. It would appear therefore that the position to dominate the framing of the agreement is irrelevant when considering direct effect (*argumentum a fortiori*).

c) Degree of integration

Moreover, the degree of integration might be relevant when considering the (objective) intention of the contracting parties. In *Kupferberg*[188] the degree of integration was not decisive: the Court recognised direct effect without any 'special link' with the European Community.[189] Also, the integrative nature was not decisive in *Kziber* and *Simutenkov* where the Court granted direct effect to provisions of the EEC-Morocco Cooperation

186 Christian Tietje (n 151) 64. This parameter would not only be legal but also very political; it has been argued that 'whether or not to accept … the direct effectiveness of a legal rule is political and not legal' Jan Wouters and Dries van Eeckhoutte (n 174) 41.

187 Association agreements, for instance, are not necessarily unequal treaties, but are, at least to a certain extent, to the advantage of the Community, which dominates, due to its political and legal power, the negotiation and conclusion of the treaties. Within the world trading system the Community is not in a position to dominate the framing of the agreements: the WTO Members pursue their interests by way of compromise. Christian Tietje (n 151) 63.

188 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641.

189 Gerhard Bebr (n 14) 63.

Agreement and to provisions of the Communities-Russia Partnership Agreement.[190] The Court made clear that neither the fact that an agreement with third States is:

> (…) intended essentially to promote (...) economic development (…) and that (…) confines itself to instituting cooperation between the Parties without referring to (…) association (…) or future accession (…),[191]

nor the fact that an agreement with third States is 'limited to establishing a partnership between the parties'[192] may prevent certain of its provisions from having direct effect. The Court seems to imply that the fact that the relationship between the contracting parties is *only* loose does not prevent provisions from being directly effective.

d) Safeguard clauses

Unilaterally and non-unilaterally applied safeguard clauses, permitting derogations from the agreement, may affect the direct enforceability of provisions of international agreements. Safeguard clauses might, therefore, be relevant when considering the objective intention of the contracting parties. In this regard *Kupferberg* may indicate jurisprudential orientation. In *Kupferberg* it was held that safeguard clauses, which only apply to specific situations, are not 'sufficient in themselves' to affect the direct enforceability of certain provisions of free trade agreements.[193] The most important aspect is, however, that the safeguard clauses applied 'after consideration within the Joint

190 Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 23 (Article 41(1) of the EEC-Morocco CA is capable of having direct effect); Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213, [2005] ECR I-2579, para 29 (Article 23 (1) of the Communities-Russia PA has direct effect).

191 Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 21.

192 Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213, [2005] ECR I-2579, para 28.

193 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 21; confirmed in: Case C-192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, [1990] ECR I-3461, para 25.

Committee *in the presence of both parties*' (emphasis added).[194]

The Court seems to imply that the distinguishing factor is whether or not a contracting party may apply the safeguard clauses unilaterally. In cases where a contracting party may apply safeguard clauses unilaterally, obligations assumed under the agreement are not sufficiently *unconditional*. Jointly applied safeguard clauses, in contrast, seem not to affect the direct enforceability.[195]

It follows that only unilaterally applied safeguard clauses are an obstacle to direct effect. So that one may conclude that unilaterally applied safeguard clauses indicate that the contracting parties did not intend direct effect.

3. Concluding remarks on the demarcation between relevant and irrelevant parameters for the recognition of direct effect

The objective intention of the contracting parties seems relevant to the Court when considering whether direct effect is possible. As seen, there are relevant and irrelevant parameters for the identification of the objective intention of the contracting parties.

The similarity of terms, the imbalance between the obligations assumed (that is, certain asymmetry of obligations/ non-reciprocity), the ability to preserve and pursue interests

194 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 21.

195 On the other hand, one may take the view that any possibility of derogation, which is to be negotiated within a political body, may prevent provisions from being directly effective: they are not sufficiently unconditional to have direct effect. See: Gerhard Bebr (n 14) 64 and 70 who argues that it remains doubtful to what extent the obligations under the free trade agreement in *Kupferberg* were 'really unconditional'. The latter view is, however, not in line with the case law of the Court (in *Kupferberg* the jointly applied safeguard clause did not affect the direct enforceability).

(that is, position to dominate the framing of the agreement), the degree of integration and/ or jointly applied safeguard clauses seem irrelevant when considering the objective intention of the contracting parties. To put it differently, they do not affect, in themselves, the direct effect/enforceability of provisions of international agreements. Unilaterally applied safeguard clauses, in contrast, seem to indicate that the contracting parties did not intend to grant direct effect (objective intent).

However, a static application of the irrelevant and relevant parameters as such seems too schematic and seems inadequate to identify the objective intention of the contracting parties. Instead, it seems that only a holistic approach is adequate to identify the objective intention. The next section tries to conceptualise such an approach.

E. The Court's case law on direct effect: a symmetrical phenomenon

As the selection of relevant parameters *as such* does not offer a framework that is adequate to identify the constitutional effects of international agreements, the question is: what symmetry, if any, exists? - Is there a symmetry (invariance) underlying the apparent asymmetry (the Court's different approaches on direct effect[196])?

[196] For further jurisprudential reflections, see Pieter Jan Kuijper 'The New WTO Dispute Settlement System—The Impact on the European Community'(1995) 29 JWT 49-71; Miquel Montañá I Mora, '*Equilibrium*: A Rediscovered Basis for the Court of Justice of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?' (1996) 30 JWT 43-59; Philp Lee and Brian Kennedy, 'The Potential Direct Effect of GATT 1994 in European Community Law' (1996) 30 JWT 67-89, cited *supra* note 69.

The concept of *pacta sunt servanda* is based on *bona fide* and forms a basic principle of international law. The principle *pacta sunt servanda* has been codified in the Vienna Convention on the Law of Treaties and is a rule of customary[197] international law:

> Every treaty *in force* is binding upon the parties to it and *must be performed* by them in good faith.[198] (emphasis added)

The Court confirmed in *Portugal v Council* the principle of good faith:

> (…) according to the general rules of international law there must be bona fide performance of every agreement.[199]

However, in the light of their subject-matter and purpose:

> (...) WTO agreements (...) do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.[200]

This finding is essential for understanding the Court's case law on direct effect. Thinking from an external perspective, it goes without saying that the principle of international law

197 The European Union respects international law in the exercise of its powers (compliance with rules of customary international law by virtue of an international agreement): Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* EU:C:1992:453,[1992] ECR I-6019, para 9; Case C-405/92 *Etablissements Armand Mondiet SA v Armement Islais SARL* EU:C:1993:906, [1993] ECR I-6133, paras 13-15; Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 45; Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* EU:C:2008:312, [2008] ECR I-4057, para 51; Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* EU:C:2010:91, [2010] ECR I-1289, paras 40-42; Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, para 90; confirmed by Article 3 (5) TEU ('strict observance and the development of international law'); Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864, [2011] ECR I-13755, para 101.

198 Article 26 VCLT 1969.

199 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 35.

200 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 41.

cannot, as the international and EU internal spheres are to be distinguished, determine the legal effects in the internal legal order of the European Union.

Given the contractual nature of WTO/ and obligations of other agreements, one may, however, argue, from an internal perspective, that the *efficient breach* (that is, breach of contract to make a net profit from the opportunities created by the breach)[201] and *pacta sunt servanda* (that is, agreements must be observed) methodology is the symmetry or invariance underlying the Court's different approaches on direct effect.[202]

The WTO system, even though governed by international law and therefore subject to the *pacta sunt servanda* principle, sets up internally; that is, within its boundaries, a system where *pacta sunt servanda* is not the dominant rule. The WTO law system, merely with the preference of compliance, permits *efficient breach*.[203] Therefore, the WTO system has to be distinguished from other agreements concluded between the Union and non-member countries.

Due to the contractual nature of obligations of international agreements, the *efficient breach* and *pacta sunt servanda* methodology provides therefore a possible conceptual framework for the recognition or denial of direct effect of international agreements.

It seems that agreements which are designed to permit *efficient breach* are by nature not capable of conferring rights on individuals, as they do not determine the appropriate legal

201 On the concept of *efficient breach* see e.g.: Donald Harris, David Campbell and Roger Halson *Remedies in Contract and Tort* (Law in Context, 2nd edn CUP, Cambridge 2005) 11.

202 Adheres to the fiction that international treaties, e.g. WTO law, as a contract between members; that is, unitary entities, can be compared to contracts between individuals.

203 The WTO modelled as an *efficient breach* contract (clausula rebus sic stantibus): Manfred Elsig, 'The World trade Organization's Legitimacy Crisis: what does the beast look like?' (2007) 41 JWT 75, 91 with further references; and the views of Warren F. Schwartz and Alan O. Sykes, 'Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' (2002) 31 JLS 179, 179–204 (advocates of the *efficient breach* reading of the DSU); the application of *efficient breach* to international treaties is undeveloped when compared to national law (contract theory).

means of ensuring that they are applied in the European legal order (that is, individual rights would undermine the efficient breach system). Agreements which do determine the appropriate legal means of ensuring that they are applied in good faith in the European legal order (*pacta sunt servanda*) are, in contrast, capable of conferring rights on individuals, as *pacta sunt servanda* is the dominant rule.

Within this framework, we can find an answer to the question why the Court's case law on direct effect seems, at first glance, inconsistent. The idea of *efficient breach* vs. *pacta sunt servanda* seems to be the underlying symmetry. One may therefore argue that the Court's case law on direct effect is a symmetrical phenomenon; that is, consistent as the Court's different approaches on direct effect can be reconciled.

F. *Incurse*: Technical aspects of indirect effects and limitations

The Agreement Establishing the World Trade Organization and the General Agreement on Tariffs and Trade (GATT 1994) does not confer rights on citizens. There is no right to rely directly on such provisions.[204] As Eeckhout has described, consistency required that only two replies to the question of direct effect were permitted: either an international agreement had direct effect, and then it should be possible to rely on it in all types of cases, or it did not have such effect, and then it cannot be relied upon at all. Such an approach would have had the merit of clarity, but in the case of GATT it had not been followed by the Court – in Eeckhout's submission, with good reason. Given the fact that the Court had been unwilling to grant direct effect to GATT, a black-white approach

[204] In terms of GATT rules (Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 27; Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 110) and WTO agreements (Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 48) direct effect was denied. The possibility of direct effect was accepted for provisions of FTAs (Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 26); acc. associations (Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* EU:C:1982:129, [1982] ECR 1331, paras 25-27; Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* EU:C:2000:224, [2000] ECR I-2927, para 54; Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk* EU:C:2001:488, [2001] ECR I-6369, para 38; Case C-235/99 *The Queen v Secretary of State for the Home Department, ex parte Kondova* EU:C:2001:489, [2001] ECR I-6427, para 39; Case C-257/99 *The Queen v Secretary of State for the Home Department, ex parte Barkoci and Malik* EU:C:2001:491, [2001] ECR I-6557, para 39; Case C-268/99 *Jany and Others v Staatssecretaris van Justitie* EU:C:2001:616, [2001] ECR I-8615, paras 26 and 28; Case C-162/00 *Nordrhein-Westfalen v Pokrzeptowicz-Meyer* EU:C:2002:57, [2002] ECR I-1049, para 30; Case C-438/00 *Deutscher Handballbund eV v Kolpak* EU:C:2003:255, [2003] ECR I-4135, para 30; Case C-327/02 *Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* EU:C:2004:718, [2004] ECR I-11055, para 18); DAs (Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* EU:C:1976:18,[1976] ECR 129, para 25; Case C-18/90 *Office national de l'emploi v Kziber* EU:C:1991:36, [1991] ECR I-199, para 23; Case C-58/93 *Yousfi v Belgian State* EU:C:1994:160, [1994] ECR I-1353, paras 16-19; Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia* EU:C:1995:435, [1995] ECR I-4533, paras 34-35; Case C-126/95 *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* EU:C:1996:368, [1996] ECR I-4807, paras 19-20; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, para 34; Case C-416/96 *El-Yassini v Secretary of State for Home Department* EU:C:1999:107, [1999] ECR I-1209, para 32; Case C-179/98 *Belgian State v Fatna Mesbah* EU:C:1999:549, [1999] ECR I-7955, para 14; Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* EU:C:2005:213, [2005] ECR I-2579, para 29) and the EEA Agreement (Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3, [1997] ECR II-39, paras 100-102).

would have stood in the way of useful effects of GATT resulting from the application of the principle of consistent interpretation and from the principle of implementation.[205]

In *Fediol*[206] and *Nakajima*[207] the Court addressed the issue of the indirect effects of GATT rules.[208] Fediol (EEC Seed Crushers' and Oil Processors' Federation), a trade association, sought the annulment of the Commission's (unpublished) Decision No 2506 of 22 December 1986[209] refusing to examine Argentinian trade practices asserted to violate Council Regulation No 2641/84 of 17 September 1984[210] ("the New Commercial Policy Instrument"), to deny initiation of an examination of two practices on the part of Argentina which Fediol described as "illicit commercial practices"; that is, these practices violated the GATT and were thus injurious to the Community's soy-bean oil industry, namely a scheme of differential charges (differential tax regime) and quantitative restrictions, *inter alia* in the form of export registrations and sporadic suspension of exports. The Commission argued that the appeal was inadmissible.[211] The

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205 Piet Eeckhout, 'The domestic legal status of the WTO Agreement: Interconnecting legal systems' (1997) 34 CMLR 11, 58.

206 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781 (GATT 1947).

207 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069 (GATT 1947). See amongst others, Hans-Peter Folz and Barbara Brandtrer, '*Nakajima*' (1993) 4 E.J.I.L. 430-432; Geert A. Zonnekeyn, 'The latest on indirect effect of WTO law in the EC legal order: the *Nakajima* case law misjudged' (2001) 4 Int Economic Law 597-608; Geert A. Zonnekeyn, 'The ECJ's *Petrotub* judgment: towards a revival of the "*Nakajima* doctrine"?' (2003) 30 L.I.E.I. 249-266. For critical analysis of the *Fediol* and *Nakajima* case-law, e.g. Francis Snyder, 'The gatekeepers: The European courts and WTO law' (2003) 40 CMLR 313-367.

208 Referred to as indirect effect, by analogy with the rule of consistent interpretation, Nanette A. Neuwahl, 'Individuals and the GATT: Direct effect and indirect effects of the General Agreement of Tariffs and Trade in Community Law' in N. Emiliou and D. O'Keeffe (eds), *The European Union and World Trade Law* (John Wiley & Sons, Chichester 1996) 313-328.

209 Commission Decision (EEC) No 2506/86 of 22 December 1986 (unpublished).

210 Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices [1984] OJ L252/1.

211 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781, para 13.

Court found that the tax regime violated none of the GATT provisions relied on.[212]

Nakajima All Precision Co. Ltd, a company incorporated under Japanese law, which manufactured typewriters and dot-matrix printers, contested Council Regulation No 3651/88[213] imposing definitive anti-dumping duties on serial-impact dot-matrix printers originating in Japan. Nakajima All Precision Co. Ltd whose goods sold for export to the Community were subjected to definitive anti-dumping duties, fixed at 12 %, was one of the manufacturers named in Article 1 (2) of the contested Regulation.[214] Nakajima raised the plea of inapplicability with regard to the basic EC's anti-dumping regulation. The Court held that it was necessary to examine whether the Council went beyond the legal framework laid down in adopting the disputed provision, as Nakajima claimed. *Nakajima* and *Fediol* lead in the same direction. *Nakajima* and *Fediol* type of cases are manifestation of the judicial application of GATT rules. *Nakajima* allows the Court to review the legality of the Community measures in the light of the GATT rules where the Community intended implementation of a particular obligation assumed in the context of the GATT[215] and *Fediol* where the measure makes explicit reference to a specific provision of the GATT agreement.[216]

212 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781. See for analysis of the judgment: Arthur E. Appleton, 'Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission des Communautés Européennes. Case No. 70/87. Court of Justice of the European Communities, June 22, 1989.' (1990) 84 AJIL 258-262.

213 Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan [1988] OJ L317/33.

214 See for analysis of the judgment: Fernando Castillo de la Torre, 'Anti-dumping policy and private interest'(1992) 17 ELRev. 346-348.

215 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069, para 31. As regards GATT 1947 (Community rules, adopted for the purpose of implementing GATT).

216 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781, paras 19-20 (GATT 1947. Community rules referred to the provisions of GATT).

Further crucial manifestation of the judicial application of GATT norms is the "*International Dairy Arrangement (IDA)*" decision.[217] In its setting, the Commission brought Germany before the Court for failing to implement (correctly) its obligations under the IDA, a self-standing international agreement, creating stable market conditions for trade in dairy products. The Court engaged in a interpretation of the IDA. The Court in *IDA* held that, in cases where the wording of secondary EC legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. The Court further held that an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation. Likewise, the primacy of EC international agreements over provisions of secondary EC legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.[218] IDA provides insights into the relationship between EC and GATT (WTO) law; that is, division of horizontal powers.

Post-Fediol and Nakajima jurisprudence. In *Portugal v Council* the Court maintained its *Fediol*[219] and *Nakajima*[220] line of reasoning:

> It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the

[217] Case C-61/94 *Commission v Germany (International Dairy Arrangement)* EU:C:1996:313,[1996] ECR I-3989. See for analyses of the judgment: Piet Eeckhout, 'Case C-61/94, *Commission v. Germany*, [1996] ECRI-3989' (1998) 35 CMLR 557-566; Noreen Burrows, 'Interpreting the International Dairy Agreement' (1997) 22 ELRev. 263-264.

[218] Case C-61/94 *Commission v Germany (International Dairy Arrangement)* EU:C:1996:313, [1996] ECR I-3989, para 52.

[219] Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781.

[220] Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069.

> Community measure in question in the light of the WTO rules (…).[221]

The Court furthermore confirmed this case law in *Ikea*[222] and *FIAMM*.[223] In all such cases the Court confirmed the *Fediol*[224] and *Nakajima*[225] exceptions to the general principle that Community measures may not be reviewed for compliance with WTO law as expressed in Opinion of Advocate General Geelhoed in *Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung*.[226]

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221 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 49.

222 Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* EU:C:2007:547, [2007] ECR I-7723, para 30. In Hermann's view, given the settled case-law, '(…) from *Portugal v. Council* to *Van Parys*, the treatment of the ADA in the present case is hardly surprising. Nevertheless, it begs the question whether there is any situation at all in which the use of the *Nakajima* principle can in fact be made. If not in the case of anti-dumping, where else could we speak of the EC having intended to implement specific obligations arising under the WTO agreements? (…).' See Christoph Hermann, 'Case C-351/04, *Ikea Wholesale Ltd v. Commissioners of Customs & Excise*, Judgment of the Court of Justice of 27 September 2007, Second Chamber [2007] ECR I-7723' (2008) 45 CMLR 1507, 1515.

223 Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v Council and Commission* EU:C:2008:476, [2008] ECR I-6513, para 114.

224 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781, paras 19-22.

225 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069, para 31.

226 'On this point, however, I would observe that the Commission has not, in my view, given any convincing reasons why the Court should review (or remove) the longstanding *Nakajima* exception in the present case. To begin, it is clear that the Court was fully aware of, and considered, the implications of the reciprocal nature of the WTO agreements in its leading judgments setting out the circumstances in which WTO rules may form a ground of review of Community measures. Thus, for example, in *Portugal v Council*, the Court recalled that the WTO agreement is (…) founded, like GATT 1947, on the principle of negotiations with a view to "entering into reciprocal and mutually advantageous arrangements" (…). In all such cases, however, the Court none the less confirmed the *Fediol* and *Nakajima* exceptions to the general principle that Community measures may not be reviewed for compliance with WTO law. Moreover, the existence of these exceptions does not, to my mind, conflict with what was a primary rationale for the general principle; namely, that according direct effect to WTO rules would 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.' (…) In a case where it is clear that a Community measure was specifically intended to implement a particular obligation of WTO law, the Community legislature has essentially chosen to limit its own scope of manoeuvre in negotiations by itself 'incorporating' that obligation into Community law.' See Case C-313/04 *Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung* EU:C:2005:733, [2006] ECR I-6331, Opinion of AG Geelhoed, para 64.

According to Advocate General Geelhoed there are principal difficulties with defining the scope of the *Nakajima*[227] exception. First, the meaning of the requirement that the measure should implement a particular obligation of GATT, in Advocate General Geelhoed's view this requirement referred only to implementation of one specific, or a specific group of, provisions of GATT. Advocate General Geelhoed did not agree with the interpretation of the General Court in *Chiquita* that a distinction should be made between GATT provisions that are general (in that case, the Article XIII of the GATT obligation of non-discriminatory application of quantitative restrictions) and particular in nature. Aside from the fact that it seemed difficult to draw a consistent line between types of obligation in this manner (the General Court did not define how this should be done), it seemed to Advocate General Geelhoed that the rationale of the *Nakajima* exception would also apply to an obligation implemented into EC but, for instance, not confined to just one individual area such as anti-dumping. Second, the principal difficulty with defining the scope of the *Nakajima* exception was setting out how to assess whether the EC legislator's 'intention' in taking the contested measure was to implement a particular obligation of GATT. On this point, while it seemed initially attractive to interpret this test as simply requiring an assessment of the EC legislator's subjective intention, this approach was in Advocate General Geelhoed's view inherently flawed. Advocate General Geelhoed has argued that it was almost impossible for the Court – and for individuals seeking to ascertain the scope of their rights – to be certain what the EC legislator's subjective intention was at the time of passing legislation and also the Court has been inconsistent in assessing the relevance of direct evidence of the EC's legislator subjective intention, thus, in cases such as *Van Parys*, the Court rejected the applicability of the *Nakajima* doctrine in circumstances where the subjective intention of the EC legislator was, as expressed in the preamble and in comments of the Commissioner at the time, to

[227] Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069.

implement a WTO obligation.[228]

According to Gáspár-Szilágyi, recently, in *LVP NV v Belgische Staat,*[229] the Court declined to extend the *Fediol* and *Nakajima* principles to the compatibility of the European Union's banana regime with WTO law. *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*[230] and *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*[231] concerned the application of the *Fediol* and *Nakajima* principles to the Aarhus Convention. It has been suggested that, as a result of the two judgments, it seems that the afore-mentioned principles will remain confined to WTO law (anti-dumping, anti-subsidies and trade barriers).[232]

228 Case C-313/04 *Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung* EU:C:2005:733, [2006] ECR I-6331, Opinion of AG Geelhoed, paras 72-76. The General Court points to the fact that applications of the *Nakajima* case law is not, *a priori*, limited to areas of anti-dumping. See, Case T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v Commission* EU:T:2005:31, [2005] ECR II-315, para 124.

229 Case C-306/13 *LVP NV v Belgische Staat* EU:C:2014:2465.

230 Joined Cases C-401/12 P, C-402/12 P and C-403/12 P *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* EU:C:2015:4.

231 Joined Cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* EU:C:2015:5.

232 For further discussion, see Szilárd Gáspár-Szilágyi, 'The relationship between EU law and international agreements: Restricting the application of the *Fediol* and *Nakajima* exceptions in *Vereniging Milieudefensie*' (2015) 52 CMLR 1059-1077, in particular at 1074-1077.

Doctrinal (in)coherence. Fediol[233] and *Nakajima*[234] and the 'monistic' (in)coherence of the Court's case law. *International Fruit Company*[235] suggests a monistic conception of the relationship between international and European law and seems to indicate that the Unions' legal order stands in a monistic tradition towards international law. That is,

> (…) desire to observe the Undertakings of the General Agreement follows as much from the very provisions of the EEC Treaty as from the Declarations made by Member States on the presentation of the Treaty to the contracting parties of the General Agreement in accordance with the obligation under Article XXIV thereof.
>
> That intention was made clear in particular by Article 110 of the EEC Treaty [now Article 206 TFEU], which seeks the adherence of the Community to the same aims as those sought by the General Agreement, as well as by the first paragraph of Article 234 [now Article 351 TFEU] which provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty, and in particular multilateral agreements concluded with the participation of Member States, are not affected by the provisions of the Treaty.
>
> The Community has assumed the functions inherent in the Tariff and Trade Policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles [111] and 113 of the Treaty [now Article 207 TFEU].
>
> By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General Agreement.[236]

As confirmed in *Haegeman*, '[t]he provisions of the Agreement [Association Agreement

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233 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781.

234 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069.

235 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

236 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, paras 12-15 (GATT 1947).

with Greece], from the coming into force thereof, form an integral part of Community law.'[237] This 'monistic' consistency of the Court's case law is openly at odds with the approach in *Portugal v Council*,[238] inspired by dualism; that is, denial of automatic effects within the Union's legal order.

> The judgments in Case 70/87 *Fediol v Commission* [1989] ECR 1781 and Case C-69/89 *Nakajima v Council* [1991] ECR I-2069 are only apparently, or at any rate only partly, inconsistent with this general tendency. The implication of those judgments is that whenever a Community rule refers to the provisions of GATT (as in *Fediol*) or has been adopted for the purpose of implementing them (as in *Nakajima*), the Court accepts that individuals may rely on those provisions as a measure of the legality of the Community act in question. It is true that in such cases the option of invoking the GATT provisions is not based on the direct effect of those provisions but on the fact that there is a Community act which has implemented them or at least expressed the intention of implementing them. The fact that the provision may serve as a measure of the validity of a Community act only in cases where the act refers to or implements the GATT provision clearly means that it may do so only if and when the international provision has been transposed into Community law. This in turn raises further questions about the 'monist' consistency of the Court's case-law, which is openly at odds with the approach in *Nakajima* (…).[239]

Indeed, *Fediol*[240] and *Nakajima*[241] seem to deny, in line with *Kupferberg*,[242] that WTO law is automatically integrated into the legal order of the European Community:

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237 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449, para 5. *Cf.* Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719, para 7. For a recent discussion, Armin von Bogdandy and Maja Smrkolj 'European Community and Union Law and International Law' in Wolfrum, Rüdiger (et al, eds), *Encyclopedia of Public International Law* (OUP, Oxford 2011), para 9 with further references; or H. G. Schermers, 'Community Law and International Law' (1975) 12 CMLR 77, 83-84.

238 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395.

239 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 27 fn 45.

240 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781.

241 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069.

242 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641.

> It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that state assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.
>
> The governments which have submitted observations to the Court do not deny the Community nature of the provisions of agreements concluded by the Community. They contend, however, that the generally recognized criteria for determining the effects of provisions of a purely Community origin may not be applied to provisions of a Free-Trade Agreement concluded by the Community with a non-Member country.[243]

The European Parliament's resolution on the relationships between international law and the constitutional law of the Member States. This reasoning, stating that:

> Calls for a clear statement of the relationship between international law and European law to be written into the EC Treaty, in terms of the EC being equated with nation states, which means that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EC or after its substance has been transposed into EC legislation.[244]

This dualistic approach may be seen as a shift from monism to dualism and indicates a dualistic conception of the relationship between international and European Union law.[245]

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243 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, paras 14-15.

244 The European Parliament, Resolution on the relationships between international law and the constitutional law of the Member States [1997] OJ C325/26, para 14.

245 See Robert Uerpmann-Wittzack, 'The Constitutional Role of International Law' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd revised edn Hart, Oxford 2011) 137-147.

In line with *International Fruit Company*[246] and *Haegeman*,[247] the General Court suggested a monistic approach in *Kadi*:[248]

> It has to be added that, with particular regard to Article 307 EC [now Article 351 TFEU] and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community (…).[249]

In contrast, Advocate General Maduro, adopted a dualistic/or pluralistic approach, rather than a monistic one. According to him the relationship between international law and the Community legal order was governed by the Community legal order itself, and international law could permeate that legal order only under the conditions set by the constitutional principles of the Community.[250]

In turn, the Court highlighted the autonomy of the Union's legal order, without addressing the monism/dualism dichotomy,

> It follows from all these considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to

246 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

247 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449.

248 Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* EU:T:2005:332, [2005] ECR II-3649.

249 Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* EU:T:2005:332, [2005] ECR II-3649, para 224.

250 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:11, [2008] ECR I-6351, Opinion of AG Maduro, para 24.

> review in the framework of the complete system of legal remedies established by the Treaty.[251]

In the light of the Court rulings mentioned above and considering the inconsistency of the Court's case law there seems no doctrinal support to convey a consistent dualistic approach.[252] The doctrinal inconsistencies still leave unexplained whether the descriptors 'monistic' and 'dualistic' imply the emergence of differences in fundamental rights

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[251] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351, para 285. The Court's attitude has been widely discussed in the literature: Rory Stephen Brown, 'Executive Power and Judicial Supervision at European Level: *Kadi v Council of the European Union and Commission of the European Communities*' (2006) 4 EHRLR 456; Helmut Philipp Aust and Nina Naske, 'Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte? Die Rechtsprechung des EuG zur Umsetzung "gezielter Sanktionen" aus dem Blickwinkel des Völkerrechts'(2006) 61 ZÖR 587; Sebastian Steinbarth, 'Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus, Die Entscheidungen des EuG in den Rs. "*Yusuf* u.a." sowie "*Kadi*"' (2006) ZeuS 269; Andreas von Arnauld, 'UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz' (2006) 44 AdV 201; Christoph Möllers, 'Das EuG konstitutionalisiert die Vereinten Nationen – Anmerkungen zu den Urteilen des EuG vom 21.09.2005, Rs. T-315-01 und T-306/01' (2006) 3 EuropaR 426; Luis M. Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment' (2008) 5 IOLR 339; Stefan Griller, 'International Law, Human Rights and the Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*' (2008) 4 EuConst 528; Deirdre Curtin and Christina Eckes, 'The *Kadi* Case: Mapping the Boundaries between the Executive and the Judiciary in Europe' (2008) 5 IOLR 365; Pierre D'Argent, 'Arrêt "*Kadi*": le droit communautaire comme droit interne' (2008) 153 JDE 265; Nikolaus Graf Vitzthum, 'Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme - L'affaire «*Kadi*»' (2008) ZeuS 375; Guy Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* Dispute' (2009) 14 E.F.A.Rev. 65; Paul James Cardwell, Duncan French and Nigel White, 'European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (Joined Cases C-402/05 P and C-415/05 P) Judgment of 3 September 2008' (2009) 58 ICLQ 229; Marjorie Beulay, 'Les arrêts Kadi et Al Barakaat International Foundation -Réaffirmation par la Cour de justice de l'autonomie de l'ordre juridique communautaire vis-à-vis du droit international' (2009) 524 RMCUE 32; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) Jean Monnet Working Paper No. 1/09 <http://www.jeanmonnetprogram.org>. Review of the comments on the General Court's and the Court's *Kadi* rulings: Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 YEL 533.

[252] In Hinarejos's view the Court took a decidedly dualistic approach. See Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, Oxford 2009) 143. In De Witte's view it is hard to conclude, as some authors have done, that the *Kadi* judgment conveys a consistent dualistic approach, Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 ZÖR 141, 154.

protection. Halberstam and Stein, intentionally avoid the descriptors 'monistic' and 'dualistic' as neither of the theoretical notions is apt to capture the interactions among multiple legal systems.[253] Von Bogdandy argued in the same vein that the general understanding of the relationship between international and internal law should be placed on another conceptual basis, a theory of legal pluralism.[254]

G. Conclusion

This chapter investigated the symmetries and invariances of the Court's case law on direct effect in order to suggest a conceptual framework for the recognition or denial of the possibility of direct effect of international agreements.

Section 1 examined the concept of direct effect and dealt with the formula for direct effect. It demonstrated that there is neither a nexus between direct effect and the constitutional situation in each Member State; nor is there a nexus between direct effect and the dualist/monsistic philosophy towards international law. The section highlighted that direct effect and direct applicability are two distinct and different legal concepts, and that the formula of direct effect is two-fold consisting of a 'wording, purpose and nature' component and a 'clear, precise and unconditional' component.

Section 2 considered the Court's different approaches towards the (absence of) direct effect of GATT rules and WTO agreements and towards the possible direct effect of provisions of free trade associations, accession associations, development associations and of provisions of the EEA Agreement. It highlighted the structural differences

253 Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order' (2009) 46 CMLR 13, 43.

254 Armin von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 I.J.C.L. 397, 400.

between WTO law and other agreements.[255]

After having considered the Court's different approaches towards the possible direct effect of international agreements; that is, dualism (denying direct effect in respect of WTO agreements), Section 3 turned the spotlight on the demarcation between relevant and irrelevant parameters for the recognition of direct effect.

The section established that the 'wording, purpose and nature' component of the two-fold test for direct effect is a method to interpret the objective intention of the contracting parties, which is relevant when considering whether an agreement is capable of having direct effect. Also, the section established that the Court distinguishes between relevant and irrelevant parameters when interpreting the objective intention of the contracting parties.

The similarity of terms (that is, provisions of the agreement/ provisions of the Treaty), the imbalance between obligations assumed (that is, a certain asymmetry of obligations/ non-reciprocity), the position to dominate the framing of an agreement (that is, the ability to preserve and pursue interests) and the degree of integration (that is, the question of whether there is any 'special link' with the European Union), and (jointly) applied safeguard clauses, are criteria unlikely to affect the direct enforceability.

Unilaterally applied safeguard clauses indicate that the contracting parties did not intend direct effect (that is, obligations assumed are not sufficiently *unconditional*).

A static application of the relevant and irrelevant parameters *as such* seemed, however, too schematic and is therefore inadequate to identify the objective intention of the

[255] For a recent contribution see Szilárd Gáspár-Szilágyi, 'EU international agreements through a US lens: different methods of interpretation, tests and the issue of "rights"' (2014) 39 ELRev. 601-625.

contracting parties.

Section 4 suggested that only a holistic approach is adequate to identify the objective intention of the contracting parties, and conceptualised such an approach. Due to the contractual nature of obligations of international agreements, the *efficient breach* and *pacta sunt servanda* methodology provides a possible conceptual framework for the denial or recognition of direct effect of international agreements.

Section 5 turned to the technical aspects of the question of indirect effects – which was an *Incurse* in Chapter 1.

CHAPTER II: GENERAL ISSUES AND PRACTICE ON EU INTERNATIONAL AGREEMENTS (CFSP AND PJC (BY NOW FSJ) AGREEMENTS)

A. Introduction

The pre-Lisbon Union has been endowed with the capacity to inaugurate CFSP and PJC (by now FSJ) agreements in conformity with Articles 24 and 38 TEU which enabled the EU to conclude agreements in implementation of Title V and VI TEU. With the entry into force of the Lisbon Treaty Article 218 TFEU has become the general legal basis for the Union's treaty-making.

This chapter focuses on the general issues and practice on EU agreements (CFSP and PJC (by now FSJ) agreements), and integrates sections on direct and indirect effect.

The chapter is divided into four sections. Section 1 deals with the international legal personality of the Union. There was debate as to whether the Union had implicitly acquired international legal personality. Treaty provisions did not expressly provide on whose behalf such agreements were concluded. According to one school of thought powers rested with the Member States and the Council acted on behalf of the Member States. By contrast, according to another school of thought the Council acted on behalf of the European Union and not on behalf of the Member States. The entry into force of the Lisbon Treaty has rendered the debate on whether such agreements were concluded by the Council on behalf of the EU or on behalf of the Member States obsolete. Article 47 TEU designates the Union as a contracting party. Section 2 subsequently deals with the practice on EU agreements. Sections 3 and 4 consider respectively direct effect and indirect effect and address a vertical dimension (*vis-à-vis* national legislation).

B. International legal personality

Article J.14 and K.10 TEU, text of the Treaty of Amsterdam, for which there is no precedent in the Treaty of Maastricht, stated that:

> When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them.
>
> (…) Agreements referred to in Article J.14 [CFSP title] may cover matters falling under this Title [JHA].

This provision provided for the Council to conclude agreements on matters of the Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters.

An appended Declaration stated that:

> The provisions of Articles J.14 [37 new] and K.10 [repealed] of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.[1]

The Amsterdam provisions did not point to the existence of a legal personality for the

[1] Declaration no. 4 on Articles J.14 and K.10 of the Treaty on European Union, annexed to the Final Act of the Amsterdam Treaty.

Union,[2] distinct from the Community.

The Nice Treaty had continued filling out the initially meagre provisions of Articles J.14 and K.10 TEU begun at Amsterdam. The new Articles J.14 and K.10 TEU, renumbered Articles 24 and 38 TEU, read as follows:

> When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency. (…) No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally (…).
>
> (…) Agreements referred to in Article 24 may cover matters falling under this title [Title VI].

The TEU in its Nice version did not include a provision explicitly conferring legal personality to the Union. The Nice provisions did not explicitly provide on whose behalf the agreements are concluded or who is bound by agreements on matters of the Common Foreign and Security Policy or Police and Judicial Co-operation in Criminal Matters – questions with no certain answers available presently.

According to one school of thought, the European Union was not a subject of international law; that is, powers rested with the Member States and the Council acted on behalf of the Member States which were the contracting parties. That is, rather than the Member States creating an independent capacity of the Union to conclude international treaties, it seemed to be a case of them wanting to borrow the EU institutions to act on their behalf. There seemed to be little prospect of the Union emerging as a fully fledged

[2] Union is a convenient label to use in general terms. Historical developments explain the necessity of being precise on legal terminology.

international treaty-making partner, as distinct from the Member States. In the areas of CFSP and JHA, the Council acted on behalf of the Member States. That was a limited move away from individual action by the Member States.[3]

By contrast, according to another school of thought, the European Union had implicitly acquired international legal personality; that is, the Council acted on behalf of the European Union and not on behalf of the Member States. That followed from the text of (old) Article 24 of the Treaty on European Union read in its context: that is, the concluding power, the Council, is an EU institution (the agreements were negotiated by the Presidency which pursuant to Article 18 (1) represented the Union and not its Member States). The CFSP had its own objectives and its own legal instruments laid down in (old) Article 11 and Article 12 of the Treaty on European Union, and the right of abstention by the Member States in (old) Article 23 of the Treaty on European Union – which applied to agreements concluded under ex-Article 24 (old) EU – required that the abstaining Member State "would accept that the decision commits the Union". This was confirmed by the subsequent practice. The more than fifty agreements concluded between the EU and third countries or international organisations explicitly provided that such agreements were concluded by the Council on behalf of the EU. Finally, the addition of paragraph 6 of Article 24 by the Treaty of Nice to the effect that agreements "would be binding on the institutions of the Union" indicated clearly that the Union as

[3] Nanette A.E.M. Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam' (1998) 3 E.F.A.Rev. 177, 186. Amongst others, Christiane Trüe, 'Rechtspersönlichkeit der Europäischen Union nach den Vertragsänderungen von Amsterdam: Wer handelt in GASP und PJZ?' (2000) ZeuS 127, 163-65; K Lenaerts and E de Smijter, 'The European Union as an Actor under International Law' (1999-2000) 19 YEL 95, 130; Jaap W. de Zwaan, 'The Legal Personality of the European Communities and the European Union' (1999) 30 NYIL 75, 103; Marise Cremona, 'The European Union as an International Actor: The Issues of Flexibility and Linkage' (1998) 3 E.F.A.Rev. 67, 70; Jörg Monar, 'The European Union's Foreign Affairs System after the Treaty of Amsterdam: A Strengthened Capacity for External Action?' (1997) 2 E.F.A.Rev. 413, 427; Eileen Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford 2002) 176 have argued that the Council acts on behalf of the Member States.

such was bound by the agreements. The European Union was acting as having legal personality.[4]

According to Dashwood, applying the criteria enunciated by the International Court of Justice in the Reparation for Injuries suffered in the Service of the United Nations case (leading authority for the implicit attribution of legal personality [1949] ICJ Rep 174 where the ICJ in its Advisory Opinion considered the international legal personality of the United Nations), there were solid grounds for regarding the Union as possessing of legal personality, capable of incurring rights and obligations, confirmed by the central role of the Union's organs and institutions, at least as regarding the functions assigned to it under Title V of the Treaty on European Union. The main indications could be found in the ambitious scope and objectives of the CFSP as defined by Article J.1, which could only be realised effectively through action on the international plane, and the fact that, in the Council, the Presidency and the Commission, the Union was equipped with organs well qualified to pursue such action. Practice since the entry into force of the Treaty on

[4] Ricardo Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 CMLR 337, 356-57. Amongst others, Theodore Georgopoulos, 'What kind of treaty making power for the EU? Constitutional problems related to the conclusion of the EU-US agreements on extradition and mutual legal assistance' (2005) 30 ELRev. 190, 193; Gilles de Kerchove and Stephan Marquardt, Stephan 'Les accords internationaux conclus par l'Union européenne' (2004) 50 A.F.D.I. 803, 809 et suiv; Alan Dashwood, 'The European Union – A new international actor (Editorial Comment)' (2001) 38 CMLR 825, 826; Ramses A. Wessel, 'The inside looking out: consistency and delimitation in EU external relations' (2000) 37 CMLR 1135, 1142; Ramses A. Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 E.F.A.Rev. 507, 535; Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CMLR 703, 745; Sally Langrish, 'The Treaty of Amsterdam: selected highlights' (1998) 23 ELRev. 3, 14; Frederik Naert, 'The International Legal Status of the EU' in *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, Antwerp 2010) 340-41; Ramses A. Wessel, 'The EU as a party to international agreements: shared competences, mixed responsibilities' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations: salient features of a changing landscape* (CUP, Cambridge 2008) 159; Nicholas Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in Martin Trybus and Nigel D White (ed), *European Security Law* (OUP, Oxford 2007) 116-17 and 122; Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2005) 159; Delano Verwey, *The European Community, the European Union and the International Law of the Treaties – A comparative Analysis of the Community and Union's External Treaty-Making Practice* (TMC Asser Press, The Hague 2004) 60 have argued that the Council acts on behalf of the Union.

European Union has provided a measure of confirmation.[5]

A similar argument was advanced by Koutrakos, who suggested that treaty-making practices by the Union in the area of the Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters, under ex-Articles 24 and 38 TEU, would have suggested that the Union had legal personality, albeit impliedly.[6] Sari carried this thought further, using an analysis of subsequent practice in the context of the ESDP (now CSDP) to demonstrate that the Council had acted on behalf of the Union when entering into these agreements, and that the Union had become a contracting party to them. In his view, it seemed that a consensus was then emerging in the literature to the effect that the international agreements concluded by the Council since 2001 in the context of the ESDP demonstrated that the Council acted on behalf of the EU under Article 24 TEU, rather than on behalf of the Member States. One of the key arguments put forward in support of this view was that both the internal Council acts adopting international agreements as well as the agreements themselves name the 'European Union' as one of the contracting parties. The Council consistently approved the agreements negotiated by the Presidency under Article 24 TEU 'on behalf of the European Union', and specifically authorised the Presidency to designate the person empowered to sign them 'in order to bind the European Union'. The titles and preambles of agreements concluded by the Council referred to the 'European Union' as one of their parties.[7]

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5 Alan Dashwood, 'External Relations Provisions of the Amsterdam Treaty' (1998) 35 CMLR 1019, 1040.

6 Panos Koutrakos, 'Primary law and policy in EU external relations: moving away from the big picture' (2008) 33 ELRev. 666, 675. Earlier assessments, Stephan Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union' in Vincent Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (TMC Asser Press, The Hague 2001) 340-44.

7 Aurel Sari, 'The Conclusion of International Agreements in the Context of the ESDP' (2008) 57 ICLQ 53, 69-85, at 80.

C. Legal practice

Discussions on contracting practices and political activities of the Union in areas of international cooperation initially were taken forward in Daniel Thym's contribution in the international treaties of the European Union[8] and Aurel Sari's contribution in the conclusion of international agreements in the context of the ESDP.[9] Daniel Thym's contribution concentrated on consensual international law. A large number of quantitative contracts related to the conduct of civilian and military operations in CSDP, as an integral part of the CFSP.[10] Thym presented the international practices of the European Union and placed them in the context of jurisprudential debate. Aurel Sari's contribution (an overview of international agreements concluded in the context of the CSDP) examined the Council's practice in the implementation of CFSP agreements and assessed the widely held view that CFSP agreements offered conclusive proof of the Union's status as an independent subject of international law.[11] Existing agreements relating to the conduct of CSDP operations may be classified into three types: Status of forces and status of mission agreements with host States to determine the legal status of CSDP operations and their members during their presence in the territory of host States concerned, agreements contributing personnel and assets to CSDP operations in order to define the modalities of

8 See Daniel Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 ZaöRV 863-925, at 875-899.

9 See Aurel Sari, 'The Conclusion of International Agreements in the Context of the ESDP' (2008) 57 ICLQ 53-86, at 55-59.

10 Marise Cremona, 'The EU and Global Emergencies – Competence and Instruments' in A Antoniadis, R Schütze & E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart, Oxford/Portland 2011) 11-31 addresses the Union's competences and the instruments it may use in global emergency situations (crisis management missions within the framework of CSDP); Alan Dashwood, 'Conflicts of competence in responding to global emergencies' in A Antoniadis, R Schütze & E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart, Oxford/Portland 2011) 33-48; Gilles Marhic, 'Common Security and Defence Policy Crisis Management Missions: an Effective Tool for EU Response to Emergencies' in A Antoniadis, R Schütze & E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart, Oxford/Portland 2011) 247-260; Stefan Olsson (ed), *The Future of Crisis Management within the European Union – cooperation in the face of emergencies* (Springer, Berlin-Heidelberg 2009).

11 *Cf.* Editorial, 'The European Union – A new international actor' (2001) 38 CMLR 825, 825 (e.g. the agreement on EUMM activity in the FRY).

respective contributions and agreements to regulate the exchange of classified information between the Union and third parties.[12]

The pre-Lisbon practice[13] of the European Union was manifest. The Union had concluded treaties with various third States – EU agreements (CFSP and PJC (by now FSJ) agreements) – complemented by treaties with international organisations (NATO and the International Criminal Court).

EU agreements (CFSP and PJC (by now FSJ) agreements) classified into agreement type[14] (pre-Lisbon practice):

I.) Status and activities of the European Union with host States (CSDP): Status of mission (SOMA) and status of forces (SOFA) Agreements; a gradual expansion of the

[12] For example, Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 167 et seq provides an overview of the Union's treaty-making activity in the area of CSDP (procedural and substantive issues) and typology.

[13] See, amongst others, Marise Cremona, 'Coherence in European Union foreign relations law (Coherence in Foreign Policy – the Legal Dimension)' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, Cheltenham 2011) 55-92; Simon Duke, 'Consistency, coherence and European Union external action: The path to Lisbon and beyond' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, Cheltenham 2011) 15-54.

[14] *Cf.* Ramses A. Wessel,'The EU as a party to international agreements: shared competences, mixed responsibilities' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations: salient features of a changing landscape* (CUP, Cambridge 2008), cited above, at 160 categorises agreements to which the Union has become a party, as follows: 1. agreements between the EU and a third State on the participation of that State in an EU operation; 2. agreements between the EU and a third State on the status or activities of EU forces; 3. agreements between the EU and a third State in the area of PJCC; 4. agreements between the EU and a third State on the exchange of classified information; 5. agreements between the EU and other international organisations; 6. agreements between the EU and a third State in the form of an Exchange of Letters; 7. joint declarations and Memoranda of Understanding between the European Union and a third State; 8. agreements concluded by European Union agencies.

military component;
II.) Participation in European Union Missions (CSDP): The Union has entered into agreements with third States in order to determine the conditions of their participation in CSDP missions;
III.) Exchange of classified information (CSDP /Justice, Freedom and Security); e.g. division of labour with NATO;
IV.) Processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (TFTP) (Justice, Freedom and Security);
V.) Enhanced cooperation in the field of extradition and mutual legal assistance (MLA) (Justice, Freedom and Security);
VI.) The processing and transfer of Passenger Name Record (PNR) data (Justice, Freedom and Security);
VII.) The Schengen acquis. Agreements, concluded by the Council of the Union and Iceland/Norway and Swiss Confederation, concerning the latters' association with the implementation, application and development of the Schengen acquis (Justice, Freedom and Security).

I. Status and activities of the European Union with host States. Status of mission (SOMA) and status of forces (SOFA) Agreements[15] with a host country were bi-or multilateral; they addressed legal matters relating to the conduct of CSDP missions and determined the legal status of their members; that is, military forces and civilian personnel, during their presence in the host States concerned (Appendix I).[16] Status of mission (SOMA) and forces (SOFA) agreements included provisions governing the mandate, status and composition, entry and departure of personnel, personnel employed locally, access to borders and border crossing, entry/exit points and movement within the host State's territory, chain of responsibilities, means of transport, cooperation/ and access to information and media in the territory of the host State, host party support/ contracting/ privileges and immunities, accommodation and practical arrangements, change to facilities, military police and mutual assistance. Status agreements further included provisions governing the settlement of claims (e.g. claims for death, injury,

[15] For an excellent overview of the evolution of the Union's practice of concluding status of forces and status of mission agreements in the context of the Common Security and Defence Policy: Aurel Sari, 'Status of forces and status of mission agreements under the ESDP: the EU's evolving practice' (2008) 19 E.J.I.L. 67-100, with further references; Sari's article examines key provisions of the two model status agreements adopted by the Council of the European Union in 2005 to serve as a basis for negotiations with prospective host states in future operations; the conclusion of status agreements has had a profound impact on the visibility of the Union on the international legal scene. Liability of the Union, e.g. for the personal injuries suffered by officers of the Member States while serving in such operations: Maria-Gisella Garbagnati Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' (2006) 55 ICLQ 77, 116-117. See also Frederik Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations' in Martin Trybus and Nigel White (ed), *European Security Law* (OUP, Oxford 2007) 61-101; Antonio Missiroli, 'The European Union: Just a Regional Peacekeeper?' (2003) 8 E.F.A.Rev. 493-503; Eileen Denza, 'External relations' (2002) 51 ICLQ 990, 995; that is, the conclusion of CFSP agreements e.g. the agreement on EUMM activity in the FRY, and addresses the problem of how non-member parties to any agreement might secure redress.

[16] Agreements on the activities and on the tasks, status, privileges and immunities of the European Union Monitoring Mission (EUMM) (Appendix I-1), Agreements on the status and activities of the European Union Police Mission (EUPM) (Appendix I-2), Agreements on the status of the European Union-led forces (Appendix I- 3), Agreements on the status and activities of the European Union Rule of Law Mission (Appendix I-4), Agreements on the status of the European Union Special Representative and his/her support team (Appendix I-5), Agreements on the Status of the European Union Missions in Support of Security Sector Reforms (Appendix I-6), for instance, determine the legal status of certain CSDP operations.

damage or loss, and the exercise of civil and criminal jurisdiction) and provisions on the protection of the environment and cultural heritages.[17]

In addition, operational, administrative, technical[18] and financial[19] arrangements had been drawn up. Implementing arrangements addressed specific questions; such as, status of local staff and contractors, visits of officials, communication and information systems, coordination of information activities, exchange of information, medical services, protection of the environment, host-nation support, procedures for addressing/settling claims, modalities and procedures for the Joint Coordination Group and/or transport arrangements.[20] Implementing measures required that they were concluded by the EU Force/Mission Commander/Head of Mission, appointed by the Council of the European Union, and the Host State's administrative authorities.

In response to growing international concern,[21] the Union had entered into agreements with third States to define the conditions and modalities for the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy on the high seas and detained by the European Union-led naval force (EUNAVFOR), and seized

17 E.g. Article 9 of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46.

18 E.g. Article 18 Seychelles (EUF) [2009] OJ L323/14; Article 20 Georgia (EUMM) [2008] OJ L310/31; Article 19 Guinea-Bissau (Mission in Support of Security Sector Reform) [2008] OJ L219/66; Article 18 CAR (EUF) [2008] OJ L136/46; Article 18 Chad (EUF) [2008] OJ L83/40; Article 18 Cameroon (EUF) [2008] OJ L57/31; Article 18 (EUF) Gabon [2006] OJ L187/43.

19 E.g. Article 18 of the Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta [2009] OJ L33/43.

20 E.g. Article 16 of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46.

21 Douglas Guilfoyle, 'Counter-piracy law enforcement and human rights' (2010) 59 ICLQ 141-69 outlines the general legal framework surrounding Somali piracy before returning to specific FRs issues raised by the arrest/detention of pirates, e.g. the protection of suspects' rights to a fair trial/effective remedy, and potential ways forward; Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 E.J.I.L. 399, 407 and 408-12 addresses the protection of fundamental rights of captured individuals, and Operation Atlanta.

property in the possession of EUNAVFOR, from EUNAVFOR to host States, and for their treatment after such transfer (Appendix I- 7);[22] these included detailed provisions for the protection of fundamental rights of pirates and armed robbers captured by the Union's naval force and transferred to the host State.[23]

Implementing arrangements,[24] on technical and other assistance, to enable the transfer, investigation, prosecution and trial of transferred individuals covered, *inter alia*, the identification of competent law enforcement authorities, detention facilities, points of contact for notifications, forms to be used for transfers, technical and logistical assistance in the fields of revision of legislation, training of investigators/prosecutors, investigative/judicial procedures, handling of documents (storage/handing-over of

22 Efthymios Papastavridis, 'EUNAVFOR Operation Atlanta off Somalia: the EU in unchartered legal waters?' (2015) 64 ICLQ 533-568 looks at the basis under international law and EU law of the EUNAVFOR Operation Atalanta, combating piracy off Somalia. Firstly, Papastavridis analyses, the application of the UN Convention on the Law of the Sea 1982. Second, Papastavridis examines if any breaches of international law would be attributable to the EU or to the contributing State and addresses the responsibility gap of the EU in the context of CSDP operations. He emphasises that claims arising from the conduct of the EU in the course of the Operation Atlanta can only be submitted to Member States courts. According to him that is surely conclusive in holding the Member States primarily liable for wrongful conduct committed in the course of the Operation Atlanta. The EU finally acceding to the ECHR would induce a new situation. It would then be possible that both the Member State involved, and the EU, might become co-respondents in a case before the ECtHR. As provided for in the draft agreement on the accession of the EU to the ECHR, the relevant application would have to be filed against the Member State concerned, and the EU could then join as co-respondent. Yet, *Opinion 2/13* has delayed progression towards the EU acceding to the Convention (at 566-567).

23 Articles 3 and 4 of the Agreement between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49.

24 Para 9 of the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49; and Article 10 of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/3.

evidence to the competent law enforcement authorities) and appeal procedures. In addition, implementing arrangements provided for the repatriation of transferred individuals in case of acquittal/ or non-prosecution, transfer for completion of sentence in another State, or their repatriation after serving a prison sentence.

Parliament v Council[25] concerned inter-institutional practice. Firstly, the Parliament sought the annulment of the Council Decision on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer. Secondly, it sought the maintenance of the effects of that decision until it will be replaced.[26] The Parliament put forward two pleas in law in support of the action, alleging a violation of the second subparagraph of Article 218 (6) TFEU (choice of the substantive legal basis) and of Article 218 (10) TFEU (information obligation). The CJEU's analysis showed that the substantive legal basis of the contested decision was appropriate and therefore could be adopted without the consent or consultation of the Parliament and the Court further showed that the Council violated Article 218 (10) TFEU.[27] The CJEU emphasised that Article 218 (10) TFEU was prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the EU's external action, and more specifically, to verify that its powers were respected precisely in consequence of the choice of legal basis for a decision concluding an agreement.[28] The CJEU explained that the information requirement laid down in Article 218 (10) TFEU applies to any procedure for concluding an international agreement. This includes agreements relating only to the CFSP.[29] The CJEU further held that if the Parliament was

25 Case C-658/11 *Parliament v Council (EU-Mauritius Agreement)* EU:C:2014:2025.

26 [2011] OJ L254/1.

27 Case C-658/11 *Parliament v Council (EU-Mauritius Agreement)* EU:C:2014:2025, paras 43-63 and paras 69-87.

28 Case C-658/11 *Parliament v Council (EU-Mauritius Agreement)* EU:C:2014:2025, para 79.

29 Case C-658/11 *Parliament v Council (EU-Mauritius Agreement)* EU:C:2014:2025, para 85.

not immediately and fully informed at all stages of the EU treaty-making procedure in accordance with Article 218 (10) TFEU, including that preceding the conclusion of the agreement. It was not in a position to exercise the right of scrutiny.[30]

II. Participation in European Union Missions. The Union had entered into agreements with third States in order to determine the conditions of their participation in CSDP missions. Agreements on the participation in European Union Missions (Appendix II)[31] defined the modalities of respective contributions. Agreements on the participation of States in European Union missions included provisions governing personnel[32] and assets to EU crisis management missions; for example, costs associated with the participation in the operation apart from the costs which were subject to common funding, or contributions to the operational budget.[33]

30 Case C-658/11 *Parliament v Council (EU-Mauritius Agreement)* EU:C:2014:2025, para 86.

31 Like the Agreements on the participation of States in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) (Appendix II-1), Agreements on the participation in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') (Appendix II-2), Agreements on the participation in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) (Appendix II-3), Agreements on the participation in the European Union Forces (EUF) in the Democratic Republic of Congo (Annex II-4) /and in the former Yugoslav Republic of Macedonia (Appendix II-5), Agreements on the participation in the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) (Appendix II-6), Agreements on the participation in the military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) (Appendix II-7), Agreements on the participation in the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (Operation EUFOR RD Congo) (Appendix II-8), Agreements on the participation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA) (Appendix II-9), Agreements on the participation in the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO) (Appendix II-10), and Agreements establishing a framework for the participation in the EU crisis management operations (Appendix II-11).

32 E.g. Article 2 (status of personnel) of the Agreement between the European Union and New Zealand on the participation of New Zealand in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L274/18.

33 E.g. Articles 5 (financial aspects) and 6 (contribution to operational budget) of the Agreement between the European Union and New Zealand on the participation of New Zealand in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L274/18.

A number of agreements provided for the adoption of technical and administrative modalities and required that they were concluded by the High Representative for the Common Foreign and Security Policy and the appropriate authorities of the participating State.[34]

In response to growing international concern, the Union had entered into Agreements to regulate the conditions under which third States shall participate in the EU-led military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) (Appendix II-12); these provided for the adoption of further implementing measures, technical and administrative.[35] Implementing arrangements addressed specific questions; such as, the identification of competent law enforcement authorities, detention facilities, handling of documents, including those related to the gathering of evidence, points of contacts for notifications and forms to be used for transfers. Implementing measures required that they were concluded by the the Secretary-General of the Council of the European Union/High Representative for the Common Foreign and Security Policy or the EU Operation Commander and the appropriate authorities of the participating State.

[34] E.g. EUPOL Afghanistan: Article 7 [2007] OJ L274/18 participation of New Zealand; Article 7 [2007] OJ L270/28 participation of Croatia. Aceh Monitoring Mission – AMM: Article 7 [2005] OJ L349/31 participation of the Swiss Confederation. Operation ALTHEA: Article 6 [2006] OJ L188/10 participation of the former Yugoslav Republic of Macedonia (FYROM); Article 6 [2005] OJ L202/40 participation of the Republic of Chile; Article 6 [2005] OJ L156/22 participation of the Argentine Republic; Article 6 [2005] OJ L127/28 participation of New Zealand; Article 6 [2005] OJ L65/35 participation of the Republic of Albania; Article 6 [2005] OJ L34/47 participation of the Kingdom of Morocco; Article 6 [2005] OJ L20/42 participation of the Swiss Confederation. EUFOR Tchad/RCA: Article 6 [2008] OJ L307/16 participation of the Russian Federation; Article 7 [2008] OJ L268/33 participation of Croatia; Article 6 [2008] OJ L217/19 participation of Albania. EULEX KOSOVO: Article 6 [2008] OJ L317/20 participation of Croatia; Article 6 [2008] OJ L282/33 participation of the United States; Article 6 [2008] OJ L217/24 participation of the Swiss Confederation. Framework for the participation in the European Union crisis management operations: Article 13 [2005] OJ L315/21 participation of Canada; Article 13 [2006] OJ L189/17 participation of Turkey; Article 13 [2005] OJ L182/29 participation of Ukraine; Article 13 [2005] OJ L67/14 participation of Romania; Article 13 [2005] OJ L67/8 participation of the Kingdom of Norway; Article 13 [2005] OJ L46/50 participation of the Republic of Bulgaria; Article 13 [2005] OJ L67/2 participation of the Republic of Iceland.

[35] Article 7 [2009] OJ L202/84 participation of the Republic of Croatia.

III. Exchange of classified information and safeguarding classified information from unauthorized disclosure. The Union had undertaken to protect and safeguard classified information provided or exchanged.[36] This occurred in one of two ways:

a.) The conduct of the security and defence policy required the provision of information to third States which was sensitive; the Council had entered into agreements on security procedures for the exchange of classified information to regulate the exchange of such information between the Union and third parties and to protect and safeguard classified information provided or exchanged (Appendix III-1), in the most appropriate way, by adequate measures (definition of reciprocal rules on the protection of the information exchanged).

Agreements on Security Procedures for the Exchange of Classified Information provided for further implementing arrangements to be concluded in order to lay down the standards for the reciprocal security protection.[37] Technical security arrangements included practical measures for the handling, storage, reproduction, transmission and destruction of such information. Responsibility for developing arrangements for the protection and safeguarding of classified information provided to or exchanged with the EU fell, for the EU side, on the General Secretariat of the Council Security Office and the European Commission Security Directorate.

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[36] See generally, Aurel Sari (n 7) 59; and Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 180 et seq.

[37] Article 10 Russia [2010] OJ L155/57; Article 12 Australia [2010] OJ L26/31; Article 12 Israel [2009] OJ L192/64; Article 11 Switzerland [2008] OJ L181/58; Article 13 United States [2007] OJ L115/30; Article 11 Iceland [2006] OJ L184/35; Article 11 Croatia [2006] OJ L116/74; Article 11 Ukraine [2005] OJ L172/84; Article 11 Bulgaria [2005] OJ L118/53; Article 11 Romania [2005] OJ L118/48; Article 11 FYROM [2005] OJ L94/39; Article 11 Norway [2004] OJ L362/29; Article 11 Bosnia and Herzegovina [2004] OJ L324/16.

b.) The European Union had established relationships with the North Atlantic Treaty Organisation (NATO) and had signed an Agreement with the North Atlantic Treaty Organisation on the Security of Information. Further, it had established relationships with the International Criminal Court (ICC), signing an Agreement with the International Criminal Court on cooperation and assistance on the release of classified information. In addition, the European Union had signed an Agreement with the European Space Agency (ESA) on the security and exchange of classified information, to strengthen the security of each of the Parties by setting out the rules on the security/exchange of classified information (Appendix III-2). Agreements on Security Procedures for the Exchange of Classified Information imposed the duty on the parties (i) to protect and safeguard classified information or material; (ii) to ensure that such information or material keeps the security classification given to it by the providing party in accordance with the provisions set out in its own security regulations; (iii) not to use classified information provided or exchanged for purposes other than those established by the originator and those for which the information or material was provided or exchanged; and (iv) not to disclose such information or material to third parties without the consent of the originator;[38] and provide for further implementing arrangements to be concluded.[39] Responsible for overseeing the implementation were the Secretaries-General of the Council and the European Commission.

IV. Processing and transfer of Financial Messaging Data. The Union had entered into Agreements on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking

38 E.g. Article 4 (a-d) of the Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information [2003] OJ L80/36.

39 Article 11 of the Agreement between the European Union and the European Space Agency on the security and exchange of classified information [2008] OJ L219/59; Article 11 of the Agreement between the European Union and the International Criminal Court on cooperation and assistance [2006] OJ L115/50; Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information [2003] OJ L80/36.

Program (TFTP)[40] to ensure the continuation of the TFTP (Appendix IV). The TFTP was set up by the United States Treasury in order to allow United States counter-terrorism authorities access to financial data, by having made available to the United States Treasury Department financial messaging data stored in the European Union for the purposes of the TFTP. To ensure protection of personal data, as stipulated in Article 16 TFEU and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union were applied. The TFTP Agreement provided for transparency of the use of data; that is, access, blocking and rectification of data, administrative redress, and the availability of a process for seeking judicial redress.

V. Enhanced cooperation in the field of extradition and mutual legal assistance. The Union had undertaken to provide for enhanced cooperation in the field of extradition and mutual legal assistance (MLA). The Extradition and Mutual Legal Assistance Agreements, binding on Member States as a matter of international law following their signature, provided for assistance in the investigation and prosecution of criminal offences, and involved intrusions into the personal liberty of individuals; several Member States, e.g. Germany,[41] sought parliamentary approval for their binding effect.[42] A disparity in fundamental rights protection between two jurisdictions might leave States in the difficult position of being unable or unwilling to co-operate in international criminal

40 Sylvia Kierkegaard, 'US war on terror EU SWIFT(ly) signs blank cheque on EU data' (2011) 27 C.L.S.Rev. 451, 452-57 addresses the tension between the protection of fundamental rights of individuals and ensuring safety from terrorist attacks.

41 Gesetz zu dem Abkommen vom 25. Juni 2003 zwischen der Europäischen Union und den Vereinigten Staaten von Amerika über Auslieferung, zu dem Abkommen vom 25. Juni 2003 zwischen der Europäischen Union und den Vereinigten Staaten von Amerika über Rechtshilfe, zu dem Vertrag vom 14. Oktober 2003 zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika über die Rechtshilfe in Strafsachen, zu dem Zweiten Zusatzvertrag vom 18. April 2006 zum Auslieferungsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika sowie zu dem Zusatzvertrag vom 18. April 2006 zum Vertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika über die Rechtshilfe in Strafsachen (innerstaatliche Anwendbarkeit).

42 Aurel Sari (n 7) 86, with further references.

investigations.[43]

a.) The Norway-Iceland participation Agreement created rights and obligations between Norway, Iceland and those EU Member States in respect of which the EU Mutual Assistance Protocol had entered into force[44] to improve judicial cooperation in criminal matters by applying certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters[45] between the Member States of the European Union and the 2001 Protocol thereto to Iceland and Norway; that is, substantive provisions of the EU Mutual Assistance Convention and Protocol became applicable to Iceland and Norway in their mutual relations and in their relations with the Member States of the European Union (Appendix V-1). The Treaty on European Union (TEU) had no claim as to the constitutional effects of conventions; that is, the constitutional effects of the Convention on Mutual Assistance in Criminal Matters remained undefined.

b.) Agreements on enhanced cooperation in the field of extradition and mutual legal assistance (Appendix V-2).[46] The contracting parties undertook to provide for

43 John Dugard and Christine van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187-212; Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757-779; and Robert J. Currie, 'Human rights and mutual legal assistance: resolving the tension' (2000) 11 Crim.L.F. 143-181 address the interaction of fundamental rights and extradition/ mutual legal assistance.

44 Article 6 (3) of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L26/3.

45 Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union - Council Declaration on Article 10 (9) - Declaration by the United Kingdom on Article 20 [2000] OJ C197/3; Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2001] OJ C326/1.

46 For an excellent review of the EU-US Agreements' on extradition and mutual legal assistance provisions on capital punishment, the protection of personal data, the powers of joint teams of investigators, the exchange of bank information and special and military tribunals: Theodore Georgopoulos, 'What kind of treaty making power for the EU? Constitutional problems related to the conclusion of the EU-US agreements on extradition and mutual legal assistance' (2005) 30 ELRev. 190-208.

enhancements to cooperation in the context of applicable extradition relations and provided mutual legal assistance in criminal matters, in accordance with the provisions of the Agreements, as displayed in Article 1, and initiated a legal framework and established principles and mechanisms for cooperation.[47] The Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway was aimed at improving judicial cooperation in criminal matters, with regard to the surrender procedure for the purpose of prosecution or execution of sentences, between, on the one hand, the Member States and, on the other hand, Norway and Iceland. The extradition system was based on a mechanism of surrender pursuant to an arrest warrant; in contrast to the European Arrest Warrant, dual criminality was required.[48]

VI. The processing and transfer of Passenger Name Record (PNR) data. Personal data[49] was collected every time individuals travelled by air from the Union to third countries, via PNR Agreements[50] with the United States and Australia (Appendix VI).

47 As displayed in Articles 3 and 14 of the Agreement on mutual legal assistance between the EU and the US; Articles 3 and 27 of the Agreement on mutual legal assistance between the EU and Japan; Articles 3 and 18 of the Agreement on extradition between the EU and the US; Articles 3 and 34 of the Agreement on the surrender procedure between the Member States of the EU and Iceland and Norway.

48 Article 3 (2) of the Agreement on the surrender procedure between the Member States of the EU and Iceland and Norway.

49 Including the date of reservation/issue of ticket, date(s) intended to travel, passenger's name(s), frequent flier/benefit information, contact/payment/billing information, travel itinerary, travel agency/agent, ticketing/baggage/seat information (seating preferences/requests) and the travel status of passenger. E.g. DHS letter 2007, Ch III, attached to the Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security [2007] OJ L204/21.

50 For excellent review, e.g. Mario Mendez, 'Passenger Name Record Agreement – European Court of Justice' (2007) 3 EuConst 127; Paul de Hert and Vagelis Papakonstantinou, 'The PNR Agreement and Transatlantic anti-terrorism Cooperation: No firm human rights framework on either side of the Atlantic' (2009) 46 CMLR 885.

This data was felt to be an important tool for addressing terrorist threats,[51] and related crimes, including organized crime, that were transnational in nature, in the spirit of transnational partnership.

VII. The Schengen acquis and Association (Title V, TFEU). The Council had entered into several Agreements concerning the latters' association with the implementation, application and development of the Schengen acquis;[52] measures building upon the Schengen acquis also applied to Norway, Iceland, Switzerland and Liechtenstein and their relations with each other (Appendix VII).[53] These agreements enabled certain obstacles to the free movement of persons, resulting from the geographical positions, to be eliminated.

Association Agreements set up an organisational structure, outside the institutional framework of the Union, ensuring the association of EU non-Member States with the decision making process in these fields and enabling their participation in these activities through a Mixed Committee[54] with representatives of the associated Governments and Members of the Council and Commission.

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51 Fernando Mendez and Mario Mendez, 'Comparing Privacy Regimes: Federal Theory and the Politics of Privacy Regulation in the European Union and the United States' (2009) 40 Publius 617, 624. Definition and application of PNR, Ruwantissa Abeyratne, *Aviation Security Law* (Springer, Heidelberg 2010) 122-125.

52 *Inter alia*, the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway on the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Republic of Iceland and the Kingdom of Norway, on the other, in areas of the Schengen acquis which apply to these States [2000] OJ L15/2 (Agreement on free movement of persons).

53 Article 16 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L53/52, and the Protocol to the Agreement, Council doc. 16462/06 (Brussels, 28 February 2008).

54 Preamble of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis [1999] OJ L176/36; Preamble of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L53/52.

Pre-Lisbon, the procedure to be followed for the negotiation and conclusion of international agreements was not limited to autonomous agreements, and applied also to cross-pillar agreements,[55] which had been concluded within both the EC and EU pillars. From a theoretical perspective (pre Lisbon), agreements with non-Member States, involving EC and EU matters, e.g. co-operation or trade matters and arms proliferation or political dialogue, could trigger a combined application[56] of Article 300 former TEC and Article 24 former TEU. In practice, there are barely any cross-pillar agreements. An international agreement, based on both the EU /and EC Treaties, and a combined application of Article 300 former TEC and Article 24 former TEU, was the Agreement between the European Union,[57] the European Community[58] and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis,[59] which entered into force on 1 March 2008;[60] Article 16 of that Agreement concerns the association of Liechtenstein.

55 Stephan Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union' in Vincent Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (TMC Asser Press, The Hague 2001) 339.

56 Piet Eeckhout (n 4) 184.

57 Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2004] OJ L368/26. Having regard to the EU Treaty, in particular ex-Articles 24 and 38 TEU.

58 Council Decision 2004/860/EC of 25 October 2004 on the signing, on behalf of the European Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2004] OJ L370/78. Having regard to the EC Treaty, in particular Article 62, point 3 of the first sub-paragraph of Article 63 and the Articles 66 and 95 in conjunction Article 300 (2) TEC.

59 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L53/52.

60 Council Decision 2008/903/EC of 27 November 2008, [2008] OJ L327/15; Council Decision 2008/146/EC of 28 January 2008, [2008] OJ L53/1; Council Decision 2008/149/JHA of 28 January 2008, [2008] OJ L53/50.

D. Direct effect

1. The area of CFSP and direct effect

a) Pre-Lisbon arguments for and against direct effect

There are a couple general pre-Lisbon arguments that might be raised in favour of direct effect.

According to von Bogdandy and Nettesheim, Union law acts issued under the competences of the CFSP and CJH directly applied in all legal systems and indeed with supremacy if a Union norm conflicted with a national norm. However, the unity thesis did not lead to an automatic and general extension of all characteristics of the law valid under E(E)C. EAC and ECSC treaties to the CFSP and CJH. The new forms of action (common position, joint action, measures) had to be developed in a differentiated system according to their own logic. Therefore the question of whether they were to be accorded immediate applicability could only be answered after analysing any specific form of action.[61]

The unity of the European legal system (thesis of the unitary legal system) and the recognition of the unitary nature of the Union system did not lead to an automatic and general extension of constitutional doctrines elaborated in the context of the EC to the area of CFSP.

[61] Armin von Bogdandy and Martin Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) 2 ELJ 267, 283 and 284. The Treaty of Maastricht gave rise to the thesis of the unitary legal system. The Treaty of Amsterdam added further evidence for the development and substantiation of the thesis. See Armin von Bogdandy and Martin Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) 2 ELJ 267 et seq.

According to Spaventa, in some instances, the recognition of the unitary nature of the Union system and of the binding nature of its constitutional principles was vital not only to safeguard individual rights but also ensured the legitimacy of Union action by imposing a reviewable fundamental rights limit on Union law. That was especially the case when the European Union acted by means of non-reviewable instruments and its action directly or indirectly affected individual rights.[62] That is, in light of the unitary nature of the Union system and of the binding nature of its constitutional principles, there was the possibility of providing for (at least some) individual enforcement, in areas with limited integrationist potential. As seen above, to safeguard individual rights.[63]

In a similar vein, Gosalbo Bono, the CFSP legal order, although it was a distinct field of activity of the European Union in comparison with the rest of the Union's activities (Arts. I-14 and I-16 DCT), remained part of the unified EU legal system[64]

According to de Baere, extensive interpretation; that is, enforcement, in an area with limited integrationist potential, assumed that the differences between measures falling within PJCC and CFSP were not sufficient in themselves to exclude conclusively the duty of consistent interpretation (and direct effect) from CFSP.[65]

Lenaerts and Corthaut argued that the bulk of international law is intergovernmental in nature. Yet, that has never been a reason to deny that those instruments might have important consequences in the legal order of the Member States and even the European

62 Eleanor Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 EuConst 5, 23.

63 Ricardo Gosalbo Bono (n 4) 378. As indicated by Gosalbo Bono: 'Nowadays, even the sacrosanct Community principles of direct effect and primacy over the law of the Member States cannot be said to be completely alien to the CFSP legal order.'

64 Ricardo Gosalbo Bono (n 4) 378.

65 Geert de Baere, *Constitutional Principles of EU External Relations* (OUP, Oxford 2008) 205-209 and 259.

Community, consequences which could be brought about by individuals relying on those norms.[66]

There are also pre-Lisbon arguments against direct effect. A first argument against extensive interpretation (that is, enforcement in an area with limited integrationist potential) was that it would be contrary to the system of the Treaty (with no guidance in CFSP from the Court) that constitutional doctrines elaborated in the context of the EC would apply to the European Union acts in the field of CFSP.

The Member States' court would be left entirely to its own devices, with no possibility of obtaining guidance in the matter from the ECJ. For Member States' courts directly to apply CFSP provisions under such conditions would be contrary to the system of the Treaty, as this could lead to an uncontrolled proliferation of conflicting interpretations. It would also be impossible to maintain the rule in *Foto-Frost* (Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199), that only the Court of Justice has authority to declare acts of EU institutions unlawful, as, without being able to seek a ruling on validity from the ECJ, domestic courts could not be expected to accept the validity of CFSP acts as beyond question.[67]

[66] Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 31 ELRev. 287, 288.

[67] Editorial Comments, 'The CFSP under the EU Constitutional Treaty? Issues of depillarization' (2005) 42 CMLR 325, 327.

A second argument involved an assumption that equal application of the law is essential for direct effect – not for the duty of consistent interpretation.[68]

As indicated by Peers, the importance of the preliminary ruling jurisdiction was confirmed by the *van Gend & Loos* and the *Pupino* judgment, the latter in effect a variation upon this theme.[69] As he has put it, the Court referred to the existence of the jurisdiction of the Court over preliminary rulings as a secondary argument for concluding that EC law "has an authority which could be invoked by Member States' nationals before domestic courts and tribunals". The *Pupino* judgment in effect was a variation upon this theme, when it concluded that the effectiveness of the Court's third pillar jurisdiction over preliminary rulings would be nullified in the absence of indirect effects. The limits on the Court's jurisdiction (that is, national opt-outs) were explained away by concluding that the importance of the preliminary ruling jurisdiction was confirmed by the ability of all Member States to submit observations in third pillar references before the Court. This line of reasoning was also convincing as far as it went, as it was hard to see what the point of the Court's jurisdiction would be in the absence of direct or indirect effects.[70]

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68 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, [1963] ECR 1; Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 14. The Court stated: 'It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that state assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.' See amongst others, Steve Peers, 'Salvation outside the Church: Judicial protection in the third Pillar after the *Pupino* and *Segi* judgments' (2007) 44 CMLR 883, 916; and Armin von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law'(2008) 6 ICON 397, 407-10; that is, at least, in the constellation of competition between private economic operators, the preliminary-ruling procedure (equal application of the law) is essential for direct effect.

69 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, [1963] ECR 1; Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285.

70 Steve Peers (n 68) 915-16.

A third argument was that national governments have objected to the communitarisation of CFSP to preserve their intergovernmental character. Denza phrases this as follows: Germany was the last Member State to deposit its ratification and thus bring the Maastricht Treaty into force. The Bundestag and the Bundesrat had decided to adapt a new Article 23 into the German Constitution as a basis for Germany's participation in the European Union. Public debate in Germany had focused on possible threats from the Treaty to the constitutional rights of German citizens and on the need for greater involvement by national parliaments in the process of European integration. Even after the constitutional amendment became law, Germany had delayed its ratification of the Maastricht Treaty until its Federal Constitutional Court in the case of *Brunner v European Union Treaty*[71] ruled on complaints by a German citizen that the Treaty would breach his constitutional rights and guarantees.[72]

b) Post-Lisbon arguments for and against direct effect

A first argument in favour of an extensive interpretation is the unified treaty-making procedure (Part V of the TFEU on the Union's external action). According to Article 37 TEU,

> [t]he Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter [Common Foreign and Security Policy].

Article 37 TEU provides for Union competence to conclude agreements with one or more States or international organisations in the area of Common Foreign and Security Policy. Article 37 TEU does not lay down a specific procedure applicable to CFSP agreements (that is, Articles 216, 218 TFEU – the unified treaty-making procedure (Part

[71] [1994] 1 CMLR 57. The German Constitutional Court drew a careful distinction between central areas of exercise (customs union, free movement, internal market) and areas where cooperation remains on an intergovernmental basis (foreign and security policy).

[72] Eileen Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford 2002) 60.

V of the TFEU on the Union's external action) – applies).

A second argument is the existence of a provision corresponding to Article 4 (3) TEU, namely Article 24 (2) TEU. Article 4 (3) TEU states that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. In the same vein, Article 24 (2) TEU states that,

> [w]ithin the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.

Given that the principle of sincere cooperation also operates within CFSP, the CFSP legal order, although a distinct field of activity, remains part of a unified legal system. This points to the conclusion that the duty of consistent interpretation may apply to CFSP.[73]

A third argument is Article 47 TEU, express provision for international legal personality. The Working Group of the Convention for the Future of Europe on Legal Personality expressed that the European Union should have a single legal personality, concluding that, explicit conferral of a single legal personality on the Union did not *per se* entail any amendment, either to the allocation of competences between the Union and the Member States or to the allocation of competences between the Union and Community at that time. Nor did it involve any amendments to the respective procedures and powers of the institutions regarding in particular the opening, negotiation and conclusion of

[73] This argument makes only sense once we have identified Article 4 (3) TEU as the source of the duty of consistent interpretation. Apparently dissenting, Jan Wouters, Dominic Coppens and Bart de Meester, 'The European Union's External Relations after the Lisbon Treaty' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, Vienna 2008) 191; Steve Peers (n 68) 919-920.

international agreements.[74]

This reasoning is confirmed by the Treaty of Lisbon, which contains allusion to the legal personality of the Union. Article 47 TEU provides that the 'Union shall have [international] legal personality'. Thym perceives Article 47 TEU as a drafting technique which designates the Union as an international organisation, noting that the significance of the EU's express international legal personality (Article 47 TEU) should not be overstated. It did not imply that the EU moved closer to statehood, as legal personality was a common feature of contemporary international organisations. It rather seemed that the protracted dispute about the EU's legal status in the 1990s wrongly had equated legal personality with supranationalisation, which would explain the quasi-ideological objection of EU legal personality by some authors. That was not the case because bodies such as the International Criminal Court or the WTO possess legal personality- without being a state (one might on the contrary perceive Article 47 TEU as a drafting technique which designated the EU as an international organisation). Also, international organisations exercised their own competences, whose exercise resulted in international legal obligations.[75]

Article 47 TEU makes the legal personality of the European Union explicit and designates the Union as a contracting party; as such the debate on the question of whether ex-Article 24 TEU confers implicitly legal personality to the European Union becomes obsolete.[76]

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74 CONV 305/02, Final Report of Working Group III on Legal Personality, Brussels, 1 October 2002 [IV.] [20].

75 Daniel Thym, 'The intergovernmental constitution of the EU's foreign, security and defence executive' (2011) 7 EuConst 453-480, at 472-73.

76 See, amongst others, Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 161. In the view of the writer, the debate/reasoning is still relevant, even though the question is settled.

An appended Declaration states that:

> The fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.[77]

As indicated by Craig, there is no reason why Article 47 TEU should have any impact on the competences of the European Union.[78]

Article 47 TEU, as indicated by de Baere, in a point perhaps only of academic interest regarding the Union, does not in itself actually grant the Union international legal personality. This is because, whether an entity possessed international legal personality was a conclusion that had to be drawn within international law. When the founders of an international organisation explicitly endowed it with international legal personality, this merely indicated that the founders wished to create an entity distinct from their aggregate, and this would be of evidentiary value when deciding on the existence of a legal person under international law. An explicit grant of personality would be immediately valid among the Member States of the organisation, but one could think of hypothetical circumstances in which it would not have any effect *vis-à-vis* non-Member States, for instance if in reality the organisation had no independent organs at all.[79]

As indicated by Naert, challenges in the field of external relations to result from the explicit grant of legal personality to the Union are questions of mostly theoretical importance. As regards human rights law the TEU does not specifically refer to IHL, but IHL is covered by provisions of the TEU on international law and is arguably covered to some extent by the human rights provisions of the TEU, according to Naert, the main

77 Declaration no. 24 concerning the legal personality of the European Union.

78 Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP, Oxford 2010) 387.

79 Geert de Baere (n 65) 144.

source of IHL obligations of the EU itself was customary international humanitarian law. Yet, there were few indications so far of a recognition that the EU itself could have IHL obligations, although it remains to be seen whether the explicit grant of legal personality to the EU will change this. In addition, the application of IHL to the EU did raise some difficult questions of mostly theoretical importance, even though most of its rules could readily be applied by the EU in its CSDP operations. On the basis of those considerations, it could seem that the IHL and human rights law obligations of the EU and its Member States in CSDP operations were to a significant extent similar, although not fully identical.[80]

There are also post-Lisbon arguments against direct effect. A first argument is that the ability of a norm to be self-executing or justiciable is, even after the de-pillarisation following the Treaty of Lisbon, severely limited under the CFSP.

According to Schütze, unlike ordinary EU law, however, the direct effect of CFSP law will be exceptional. The notion of direct effect stands for the ability of a norm to be self-executing or justiciable. That quality will be severely limited within the CFSP. The jurisdiction of the Court of Justice is excluded with respect to CFSP provisions and acts adopted on the basis of those provisions (European Union, Court of Justice and General Court). There are only two express exceptions. CFSP law can be reviewed under Article 40 TEU and the Court of Justice has jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted on the basis of Chapter 2 of Title V of the Treaty on European Union under Article 275 TFEU.[81]

The Court continues to lack jurisdiction under Article 267 TFEU with regard to CFSP

[80] Frederik Naert, 'The application of International Humanitarian Law and Human Rights Law in CSDP Operations' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 211-12.

[81] Robert Schütze, 'European Community and Union, Decision-Making and Competences on International Law Issues' in Wolfrum, Rüdiger (et al, eds), *Encyclopedia of Public International Law* (OUP, Oxford 2011), para 22.

measures; that is, there is no preliminary reference mechanism for the CFSP.

This results in a second argument. The distinct nature of CFSP competences; an additional reason for being careful with the Union-wide application of Community concepts. Elsuwege phrases this as follows: In contrast to other EU competences, CFSP competence does not fall within one of the three categories set out in Article 2 TFEU (making reference to exclusive competence, shared competence and supporting or complementary competence). Arguably, the drafters of the treaty did intend to provide for a non-defined, *sui generis* category of competences to underline the specific nature of the CFSP as a distinct policy area of the Union, which is not subject to pre-emption and not merely complementary to activities of the Member States.[82]

The intergovernmental, institutional framework of CFSP is characterised by the consensus principle (Article 24 (1) TEU). National governments act within the framework of the Council; due to national sovereignty (individual, national interests) cooperation cannot develop into integration.[83]

The specificities of the CFSP, and its distinctive nature (Article 24 TEU), are reflected in the continued exclusion[84] of the Court in these matters,[85] with a different institutional balance and decision-making procedure, militating against an extensive interpretation;

82 Peter van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency' (2010) 47 CMLR 987, 991. In the same line, Daniel Thym (n 8) 900-01.

83 Jakob C. Øhrgaard, 'Less than Supranational, More than Intergovernmental': European Political Cooperation and the Dynamics of Intergovernmental Integration' (1997) 26 Millennium J.Int'l Stud. 1, 2.

84 Save for two exceptions. Jurisdiction to monitor compliance with Article 40 TEU and jurisdiction to review the legality of decisions referred to in Article 275 (2) TFEU providing for restrictive measures against natural or legal persons adopted by the Council.

85 Panos Koutrakos, 'EU law: External relations' (2010) 59 ICLQ 481, 487; Steven Blockmans and Ramses A. Wessel, 'The European Union and crisis management: will the Lisbon Treaty make the EU more effective?' (2009) 14 J.C.& S.L. 265, 295.

that is, individual enforcement in an area with limited integrationist potential.

A third argument – although the area of the CFSP is an object of European co-operation within the framework of the Union, the Member States have deliberately not incorporated them into the supra-national jurisdiction system.[86] If effect were to derive from EU law (e.g. by explicit Treaty provision) national constitutional courts would have no choice. But to accept.

Arguments in the previous section; that is, rationales, in favour of individual enforcement, seem less thorough / less elaborated on.

2. The area of FSJ and direct effect

a) Pre-Lisbon arguments for and against direct effect

As a presumption a careful extension of the Court's case law (legal principles developed in the context of the EC Treaty) to the former third pillar of PJCC might bridge many *lacunae* in the Treaty. It has been suggested in the legal literature that legal principles developed in the context of the former EC Treaty could be extended to the EU Treaty as long as they were not expressly excluded. The principle of direct effect, for example, was excluded, but the principle of supremacy of European Law was not. Parts of the case law on supremacy also related to treaty provisions which were not directly applicable. The critical case was where a legal act under ex-Title VI to the TEU (provisions concerning police and judicial cooperation in criminal matters) which required the adoption of a national law was in conflict with a Member State's constitution. Here, the national law could be adopted if the European act was considered supreme. A careful extension of the

[86] *Brunner* [1994] 1 CMLR 57 (Maastricht), para 18 and 2 BvE 2/08 *Gauweiler v Treaty of Lisbon* (Judgment of 30 June 2009), para 50.

case law of the ECJ might bridge many *lacunae* in the EU Treaty.[87]

In this sense, as indicated by Spaventa, the Court in the *Pupino* case[88] simply anticipated this extension.

By transposing a former Community law doctrine to the area of co-operation in criminal matters, it acted as a bridge between the pillars. The ruling in *Pupino* was not unanimously well received: concerns about loss of sovereignty in the criminal sphere and judicial law-making contributed to the criticism. That said, it should be regarded that the ruling might serve as a much-required judicial guarantee in an area where significant legislative action had taken place without any significant democratic accountability. The problem, if there was one, did not stem from the transposition of a Community law doctrine to the area of criminal co-operation; rather, it stemed from the institutional framework in the third pillar that allowed action in the criminal sphere to be taken at the executive level and far away from the public eye. The Constitutional Treaty would have solved that problem by eliminating the pillar structure and subjecting action in the criminal sphere to the same judicial and democratic guarantees that characterised the first pillar.[89]

As Spaventa, rhetorically suggested, by transposing a former Community law doctrine to the field of co-operation in criminal matters, the duty of consistent interpretation acted as a bridge between the pillars.

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87 Armin von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) 36 CMLR 887, 909-10.

88 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285.

89 Eleanor Spaventa (n 62) 24.

b) Post-Lisbon arguments for and against direct effect

The starting points for any discussion of judicial protection (which national courts must secure as regards areas of Freedom, Security and Justice) are national constitutional rights, and the process of "communitarisation".

With the entry into force of the Lisbon Treaty, the acquis that has been built up under pre-Lisbon's Police and Judicial Cooperation in Criminal Matters merged with that of the "Community".

Police and Judicial Cooperation in Criminal Matters, transferred to the Treaty on the Functioning of the European Union (TFEU), as policy aiming at creating an Area of Freedom, Security and Justice (FSJ) is submitted to the "Community" method; that is, some of the Community pillar principles, to unify pre-Lisbon's first and third pillars.

In the *Simmenthal*[90] case the Court has stated that any provision of a Member States' legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EC law by withholding from the Member States' court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside Member States' legislative provisions which might prevent EC rules from having full force and effect were incompatible with those requirements which were the very essence of EC law. That would be the case in the event of a conflict between a provision of EC law and a subsequent Member States' law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EC law, even if such an impediment to the full effectiveness of EC law were merely

[90] Case 6/64 *Flaminio Costa v E.N.E.L.* EU:C:1964:66, [1964] ECR 585; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49, [1978] ECR 629.

temporary.[91]

As indicated by Hinarejos, following the "communitarisation" of pre-Lisbon's Police and Judicial Cooperation in Criminal Matters, the *Simmenthal* duty; that is, the duty to dis-apply a conflicting national rule, might come coupled with a full extension of the "Community" method: Both the recent case-law on the criminal competence of the Community and the Commission's proposal to transfer all third pillar matters into the Community pillar had recently hinted at a possible gradual blurring of the distinction between first and third pillar - not by extending the principles of what was then Community law to the third pillar, but by transferring areas of competence currently exercised under the third pillar to the first one. Yet recently, the European Council had

[91] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49, [1978] ECR 629, paras 22-23. 'Primacy' and 'trigger' models are competing visions for primacy /direct effect. For critical analysis of the two competing models: Michael Dougan, 'When worlds collide: competing visions of the relationship between direct effect and supremacy' (2007) 44 CMLR 931. The author previously used the terms 'common law' and 'civil law' models. See Michael Dougan, 'Legal Developments' (2005) 43 JCMS 89. Advocates of the 'primacy' model; that is, the assumption of a free-standing principle of primacy, are: Miriam Lenz, 'Horizontal What? Back to Basics' (2000) 25 ELRev. 509; Takis Tridimas, 'Black, White, and Shades of Grey: Horizontality of Directives Revisited' (2002) 21YEL 327; Koen Lenaerts and Tim Corthaut (n 66); Gerrit Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 OJLS 397. Note also the doctrinal support in the Court's case law; several Advocates General articulated that there should be a distinction between the 'substitution effect' and the 'exclusionary effect'. E.g. Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* EU:C:1999:620, [2000] ECR I-4941, Opinion of AG Saggio, para 38; Case C-287/98 *Grand Duchy of Luxemburg v Linster* EU:C:2000:3, [2000] ECR I-6917, Opinion of AG Léger, para 57; and Case C-457/02 *Criminal proceedings against Antonio Niselli* EU:C:2004:365, [2004] ECR I-10853, Opinion of AG Kokott, paras 52-75 (exclusion of the offending national rules). The 'trigger' model assumes that the Union legal order and the national legal order are separate legal systems, with the inherent need for linkages; that is, the need to render Union law cognizable before national courts through the doctrine of direct effect. See Joined Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.* EU:C:2004:584, [2004] ECR I-8835; and Sacha Prechal, 'Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer et al*., with annotation' (2005) 42 CMLR 1445. Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02)* EU:C:2005:270, [2005] ECR I-3565 are affirmations of the Court's understanding in Joined Cases C-397/01 to C-403/01. See Michael Dougan, 'When worlds collide: competing visions of the relationship between direct effect and supremacy' (2007) 44 CMLR 931, 948 and 963. The 'trigger' model, as opposed to the 'primacy' model, is more straightforward, and intellectually sustainable.

agreed to issue a mandate to draft a new Reform Treaty, which should in theory do away with the distinction between those two areas. Albeit the details remained to be seen, it was expected that the general principles of Community law would be explicitly extended to the third pillar. If that was the case, the extension of the *Simmenthal* duty would come coupled with a full extension of the Community method, and the problems discussed above would not arise.[92] In the writer's view a full extension of the "Community" method is very superficial and difficult to draw. Already an open-minded reading, indicates the inadequacy of this understanding. To sum, the fact that FSJ is now "communitarised" says nothing as to the effect of international agreements.

3. Contractual exclusions of direct effect

The Court said, in the context of ruling on whether a German tax on wines was applicable to imports from Portugal (*Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*),

> 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 account of the international origin of the provisions in question. In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.[93]

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92 Alicia Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?' (2008) 14 ELJ 620-634, at 633-34.

93 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362, [1982] ECR 3641, para 17.

In *Portugal v Council*, the Court held in connection with a challenge against a Council Decision establishing a Memorandum of Understanding between the European Community and India and Pakistan, relating to trade in textiles:

> It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (*Kupferberg*, paragraph 18).[94]

That is, direct effect will also depend upon the phrasing of EU agreements (CFSP and PJC (by now FSJ) agreements). The agreement between the European Union and,

… the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) [2005] OJ L256/58 (Treaty EU, Article 24).
… Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42 (Treaty EU, Article 24).
… the Former Yugoslav Republic of Macedonia on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima) [2004] OJ L16/66 (Treaty EU, Article 24).
… the Republic of Poland on the participation of Polish armed forces in the European Union force (EUF) in the former Yugoslav Republic of Macedonia [2003] OJ L285/44 (Treaty EU, Article 24).
… the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46 (Treaty EU, Article 24).

are EU agreements (CFSP agreements) where the contracting parties have agreed that:

> the purpose of the privileges and immunities as provided for in this

[94] Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 35.

> Agreement are not to benefit individuals but to ensure the efficient performance of the EU Mission/ operation, (...).[95]

The agreement between the European Union and,

… the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11 (Treaty EU, Articles 24, 38).
… Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service [2008] OJ L213/49 (Treaty EU, Articles 24, 38).
… the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (PNR II Agreement) [2007] OJ L204/18 (Treaty EU, Articles 24, 38); replaces the interim agreement.
… the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security [Interim]Agreement [2006] OJ L298/29 (Treaty EU, Articles 24, 38).

are EU agreements (PJC (by now FSJ) agreements), where the contracting parties have agreed that the agreement:

> does not/ shall not create or confer any right or benefit on any other person or entity, private or public.[96]

The aforementioned agreements are examples for the contractual exclusion of direct effect.

[95] Preamble [2005] OJ L256/58; Preamble [2004] OJ L389/42; Preamble [2004] OJ L16/66; Preamble [2003] OJ L285/44; Preamble [2003] OJ L82/46.

[96] E.g. Article 13 [2010] OJ L8/11; Article 14 [2008] OJ L213/49.

E. Indirect effect

1. Indirect effects: The significance of the doctrine of consistent interpretation

In *Pupino*,[97] a reference for a preliminary ruling was made in the context of criminal proceedings against Maria Pupino, a nursery school teacher accused of having committed offences of misuse of disciplinary measures. During the course of preliminary criminal proceedings the public prosecutor asked the court to allow, because of the witnesses' extreme youth, evidence to be taken before a judge ahead of trial.

The Italian Code of Criminal Procedure ('the CPP'), relating to witness statements recorded beforehand, and to special forms of procedures for taking or recording evidence where the case involves sexual offences and the witness is under 16, derogates from the ordinary procedure to be followed in taking evidence, and sets out the circumstances under which this could be done, but is limited to abuses of a sexual nature. The judge in charge of preliminary enquires applied the relevant national provisions. Not satisfied with the limited scope for the application of special protective procedures, referred the case to the Italian Constitutional Court to extend the special procedure to offences not identified by the legislature. The Italian Constitutional Court found that the limited availability of special protective procedures, restricted to sexual offences, is compatible with the right to equality and the principle of dignity enshrined in the national Constitution. The national court, bearing in mind its duty to construe national law in the light of Union law, decided, due to serious doubts as to the compatibility of Articles 392

[97] Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285. See generally, Maria Fletcher, 'Extending "indirect effect" to the third pillar: the significance of *Pupino*?' (2005) 30 ELRev. 862; J. R. Spencer, 'Child Witnesses and the European Union' (2005) 64 CLJ 569; George Gebbie, '"*Berlusconi*" -v- "*Pupino*": Conflict or Compatibility?' (2007) 1 JECL 31; Eleanor Spaventa (n 62); Teresa Magno, 'The *Pupino* Case: Background in Italian Law and consequences for the national judge' (2007) 8 ERA 215; Steve Peers (n 68).

(1a)[98] and 398 (5a) of the Italian Code of Criminal Procedure ('the CPP') with Articles 2,[99] 3[100] and 8[101] of the Framework Decision on the standing of victims in criminal proceedings, to stay the proceedings, and asked the Court to rule on the scope of Articles 2, 3 and 8 of the Framework Decision on the standing of victims of crime.[102]

The Framework Decision related to respect for, and recognition of, victims and to victims as witnesses, and to the Member States' duty to develop special procedures for giving evidence, to ensure that vulnerable victims receive specific treatment.

The central question in this case was whether the Framework Decision could have some effects in the national legal order, and whether national courts would be required to take account of Framework Decisions when interpreting their national laws. Faced with the preliminary objections raised by the intervening governments, in particular with the objection that the duty of consistent interpretation cannot extend to a Union law instrument (which is not in itself directly effective)[103] the Court decided to extend, in line with its Advocate General,[104] the duty of consistent interpretation to the area of Police and Judicial Cooperation in Criminal Matters, as:

> It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters,

98 Article 392 of the CPP (Preliminary enquiries and preliminary hearing).

99 Article 2 (Respect and recognition).

100 Article 3 (Hearings, and provision of evidence).

101 Article 8 (Right to protection).

102 Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L82/1.

103 Article 34 (2) TEU excluded the possibility that Decisions and Framework Decisions confer enforceable rights on individuals.

104 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2004:712, [2005] ECR I-5285, Opinion of AG Kokott, para 26.

> which is moreover entirely based on cooperation between the Member States and the institutions (...).[105]

The Court stated that national courts have a duty of sincere cooperation and have to interpret national law, insofar as possible,[106] in conformity with Framework Decisions, as:

> (...) the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.[107]

With the extension of a former first pillar (EC) tool to an area with a strong inter-governmental component[108] – but also with a strong supra-national component[109] – the principle of loyal cooperation, in the absence of alternative enforcement mechanisms in pre-Lisbon's third pillar, takes on added significance. According to Fletcher, it was at least imaginable that there was not the same broad consensus in regard of the goals of

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105 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285, para 42.

106 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285, para 61.

107 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285, para 43. The fact that there was no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of (former) Title VI did nothing to invalidate the conclusion that the duty of consistent interpretation applies to pre-Lisbon's Police and Judicial Co-operation in Criminal Matters (para 35).

108 Intergovernmental components: a (strong) intergovernmental component arises from the Council's monopoly to authorise the opening of negotiations, as displayed in Article 218 (2), (3) TFEU /and the Council's monopoly to approve (Article 218 (2), (5) TFEU) /and to conclude (Article 218 (2), (6) TFEU) EU agreements (CFSP and PJC (by now FSJ) agreements).

109 Supra-national components: a supra-national component arises from the Parliament's right to be immediately and fully informed of the progress of the negotiations at all stages of the procedure, as displayed in Article 218 (10) TFEU /and the control *a priori* of legality, as displayed in Article 218 (11) TFEU.

integration concerning criminal law co-operation as there was in respect of the first pillar. A system of enforcement based upon a limited interpretative obligation on Member States' courts itself had to be limited. But in the absence of alternative enforcement mechanisms in the third pillar, the *Pupino* principle took on added significance. Consequently, it seemed particularly important that the scope of the interpretative duty on Member States' courts was sufficiently clear and precise.[110]

As indicated by Spencer, the broader implication is that the European Union must respect fundamental rights as guaranteed by the ECHR. As such, criminal courts, when construing the rules of English law in relation to criminal justice, in future will have to operate not merely looking over their left shoulders at the Strasbourg Court and the ECHR, but simultaneously looking over their right ones at the Luxembourg Court and EU Framework Decisions.[111]

In the light of the above considerations, loyal cooperation, inherently limited by the general principles of Union law (in particular, by the principles of legal certainty, non-retroactivity, and by fundamental rights) may contribute to the protection of individual rights – but can also be used to the detriment of an individual.[112] The applications of the duty of consistent interpretation may result in detrimental effects on persons charged of a criminal offence (not to the detriment of the defendant). That is, loyal cooperation may be used to affect procedural rules, e.g. rules on how evidence is gathered, or rules determining the time limit for an action, which in themselves are not constitutive of criminal liability. The Court held that:

110 *Cf.* Maria Fletcher (n 97) 873.

111 J. R. Spencer (n 97) 571.

112 Case C-321/05 *Kofoed v Skatteministeriet* EU:C:2007:408, [2007] ECR I-5795; Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG* EU:C:2005:637, [2005] ECR I-9215; Case C-142/04 *Maria Aslanidou v Ypourgos Ygeias & Pronoias* EU:C:2005:473, [2005] ECR I-7181; Joined Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.* EU:C:2004:584, [2004] ECR I-8835; Case C-343/98 *Renato Collino and Luisella Chiappero v Telecom Italia SpA* EU:C:2000:441, [2000] ECR I-6659; Case C-2/97 *Società italiana petroli SpA (IP) v Borsana Srl* EU:C:1998:613, [1998] ECR I-8597.

> the provisions which form the subject-matter of this reference for a preliminary ruling do not concern the extent of the criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence.[113]

For example, Spaventa questioned whether the application of the duty of consistent interpretation to rules of criminal procedure, which might result in a detrimental effect on the person charged of a criminal offence, would ever be compatible with the guarantees afforded by the ECHR, and with the principles of legal certainty and forseeability. In her reasoning, in that respect, it would have been preferable for the Court of Justice to clearly state that the principle of consistent interpretation could not be used to the detriment of the defendant, regardless of the nature of the rules in question (in which case the ruling in *Pupino* would have been of little use to the prosecution).[114]

According to Fletcher, the potential of the principle of loyal cooperation is necessarily limited. It depends upon the willingness and the possibility of national courts to engage their duty. Individuals undoubtedly have lain at the heart of the wider FSJ agenda and the protection of citizen's rights in the criminal process was clearly of particular importance. Where the European Union had recognised the existence of rights for suspected perpetrators or victims of criminal activity it was thus crucial that those rights were enforceable. That was important not merely in terms of ensuring the effective protection of rights but also so as to ensure the success and even legitimacy of European integration.

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113 Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, [2005] ECR I-5285, para 46.

114 Eleanor Spaventa (n 62) 13. As indicated by Spaventa consistent interpretation can never be used to establish or aggravate the criminal liability, Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* EU:C:1987:431, [1987] ECR 3969. See also Case C-168/95 *Criminal proceedings against Luciano Arcaro* EU:C:1996:363, [1996] ECR I-4705; Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02)* EU:C:2005:270, [2005] ECR I-3565. The Court also specified that the duty of consistent interpretation does not stretch/ nor can serve the purpose of interpretations *contra legem* Joined Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.* EU:C:2004:584, [2004] ECR I-8835.

To the extent that the duty of harmonious interpretation provided one mechanism for the judicial enforceability of EU rights and obligations contained in framework decisions, it was a welcome development. Yet, the potential for that principle to enforce rights for the benefit of the individual was necessarily limited. As seen, it will to a large extent depend upon the specific circumstances of the case and the willingness and the possibility of a Member States' court to engage its duty.[115]

It is crucial that rights are enforceable. This is important in order to ensure the success and legitimacy of European integration.

2. Indirect effects of EU agreements (CFSP and PJC (by now FSJ) agreements)

The Court confirmed the doctrine of consistent interpretation (also referred to as indirect effect), with regard to international agreements. In *Anklagemyndigheden v Poulsen and Diva Navigation Corp*, for example, the Court held:

> As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.[116]

A similar conclusion was reached in *Commission v Germany*. The Court held that:

> When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation (see Case C-90/92 *Dr*

115 Maria Fletcher (n 97) 875.

116 Case C-286/90 *Anklagemyndigheden v Poulsen and Diva Navigation Corp* EU:C:1992:453, [1992] ECR I-6019, para 9.

> *Tretter v Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569, paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.[117]

In *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV*, the Court held, citing, by analogy, *Poulsen and Diva Navigation*,

> It is true that the measures envisaged by Article 99 and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade mark. However, since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs Agreement (see, by analogy, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, and Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52).[118]

It is strongly arguable that indirect effects apply over Union law in its entirety. De Baere phrases this as follows: As noted with regard to the implications of the *Pupino* reasoning for the application of a general duty of loyal cooperation throughout the entire EU legal order, Article 11 (2) EU (now Article 24 TEU) introduced a similar obligation with regard to the CFSP. It urged the Member States to support the Union's external and security policy 'actively and unreservedly in a spirit of loyalty and mutual solidarity'. The Member States also had to work together 'to enhance and develop their mutual political solidarity', and were told to 'refrain from any action which was contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'. Owing to

117 Case C-61/94 *Commission v Germany* EU:C:1996:313, [1996] ECR I-3989, para 52.

118 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603, para 28.

the lack of jurisdiction of the Court of Justice over Title V of the EU Treaty, no judicial review was possible within the EU legal order of Member States' compliance with the principle of loyal cooperation in Article 11 (2) EU. Yet, in light of the *Pupino* reasoning it was strongly arguable that the principle of loyal cooperation applied over EU law in its entirety and could give rise to the application of the duty of consistent interpretation in the CFSP. Individuals might invoke the duty of consistent interpretation before their domestic courts, so as to have Member States' measures reviewed for compliance with CFSP measures.[119]

Indirect effect, is an alternative/ additional means for EU agreements (CFSP and PJC (by now FSJ) agreements) to produce independent effects within the national systems.

F. Conclusion

Chapter 2 focused on the general issues and practice on EU agreements (CFSP and PJC (by now FSJ) agreements), and integrated sections on direct and indirect effect.

Section 1 dealt with the international legal personality of the Union. The TEU in its Nice version did not include a provision explicitly conferring legal personality to the Union. The Nice provisions did not explicitly provide on whose behalf the agreements were concluded or who was bound by agreements on matters of the Common Foreign and Security Policy or Police and Judicial Co-operation in Criminal Matters – questions with no certain answers available presently.

According to one school of thought, the European Union was not a subject of international law; that is, powers rested with the Member States and the Council acted on behalf of the Member States which were the contracting parties. By contrast, according to another school of thought, the European Union possesses an implicit legal personality;

[119] Geert de Baere (n 65) 259-60.

that is, the Council acted on behalf of the European Union and not on behalf of the Member States. Article 47 TEU makes the legal personality of the European Union explicit and designates the Union as a contracting party; as such the debate on the question of whether ex-Article 24 TEU conferred implicitly legal personality to the European Union becomes obsolete. In the view of the writer, the debate/reasoning is still relevant, even though the question is settled.

Section 2 dealt with the practice on EU agreements. Sections 3 and 4 considered respectively with direct effects and indirect effects and addressed a vertical dimension (*vis-à-vis* national legislation). Arguments in favour of direct effect seem less thorough and less elaborated on.

CHAPTER III: JURISDICTION OF THE COURT ON EU INTERNATIONAL AGREEMENTS

A. Introduction

As mentioned earlier, prior to the Lisbon Treaty treaty-making had different legal bases (CFSP and non-CFSP legal bases) for EC (by now EU) agreements, on the one hand, and CFSP and PJC (by now FSJ) agreements, on the other hand. As indicated by Francis G. Jacobs, the Court has taken a broad view of its jurisdiction in relation to EC (by now EU) agreements.[1] According to ex-Articles 24 (modified 1997 and 2000) and 38 of the former TEU the European Union had the capacity to conclude CFSP and PJC (by now FSJ) agreements. Post-Lisbon, Article 218 TFEU has become the sole legal basis (with respect to monetary policy, see Article 219 TFEU and Common Commercial Policy (CCP) Article 207 TFEU). The purpose of this chapter is to give an overview of the jurisdiction of the Court on EU international agreements. Accordingly the discussion that follows is in three parts: Section 1 looks at the jurisdiction of the Court on EC (by now EU) agreements before and after the Lisbon Treaty reforms, Section 2 looks at the jurisdiction of the Court on CFSP and PJC (by now FSJ) agreements before and after the Lisbon Treaty reforms and Section 3 considers the standard of review in general, and *Yusuf/Kadi* in particular.[2]

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1 Francis G Jacobs, 'Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations: salient features of a changing landscape* (CUP, Cambridge 2008) 14.

2 *Kadi I* concerned the legality of Community acts listed by the UN Sanction Committee. *Kadi II*, concerned the re-listing after the judgment in *Kadi I* of 2008. The Court of Justice of the European Union confirmed that the standard required by the EU legal order requires more than limited procedural review.

B. Jurisdiction of the Court on EC (by now EU) agreements before and after the Lisbon Treaty reforms

1. Control *ex ante* of legality of EC (by now EU) agreements

The European Parliament, the Council, the Commission or a Member State were entitled to challenge the constitutionality of a draft agreement. This judicial safeguard can be found in ex-Article 300 (6) TEC (equivalent to Article 218 (11) TFEU), which created the jurisdiction of the Court for an *ex ante* review of a draft agreement.

Ex-Article 300 (6) TEC read as follows:

> The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.[3]

According to de Baere, the *ratio legis* of the ex-Article 300 (6) TEC procedure was to enable the institutions and the Member States to obtain an authoritative statement on whether an envisaged agreement fell within the EC's competence and whether the proper legal basis had been chosen, the Commission had in the past used the procedure to attempt to establish exclusive EC competence and disprove Member State competence. Those attempts have had varying degrees of success. Both in its case law and in its Article 300 (6) EC Opinions, the Court had developed approaches that were unique to the field of external relations, such as the extensive doctrine of implied external competences, as a

[3] Further on ex-Article 300 (6) TEC. See Panos Koutrakos, *EU international relations law* (Hart, Oxford/Portland 2006) 186-192. The broad construction of pre-emptive jurisdiction under ex-Article 300 (6) TEC.

logical correlate of the primacy principle.[4]

The Court has delivered fourteen Opinions on international agreements before the entry into force of the Lisbon Treaty.[5] In *Opinion 1/75 (Local Cost Standard)*,[6] the first such opinion, concerning a (draft) Understanding on a Local Cost Standard (general purpose of the procedure) drawn up within the Organization for Economic Co-operation and development (OECD), the Court was asked to rule on the consistency of the agreement about credits for the financing of local costs linked to export operations with the EC legal order. In *Opinion 1/75,* the Court explained the purpose of the Opinion procedure:

> It is the purpose of [the procedure laid down in Article 300 (6) TEC (Article 218 (11) TFEU)] to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community. In fact, a possible decision of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion,

4 See Geert de Baere, *Constitutional Principles of EU External Relations* (OUP, Oxford 2008) 95.

5 *Opinion 1/75 (Local Cost Standard)* EU:C:1975:145, [1975] ECR 1355; *Opinion 1/76 (European laying-up fund)* EU:C:1977:63, [1977] ECR 741; *Opinion 1/78 (Natural Rubber Agreement)* EU:C:1979:224, [1979] ECR 2871; *Opinion 1/91 (EEA Draft Agreement)* EU:C:1991:490, [1991] ECR I-6079; *Opinion 2/91 (ILO Convention 170)* EU:C:1993:106, [1993] ECR I-1061; *Opinion 1/92 (EFTA Agreement II)* EU:C:1992:189, [1992] ECR I-2821; *Opinion 2/92 (Third Revised OECD Decision)* EU:C:1995:83, [1995] ECR I-521; *Opinion 1/94 (WTO Agreement)* EU:C:1994:384, [1994] ECR I-5267; *Opinion 2/94 (Accession of the Community to the ECHR)* EU:C:1996:140, [1996] ECR I-1759 (the predecessor to *Opinion 2/13 on EU Accession to the ECHR* EU:C:2014:2454); *Opinion 3/94 (Banana Framework Agreement)* EU:C:1995:436, [1995] ECR I-4577; *Opinion 1/00 (European Common Aviation Area)* EU:C:2002:231, [2002] ECR I-3493; *Opinion 2/00 (Cartagena Protocol)* EU:C:2001:664, [2001] ECR I-9713; *Opinion 1/03 (Lugano Convention)* EU:C:2006:81, [2006] ECR I-1145; *Opinion 1/08 (General Agreement on Trade in Services)* EU:C:2009:739, [2009] ECR I-11129 – Opinion pursuant to ex-Article 300 (6) TEC. See the discussion in Robert Schütze, *European constitutional law* (CUP, Cambridge 2012) 209. Further – The EC-US Agreement on the processing and transfer of passenger name record data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection – the European Parliament requested an Opinion under ex-Article 300 (6) TEC (Case C-317/04 *Parliament v Council*, notice in [2004] OJ C228/31). As indicated by Panos Koutrakos, *EU international relations law* (Hart, Oxford/Portland 2006) 190 – Parliament's request for an accelerated procedure was rejected by order of the President. Parliament instead brought an action for annulment. See Joined Cases C-317/04 and C-318/04 *Parliament v Council (C-317/04) and Commission (C-318/04)* EU:C:2006:346, [2006] ECR I-4721, paras 39-45.

6 *Opinion* 1/75 *(Local Cost Standard)* EU:C:1975:145, [1975] ECR 1355.

> incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.[7]

The general purpose of the procedure was to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community.

2. Control *ex post* of legality of EC (by now EU) agreements

The main provisions of the Court's jurisdiction are Article 258 TFEU (ex-Article 226 TEC), Article 263 TFEU (ex-Article 230 TEC) and Article 267 TFEU (ex-Article 234 TEC).[8] The provision governing direct review has been amended by the Lisbon Treaty.

a) The Court's jurisdiction in infringement proceedings

Article 258 TFEU replaces Article 226 TEC. Under Article 258 TFEU (ex-Article 226 TEC) the Commission may, after having issued a reasoned opinion, bring proceedings before the Court where it considered that a Member State has failed to fulfil an obligation under the Treaties. In *Commission v Germany*[9] on the International Dairy Arrangement, the Commission challenged the authorisation granted by German authorities; that is, the importation under inward processing relief arrangements of dairy products whose customs

7 See *Opinion* 1/75 *(Local Cost Standard)* EU:C:1975:145, [1975] ECR 1355.

8 See also Mario Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques*. (Oxford Studies in European Law, OUP, Oxford 2013), at 78, 79, 81-93 and 289-290 (annulment actions), 290 (*ex ante* review procedure) and 79, 288 (preliminary rulings).

9 Case C-61/94 *Commission v Germany (International Dairy Arrangement)* EU:C:1996:313,[1996] ECR I-3989.

value was lower than the minimum prices set under the International Dairy Arrangement (IDA).[10] The German government observed in its defence that the Commission should have awaited the opinion of the (then) Article 133 Committee (with the TFEU it has become the Article 207 Committee). In the German government's view, the (then) Article 133 Committee's task is to discuss the interpretation and implementation of international agreements and to establish a common Community position in that regard. So long as the Committee has not reached a consensus, the Commission may not bring an enforcement action under Article 258 TFEU (ex-Article 226 TEC).

The Court confirmed the Commission's autonomous power to bring enforcement action under ex-Article 226 TEC. It stated that under ex-Article 211 TEC, the Commission was responsible for ensuring application of the Treaty and, accordingly, compliance with international agreements concluded by the EC which, pursuant to ex-Article 300 (6) TEC, were binding both on the EC institutions and the Member States. For the Commission to succeed in that task, it must not be hindered in the exercise of its power under ex-Article 226 TEC to bring proceedings before the Court where a Member State had failed to fulfil its obligations under such an agreement. The initiation of proceedings before the Court by the Commission could not therefore depend on the outcome of consultations within the Article 133 Committee; *a fortiori*, it could not hinge on whether a consensus between the Member States had first been found to exist within the Committee with regard to the interpretation of the EC' s commitments under an international agreement.[11]

[10] See Panos Koutrakos (n 3) 263-4. The German government did not seek to reverse the thrust of the Court's approach to the GATT as articulated in *Germany v Council* (two years earlier). See also Mario Mendez (n 8) 200-202.

[11] Case C-61/94 *Commission v Germany (International Dairy Arrangement)* EU:C:1996:313, [1996] ECR I-3989, para 15.

In *Commission v Ireland (Berne Convention)*[12] the Commission brought an action under Article 258 TFEU (ex-Article 226 TEC) for a declaration that, by having failed to adhere to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) by 1 January 1995, Ireland had not fulfilled its obligations under Article 216 (2) TFEU (ex-Article 300 (7) TEC) in conjunction with Article 5 of Protocol 28 to the EEA Agreement.

The Court held that mixed agreements concluded by the Union, its Member States, and non-member countries, have the same status in the Union legal order as purely Union (then Community) agreements. The respective provisions in the 1971 Berne Convention came within the scope of Union competence.[13]

The Court concluded that, in ensuring respect for commitments arising from an agreement concluded by the Union institutions, the Member States fulfil an obligation in relation to the Union within the Union system, which has assumed responsibility for the due performance of the agreement.[14] The Court added that it follows that the requirement of adherence to the Berne Convention which Article 5 of Protocol 28 to the EEA Agreement imposed on the Contracting Parties came within the Union framework. This is so given that it featured in a mixed agreement concluded by the Union and its Member States and related to an area covered in large measure by the Treaty. The Commission was therefore competent to assess compliance with that requirement, subject to the Court's review.[15]

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12 Case C-13/00 *Commission v Ireland (Berne Convention)* EU:C:2002:184, [2002] ECR I-2943. For comments see Pieter-Jan Kuijper, 'Case C-239/03, *Commission v. French Republic*' (2005) 42 CMLR 1491-1500.

13 Case C-13/00 *Commission v Ireland (Berne Convention)* EU:C:2002:184, [2002] ECR I-2943, para 14.

14 Case C-13/00 *Commission v Ireland (Berne Convention)* EU:C:2002:184, [2002] ECR I-2943, para 15.

15 Case C-13/00 *Commission v Ireland (Berne Convention)* EU:C:2002:184, [2002] ECR I-2943, para 20.

In *Commission v France (Étang de Berre)*[16] the Commission brought an action under Article 258 TFEU (ex-Article 226 TEC) for a declaration that France has failed to comply with its obligation under Articles 4 (1) and 8 of the Barcelona Convention, for the protection of the Mediterranean Sea against pollution, under Article 6 (1) and (3) of the Protocol and under Article 216 (2) TFEU (ex-Article 300 (7) TEC).

The Court cited previous case law and held that mixed agreements concluded by the Union, its Member States, and non- member countries, have the same status in the Union legal order as purely Union agreements 'in so far' as the provisions fall within the scope of Union competence.[17]

Since the Convention and the Protocol created rights and obligations in a field covered in large measure by Union legislation, there was a Union interest in compliance by both the Union and its Member States with the commitments entered into under those instruments.[18]

France did not fulfil its obligations under *inter alia* Article 6 (1) and (3) of the Protocol, having not taken all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Mediterranean Sea (Étang de Berre). Furthermore, it failed to take due account of the requirements of Annex III to the Protocol concerning the protection of the Mediterranean Sea against pollution from land-based sources.[19]

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16 Case C-239/03 *Commission v France (Étang de Berre)* EU:C:2004:598, [2004] ECR I-9325.

17 Case C-239/03 *Commission v France (Étang de Berre)* EU:C:2004:598, [2004] ECR I-9325, para 25. In Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* EU:C:2007:496, [2007] ECR I-7001, para 31 the Court removed this qualification. For an overview and critical analysis of this case see Rass Holdgaard, 'Case C–431/05, *Merck Genéricos — Produtos Farmacêuticos Lda v. Merck & Co. Inc. (M & Co.) and Merck Sharp & Dohme Lda (MSL)*, Judgment of the Court of Justice (Grand Chamber) of 11 September 2007, [2007] ECR I–7001' (2008) 45 CMLR 1233-1250. See further Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125, [2011] ECR I-1255, paras 29-35.

18 Case C-239/03 *Commission v France (Étang de Berre)* EU:C:2004:598, [2004] ECR I-9325, para 29.

19 Case C-239/03 *Commission v France (Étang de Berre)* EU:C:2004:598, [2004] ECR I-9325, paras 46-70 and 78-85.

b) The Court's jurisdiction in annulment proceedings

The following set of issues must be addressed: (i) Reviewable acts, (ii) capacity to bring proceedings, (iii) grounds for review, (iv) time limits and (v) the effects of annulment.

Article 263 TFEU replaces Article 230 TEC. Article 263 TFEU (ex-Article 230 TEC) establishes a procedure known as the action for annulment under which the Court of Justice may review the legality of any acts adopted by the institutions and which have legal effects. Article 263 (1) TFEU extends the Court's review of legality to acts of 'bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties'.

The Court of Justice has jurisdiction in actions brought by privileged applicants (the Member States, the European Parliament, the Commission and Council), or semi-privileged applicants (the Court of Auditors, European Central Bank and the Committee of the Regions) in order to protect their prerogatives. Article 263 (4) TFEU has amended ex-Article 230 (4) TEC. The Court of Justice of the European Union has jurisdiction over direct actions brought by other parties; that is, applicants who do not fall into the privileged and semi-privileged categories against a regulatory act which is of direct concern to them and against other measures which are of direct or individual concern to them.

The grounds of judicial review remain unchanged. Article 263 (2) TFEU (ex-Article 230 (2) TEC) stipulates that the Court of Justice of the European Union has jurisdiction in actions brought on grounds of lack of competences, misuse of powers, breach of essential procedural requirements, or infringement of the Treaty or of any rule of law relating to its application, including general principles of EU law, namely, legal certainty, legitimate expectations, non-retroactivity, proportionality and equality. The

observance of the time limit is prescribed by the final paragraph of Article 263 TFEU (ex-Article 230 TEC).

Where an action for annulment is well founded the Court of Justice of the European Union will declare the act concerned to be void pursuant to Article 264 TFEU (ex-Article 231 TEC).

Article 266 TFEU (ex-Article 233 TEC) provides that:

> The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union

Article 268 TFEU (ex-Article 235 TEC) and Article 340 TFEU (ex-Article 288 TEC) provide that the Union may even be subject to damages caused.

The Court of Justice of the European Union has had the opportunity of direct review on a number of occasions.

aa) Lack of competences

The provision governing direct review includes as ground of review lack of competences. *France v Commission* (Case C-327/91)[20] can be subsumed within the ground of lack of competence.

In that case the French Government brought an action against the Commission seeking the annulment of the Agreement signed on 23 September 1991 with the US regarding the application of their competition laws. The Agreement aimed at promoting cooperation and coordination between the Commission and the US competition authorities and lessened

[20] Case C-327/91 *France v Commission* EU:C:1994:305, [1994] ECR I-3641.

the possibility or impact of differences between the parties in the application of EU and US competition law by their respective authorities. That is, notification of measures taken in the enforcement of competition law which may affect important interests of the other party, the exchange of information covering matters of mutual interest pertaining to the application of competition laws, coordination of enforcement activities, reciprocal consultation procedures, in addition, cooperation regarding anti-competitive activities in the territory of one party that adversely affect important interests of the other party (positive comity). Under Article XI(1) the Agreement (that is, application of competition rules) had entered into force in September 1991. The action must be understood as being directed against the act whereby the Commission sought to conclude the international agreement.

The Commission contended that the Agreement constituted an administrative agreement which it was competent to conclude.

The judgment in *France v Commission* rejected the Commission's claim and adopted a restrictive approach to the interpretation of Commission's powers under ex-Article 300 (2) TEC (Article 218 TFEU).[21] The Court found that the Commission lacked competence under Article 300 TEC (Article 218 TFEU) to conclude the EU-US antitrust agreement on the application of competition laws.

As Koutrakos has argued, in rejecting the broad interpretation of the Commission powers under ex-Article 300 (2) EC, the Court defined the procedural rules laid down in the EC Treaty as a system whose functioning relied upon the specific allocation of powers to the EC institutions. As it linked that allocation to the balance between the institutions, the Court transposed into the EC external relations system the main logic of the internal

[21] Case C-327/91 *France v Commission* EU:C:1994:305, [1994] ECR I-3641, para 41. Advocate General Tesauro's Opinion supported this reading: See Case C-327/91 *France v Commission* EU:C:1993:941, [1994] ECR I-3641, Opinion of AG Tesauro, para 26.

decision-making process, as underpinned by compliance with the institutional balance.[22]

bb) Breach of essential procedural requirements

"Legal base" cases brought by Community institutions and Member States can be subsumed within the ground of breach of an essential procedural requirement.

In *Parliament v Council* (Case C-360/93)[23] the Parliament sought the annulment of a Council act concerning the conclusion of the US-EC procurement agreement.[24] The European Parliament based its action on infringement of the Treaty and its essential procedural requirements in so far as Decisions 93/323 and 93/324 were based on ex-Article 133 TEC (Article 207 TFEU) alone notwithstanding the existence of articles specific to the fields envisaged; that is, the Parliament's right to be involved in the decision-making process had been denied by the choice of ex-Article 133 TEC (Article 207 TFEU). Ex-Articles 47, 55 and 95 TEC (Article 53, 62 and 114 TFEU), as well as ex-Article 133 TEC (Article 207 TFEU), put forward as correct by the European Parliament would have involved the Parliament (cooperation procedure).[25]

As Cremona has noted, the Council argument in defence of its position (that is, the Council defended the use of ex-Article 133 TEC (Article 207 TFEU) as the legal base) was revealing: It had contended that the focus of the US-Community Agreement, and therefore of both contested Decisions, was the extension of the benefits of the utilities Directive to US bidders. The parts of the Agreement dealing with public works, supply and service contracts more generally, were only "ancillary" and "specify the policy framework within which the Agreement is located" (to use the phraseology of the

22 Panos Koutrakos (n 3) 143.

23 Case C-360/93 *Parliament v Council* EU:C:1996:84, [1996] ECR I-1195.

24 [1993] OJ L125/1.

25 Case C-360/93 *Parliament v Council* EU:C:1996:84, [1996] ECR I-1195, para 10. The Commission intervened in support of the Council.

Advocate General). The central commitment of the Agreement, in relation to utilities, had fallen within the scope of ex-Article 133 TEC (Article 207 TFEU) as regulating the EC's external trade. The Council therefore had chosen to argue, not that ex-Article 133 TEC (Article 207 TFEU) was an appropriate legal base for an international agreement regulating trade in services, but that the Agreement in question was more limited than the Parliament maintained, and merely dealt with services in an ancillary manner. Whether the Decisions should be treated as an amendment of Article 29 of the utilities Directive under Article 29 (6), or as an extension of the benefit of the Directive to a third country under Article 29 (5), the effect was to set aside the Article 29 (3) EC preference rule.[26]

According to Cremona, Case C-360/93 was the second time that the Court had used its power under ex-Article 230 TEC (Article 263 TFEU) to annul a Decision of a Community institution concluding an international agreement. In so doing, the legal effects of the Agreement between the US and the European Community in the field of public procurement itself were not impugned (Case C-360/93 was concerned only with the question of the validity of the concluding Decision).[27]

In *Portugal v Council* (Case C-268/94)[28] Portugal challenged the validity of the legal basis of EC competence and the corresponding procedure by which the EC concluded the Agreement.

[26] See Marise Cremona, 'Case C-360/93, *European Parliament v. Council of the European Union*, Judgment of 7 March 1996, [1996] ECR I-1195' (1997) 34 CMLR 389, 394. The Court rejected the view put forward by the Council.

[27] *Ibid,* at 397-398. As indicated by Cremona, both Case C-360/93 and Case C-327/91 illustrated the use of ex-Article 173 of the Treaty in order to challenge the conclusion of an international agreement *ex post facto* (at 398).

[28] Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177.

Portugal sought the annulment of the concluding act of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development ("EC-India Cooperation Agreement").[29]

The contested decision, adopted in the Council by a qualified majority vote after consulting the Parliament, was based on ex-Articles 133 and 181 TEC (Articles 207 and 211 TFEU), provisions governing co-operation for development are laid down in Articles 208-211 TFEU, in conjunction with the first sentence of ex-Article 300 (2) and the first subparagraph of (3) TEC (Article 218 TFEU).

The Portuguese Government challenged the validity of the legal basis of EC competence and the corresponding procedure by which the EC concluded the EC-India Cooperation Agreement. It argued that the cited articles did not provide a legal basis for the EC-India Cooperation Agreement. The correct legal basis would have been ex-Article 308 TEC (Article 352 TFEU). Portugal's argument was that the clause specifying that respect for fundamental rights constituted an essential element of the Agreement; that is, Article 1 (1) required recourse to ex-Article 308 TEC (Article 352 TFEU) as the legal basis of the contested decision.[30]

According to the Portuguese Government, the inclusion of energy, tourism and culture, required the additional use of ex-Article 308 TEC (Article 352 TFEU) (with its unanimous vote).[31] The Portuguese Government's position was amended at the hearing; at the hearing it argued that cooperation in the spheres of tourism and culture also required participation of the Member States in the conclusion of the Agreement. The Portuguese Government contended that the inclusion of intellectual property and drug abuse control

29 [1994] OJ L223/23.

30 Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177, paras 14 et seq.

31 As indicated by Peers, as these matters fell within the competence of the Member States, or (in the case of energy) formed an EC objective but were not subject of a separate Title of the Treaty. See Steve Peers, 'Case C-268/94, *Portugal v. Council*, (development policy), [1996] ECR I-6177 (Full Court)' (1998) 35 CMLR 539, 545.

also required participation of the Member States in the conclusion of the Agreement; that is, adoption of a mixed agreement.[32]

The Portuguese Government's arguments; that is, that the legal basis of the contested act did not confer on the EC the necessary powers to conclude the international agreement as regards the provision therein relating to fundamental rights, and the provisions therein relating to various specific fields of cooperation,[33] raised the question of the extent to which an international agreement adopted on the basis of ex-Article 181 TEC (Article 211 TFEU) can lay down provisions on specific matters without there being any need to have recourse to other legal bases, or indeed to Member States' participation in the conclusion of the international agreement.[34] As noted by Peers, Case C-268/94 was the Court's first opportunity to delineate what development policy was or could consist of.[35]

According to Kokott and Hoffmeister, Case C-268/94 dealt with the scope of the new EC competences in the area of development policy, which were introduced into EC law by the Maastricht Treaty in 1992; interesting for two reasons: firstly, the Court's reasoning in respect of the EC's external competences in the field of development cooperation backed the EC's strategy of concluding third generation framework agreements, and, secondly, the Court stressed the importance of including fundamental rights and democracy clauses in these international agreements.[36]

According to them, "first generation" agreements with developing countries in Asia concluded in the 1970s had consisted mainly of the most-favoured-nation-clause. They

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32 Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177, para 31.

33 Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177, paras 13, 14 et seq.

34 Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177, para 35.

35 Steve Peers (n 31) 541 and 547.

36 See Juliane Kokott and Frank Hoffmeister, '*Portuguese Republic v. Council*. Case C-268/94. 1996 ECR I-6177. Court of Justice of the European Communities, December 3, 1996.' (1998) 92 AJIL 292-296, in particular at 293-294.

were authorised by ex-Article 133 TEC (Article 207 TFEU) (commercial policy). In the early 1980s, they were replaced by "second generation" agreements, which also included provisions relating to economic and development cooperation. The EC had based those agreements on ex-Article 133 TEC (Article 207 TFEU), as well as ex-Article 308 TEC (Article 352 TFEU), the "necessary and proper" clause of the Treaty. The same was true for the so-called third-generation agreements with Latin American states signed before 1994, despite the fact that those agreements had contained additional clauses about, *inter alia*, cooperation in the field of intellectual property, mining, energy, traffic, data technology, tourism, environment, health, drug abuse and public administration. Although the provisions of the Agreement with India had not differed greatly from the latter agreements with the Latin American states, it was the first to be concluded on the basis of the then new ex-Article 181 TEC (Article 211 TFEU) without unanimity in the Council. Thus, the judgment of the Court was crucial not merely for the legality of the Agreement with India, but also for third-generation agreements in general.[37]

In *Parliament v Council* (Case C-189/97)[38] the European Parliament brought an action for the annulment of the Council Regulation on the conclusion of the Agreement on cooperation in the sea fisheries sector between the Community and Mauritania and laying down provisions for its implementation. The agreement, concluded for a period of five years from 1 August 1996, enabled European Community fishermen to fish in waters under the sovereignty or jurisdiction of Mauritania. It was argued that the Agreement with Mauritania had important budgetary implications and that its conclusion therefore required the Parliament's assent under ex-Article 300 (3) (2) TEC (Article 218 TFEU). The Court elaborated on the general role of Parliament. As the Court put it:

> the scope of that provision, as set out in the Treaty, cannot, despite what the Parliament suggests, be affected by the extent of the powers available to national parliaments when approving international agreements with

[37] See Juliane Kokott and Frank Hoffmeister, above (n 36).

[38] Case C-189/97 *Parliament v Council* EU:C:1999:366, [1999] ECR I-4741.

financial implications.[39]

The assent of an institution required (here: the European Parliament's assent under ex-Article 300 (3) (2) TEC (Article 218 TFEU)) for the adoption of an act (here: involvement of the Parliament in the conclusion of an international agreement) constituted an essential procedural requirement. This can clearly be subsumed within the ground of breach of an essential procedural requirement.

In *Spain v Council* (Case C-36/98)[40] Spain brought an action for annulment of the concluding act of the Convention on cooperation for the protection and sustainable use of the river Danube.[41] The contested decision was based on ex-Article 175 (1) TEC (Article 192 (1) TFEU), which provided that the Council is to act on the basis of the procedure referred to in ex-Article 252 TEC (repealed by the Lisbon Treaty), that is by a qualified majority, in conjunction with ex-Article 300 (2) and the first subparagraph of (3) TEC (Article 218 TFEU).

Spain argued that the legal basis adopted was inappropriate. The legal bases put forward as correct by Spain – ex-Article 175 (2) TEC (Article 192 (2) TFEU), which provided that the Council is to act unanimously, in conjunction with the second sentence of ex-Article 300 (2) and the first subparagraph of (3) TEC (Article 218 TFEU).[42]

The problem of concurrent legal bases did not arise; the only difficulty to be resolved was that of the choice between general rules and specific rules within the same title of the Treaty.[43] The Court reaffirmed the principle that the choice of a legal basis must rest on

39 Case C-189/97 *Parliament v Council* EU:C:1999:366, [1999] ECR I-4741, para 34.

40 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779.

41 [1997] OJ L342/18.

42 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779, para 8.

43 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779, para 16.

> objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure (see, in particular, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 43).[44]

According to its aim and its content, the Convention's primary purpose was the protection and improvement of the quality of the waters of the catchment area of the river Danube, although it also refers, albeit incidentally, to the use of those waters and their management in its quantitative aspects.[45] Internal EC rules corresponding to the Convention's provisions were adopted on the basis of ex-Article 175 (1) TEC (Article 192 (1) TFEU). The Court then concluded that the Council was thus correct to take the first sentence of ex-Article 300 (2) and the first subparagraph of (3) TEC (Article 218 TFEU) as the basis for approval.[46]

Commission v Council (Case C-281/01)[47] involved a challenge by the Commission to the legal base of the Council Decision concluding an Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment.[48] On 14 December 2000, the Council unanimously adopted the decision authorising signature of the Energy Star Agreement. The Decision cited ex-Article 175 (1) TEC (Article 192 (1) TFEU), in conjunction with ex-Article 300 (2) TEC as its legal base. In Decision 2001/469 the Council approved the Energy Star Agreement on behalf of the Community on the basis of ex-Article 175 (1) TEC (Article 192 (1) TFEU), in conjunction with the first sentence of the first subparagraph of ex-Article 300 (2), the first subparagraph of (3) and (4) TEC (Article 218

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44 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779 para 58. See D. Gadbin, 'Environnement et aménagement du territoire: face à face entre la jurisprudence et le traité de Nice (CJCE 30 janv. 2001, *Royaume d'Espagne c/ Conseil de l'Union européenne*, aff. C-36/98)' (2001) 37 RTD eur. 687-696.

45 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779, para 74.

46 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779, paras 74 and 75.

47 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049.

48 [2001] OJ L172/1.

TFEU). Under the Energy Star Agreement, European and American labelling programmes would be coordinated, resulting in the elimination of any obstacles to trade which would have arisen from the exercise of concurrent programmes. It enabled manufacturers to sell their equipment on both the European and US market using one single label and a single registration procedure.

The Commission submitted that Decision 2001/469 (CCP measure) should have been adopted on the basis of ex Article 133 TEC (Article 207 TFEU) relating to common commercial policy, on the ground that the Agreement seeks to facilitate trade.[49]

The Council submitted in the alternative that the correct legal basis was not ex- Article 175 (1) TEC (Article 192 (1) TFEU) but ex-Article 174 (4) TEC. It referred to the Court's case law to the effect that ex-Article 174 (4) TEC was confined to defining the general objectives of environmental policy whereas ex-Article 175 TEC (Article 192 (1) TFEU) constituted the legal basis for EC measures designed to put that policy into effect.[50]

The Court held that the Energy Star Agreement simultaneously pursued a commercial-policy objective and an environmental-protection objective.[51] Therefore, in order to determine the appropriate legal basis for the measure concluding the Energy Star Agreement, the Court established whether either objective was the Energy Star Agreement's main aim or predominant aim, in which case the measure would be founded on a single legal basis, or whether the objectives pursued were inseparable without one being secondary and indirect in relation to the other, in which case the measure would be founded on a dual legal basis.[52]

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49 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, para 20.

50 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, para 32.

51 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, paras 37 and 38.

52 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, para 39.

The Court accepted that in the long term the Energy Star programme should have a positive environmental effect:

> It is true that in the long term, depending on how manufacturers and consumers in fact behave, the programme should have a positive environmental effect as a result of the reduction in energy consumption which it should achieve. However, that is merely an indirect and distant effect, in contrast to the effect on trade in office equipment which is direct and immediate.[53]

The Court then concluded that the commercial-policy objective pursued by the Energy Star Agreement was predominant, so that the decision approving the Energy Star Agreement should have been based on ex-Article 133 TEC (Article 207 TFEU), in conjunction with ex-Article 300 (3) TEC (Article 218 TFEU).[54] The fact that participation in the energy Star labelling program was not mandatory did not affect that conclusion.[55]

Commission v Council (Case C-211/01)[56] is a legal base case brought by Community institutions. The case involved a challenge by the Commission to the legal base of the Council Decision concluding an agreement with Bulgaria establishing certain conditions for the carriage of goods by road and the promotion of combined transport[57] and an agreement with Hungary establishing certain conditions for the carriage of goods by road and the promotion of combined transport.[58]

On 19 March 2001, the Council unanimously adopted the contested decisions. Both Decisions cite ex-Articles 71 and 93 TEC (Articles 91 and 113 TFEU) in conjunction with

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53 Case C-281/01 Commission v Council EU:C:2002:761, [2002] ECR I-12049, para 41. See Panos Koutrakos (n 3) 56-58.

54 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, para 43.

55 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049, para 44.

56 Case C-211/01 *Commission v Council* EU:C:2003:452, [2003] ECR I-8913.

57 [2001] OJ L108/4.

58 [2001] OJ L108/27.

the second subparagraph of ex-Article 300 (3) TEC (Article 218 TFEU) as their legal base. The Commission was of the opinion that the Council was wrong to take ex-Article 93 TEC (Article 113 TFEU) as the legal basis, which required unanimity in the Council and mere consultation of the European Parliament.

The Commission submitted that the correct legal basis was ex-Article 71 TEC (Article 91 TFEU). It pointed to the wide scope acknowledged to apply to the common transport policy in the light of ex-Articles 3 (f), 70 and 71 TEC (Articles 90 and 91 TFEU) and the Court's case law. The Commission claimed that the Court should annul the contested decisions, in so far as they were based on ex-Article 93 TEC (Article 113 TFEU) and without altering their effects until the Council has adopted new concluding acts.

The Court, formulated its judgment as a confirmation of the Commission's arguments. The Council should have used ex-Article 71 TEC (Article 91 TFEU), in conjunction with ex-Article 300 (3) TEC (Article 218 TFEU), as the legal basis for the contested decisions. In those circumstances, there was no need to examine the Commission's other arguments, for instance, the scope of ex-Articles 70 and 71 TEC (Articles 90 and 91 TFEU) in relation to other objectives of the Treaty. The Court acceded to the Commission's request to limit the effects of the necessary annulment of the Decisions by maintaining all their legal effects until the adoption of new concluding measures.

In the judgment on the Rotterdam Convention (Case C-94/03)[59] the Commission brought a successful action seeking the annulment of the concluding act of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade,[60] in so far as it was based on ex-Article 175 (1) TEC

[59] Case C-94/03 *Commission v Council* EU:C:2006:2, [2006] ECR I-1.

[60] [2003] OJ L63/27.

(Article 192 (1) TFEU).[61] The Commission alleged infringement of the EC Treaty in that the wrong legal basis was chosen. The contested decision should have been based on ex-Article 133 TEC (Article 207 TFEU), in conjunction with ex-Article 300 TEC (Article 218 TFEU). The Commission relied on the Convention's object and purposes (that is, to establish close cooperation in the field of international trade in pesticides and other hazardous chemicals) and on the Convention's text, the provisions of which reflected its predominantly commercial purpose. The Court held that,

> the Convention includes, both as regards the aims pursued and its contents, two indissociably linked components, neither of which can be regarded as secondary or indirect as compared with the other, one falling within the scope of the common commercial policy and the other within that of protection of human health and the environment.[62]

The Court therefore found that the act of approval should have been based on the two corresponding legal bases, namely, in that case, ex-Articles 133 and 175 (1) TEC (Articles 207 and 192 (1) TFEU), in conjunction with the relevant provisions of ex-Article 300 TEC (Article 218 TFEU).

The Passenger Name Records (PNR) ruling (Cases C-317/04 & C-318/04)[63] concerned the EC-US Agreement on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection.[64] The (2004) PNR Agreement was signed on 28 May 2004. On 27 July 2004, Parliament filed an action of annulment. In Case C-318/04 (on the Adequacy Decision)

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61 Case C-94/03 *Commission v Council* EU:C:2006:2, [2006] ECR I-1. It is the legal basis for the conclusion of this Convention on behalf of the EC and its incorporation into the EC legal order which is the subject matter of the two judgments analysed in: Panos Koutrakos, 'Case C-94/03, *Commission v Council*, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-1; Case C-178/03, *Commission v Parliament and Council*, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-107' (2007) 44 CMLR 171-194.

62 Case C-94/03 *Commission v Council* EU:C:2006:2, [2006] ECR I-1, para 51.

63 See Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721.

64 See the discussion in Mario Mendez, 'Passenger Name Record Agreement – European Court of Justice' (2007) 3 EuConst 127-147.

Parliament advanced four pleas; alleging, respectively, (i) *ultra vires* action (that is, the Commission had exceeded its powers), (ii) breach of the fundamental principles of the Data Protection Directive; (iii) breach of fundamental rights and (iv) breach of the principle of proportionality.[65]

In Case C-317/04 (on the Agreement) Parliament advanced six pleas; alleging, respectively, (i) the incorrect choice of ex-Article 95 TEC (Article 114 TFEU) as legal basis for Decision 2004/496 and (ii) breach of, respectively, the second subparagraph of ex-Article 300 (3) TEC (Article 218 (6) TFEU) (that is, the assent of Parliament had not been attained), (iii) Article 8 of the ECHR (right to privacy), (iv) the principle of proportionality, (v) the requirement to state reasons and (vi) the principle of cooperation in good faith.[66] The Court found that the Council Decision (which authorised the President of the Council to sign the PNR agreement on behalf of the European Community),[67] and Commission Decision 2004/535/EC (which facilitated arrangements for the transfer of PNR),[68] should both be annulled, because the data processing at issue (that is, PNR data transfers from air carriers to US authorities, within the security field,

65 Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721, para 50.

66 Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721, para 60. See Gráinne Gilmore and Jorrit Rijpma, 'Joined Cases C-317/04 and C-318/04, *European Parliament v Council and Commission*, Judgment of the Grand Chamber of 30 May 2006, [2006] ECR I-4721' (2007) 44 CMLR 1081-1099. This annotation positions *Parliament v Council and Commission (PNR)* within the context of the Court's case law on legal basis in general.

67 Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] OJ L183/83.

68 Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection (Adequacy Decision) [2004] OJ L235/11.

regarded as necessary for law enforcement purposes and for safeguarding public security) was outside the material scope of the Data Protection Directive.[69]

As Mendez has argued, *Parliament v Council* (Case C-360/93), *Portugal v Council* (Case C-268/94), *Parliament v Council* (Case C-189/97), *Spain v Council* (Case C-36/98), *Commission v Council* (Case C-281/01), *Commission v Council* (Case C-211/01), the judgment on the Rotterdam Convention (Case C-94/03) and the Passenger Name Records (PNR) ruling (Joined Cases C-317/04 & C-318/04), concerned challenges to the chosen legal basis for the concluded international agreement.[70] According to Mendez, those cases repeated the conventional point that the choice of the legal basis for a measure must be based on objective factors, including as to aim and content, amenable to judicial review.[71] Of those 8 cases, four cases have generated successful challenges.

cc) Infringement of the Treaties or of any rule of law relating to their application

The most general ground of review is infringement of the Treaties or of any rule of law relating to their application. *Germany v Council* (Case C-280/93)[72] exemplified that infringement of the Treaty or of any rule relating to its application overlaps with the other grounds of review.

That case was an action of annulment against a Council Regulation supported by Belgium and the Netherlands. The pleas in law which Germany advanced alleged first, breach of essential procedural requirements; secondly, of substantive rules; thirdly, of fundamental principles of Community law; and fourthly, of the Lomé Convention, of the GATT and of the Banana Protocol.

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69 See Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721, paras 55-61 and 67-69.

70 Mario Mendez (n 8) 78.

71 For instance Case C-360/93 *Parliament v Council* EU:C:1996:84, [1996] ECR I-1195, para 23.

72 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973.

Under the pleas concerning substantive rules of EC law came: infringement of ex-Article 33 TEC (Article 39 TFEU); exceeding the limits of ex-Articles 33, 36 and 37 TEC (Articles 39, 42 and 43 TFEU) and breach of the principle of undistorted competition; under the pleas concerning fundamental principles of EC law came: complaint of breach of the principle of non-discrimination; infringement of the right to property and alleged infringement of the freedom to pursue a trade or business.[73]

Breach of essential procedural requirements: Germany argued firstly that the procedure for adopting the Regulation was irregular. The text of the Regulation diverged from the initial proposal of the Commission, without there having been a new proposal adopted by the college of Commissioners. It argued secondly that the Regulation was vitiated by a defective statement of reasons, in that the Regulation referred only to the first Commission's proposal. Germany argued thirdly that in view of the substantial nature of the changes made in the Commission's second proposal, the Parliament should have been consulted anew.[74]

The Council, supported by the Commission, maintained that the procedure for adopting the Regulation was regular.[75] It argued that the Regulation does not have to refer both to the original proposal and the subsequent amendments, and that the Commission's amendments to its proposal did not make it necessary for the Parliament to be consulted anew.

The Council had before it a Commission's proposal amended in accordance with the political agreement accepted by the competent Member on behalf of the Commission at

[73] Those principles (the right to property and the freedom to pursue a trade or business) form part of the general principles of Community law but had to be seen in relation to their social function. See Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 78. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession could be restricted, particularly in the context of a common organization of a market.

[74] Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 28-30.

[75] Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 31.

the Council session in 1992 and approved by the college of Commissioners.[76] The Court rejected Germany's argument, finding that the Commission's amendments to its proposal did not affect the very essence of the Regulation taken as a whole, and therefore did not render it necessary for the Parliament to be consulted again.[77]

Breach of substantive rules of EC law: Germany submitted that the objectives of the Regulation; that is, safeguarding Community production and maintaining the income of Community producers, did not come under ex-Article 33 TEC (Article 39 TFEU). It also argued that a development policy in favour of the ACP States (as pursued by the Regulation) cannot be based on the provisions on the common agricultural policy but at most on ex-Articles 308, or 310 TEC (Articles 352, or Article 217 TFEU). The submission that there was an infringement of ex-Article 33 TEC (Article 39 TFEU) and the argument that the limits of ex-Articles 33, 36 and 37 TEC (Articles 39, 42 and 43 TFEU) were exceeded (with respect to the regime for imports from the ACP States) were unfounded.[78] Furthermore, Germany argued that the way the tariff-quota was allocated conflicted with the objective of undistorted competition (objective mentioned in Article 3 (g) TEC, replaced, in substance, by Article 3 (1) (b) TFEU), in that it effected a redistribution of market shares and income to the detriment of traditional importers of third-country bananas.[79]

The Court did not uphold the complaint.[80] The arguments in support of this complaint relating to the damage caused to importers of third-country bananas were examined in the context of the analysis of the plea in law alleging breach of fundamental rights and general principles of law.[81]

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76 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 35.

77 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 42-43.

78 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 52 and 57.

79 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 58.

80 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 59-62.

81 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 64 et seq.

Fundamental principles of EC law:

The complaint of breach of the principle of non-discrimination: With respect to the complaint of breach of the principle of non-discrimination, Germany argued that the subdivision of the tariff quota under Regulation 404/93 for imports from countries other than traditional ACP countries constituted unjustified discrimination against traders in third-countries bananas. It argued that the subdivision of the tariff quota in favour of EC importers and/or traditional ACP bananas was tantamount to a transfer to them of a 30% market share by an act of the public authorities.[82] However, the Court rejected Germany's argument that the subdivision to the detriment of the class of operators trading in third-country bananas, without any justification, constituted discrimination contrary to the Treaty.[83] This rejection holds that differences in treatment (that is, categories of economic operators have been affected differently by the measures adopted: operators traditionally essentially supplied by third-country bananas found their import possibilities restricted, whereas operators formerly obliged to market essentially EC and ACP bananas could now import specified quantities of third country bananas) is inherent in the objective of integrating previously compartmentalised markets.[84]

Infringement of the right to property, disregard of acquired rights: With respect to the complaint of infringement of the right to property, Germany submitted that by depriving operators who traditionally marketed third-country bananas of market shares for a long period of time, Regulation 404/93 infringed those operators' right to property and their freedom to pursue their trade or business.

The Court rejected Germany's claims. It held that economic operators cannot claim a right to property in a market share which he held at a time before the establishment of a

82 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 65.

83 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 75.

84 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 73-74.

common organization of a market, since market shares constitute only a momentary economic position exposed to the risks of changing circumstances, and cannot claim that an acquired right (or legitimate expectation) that an existing situation which is capable of being altered by decisions taken by the EC institutions within the limits of their discretionary power will be maintained.[85]

Freedom to pursue a trade or business: With reference to infringement of the freedom to pursue a trade or business, Germany submitted that Regulation 404/93 altered the competitive position of German traders. The Court recognised that both the right to property and the freedom to pursue a trade or business form part of the general principles of EC law. However, the right to property and the freedom to pursue a trade or business are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of those principles may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the EC and do not constitute a disproportionate/ intolerable interference, impairing the very substance of the rights guaranteed.[86] As regards, the freedom to pursue a trade or business, the Court held that the introduction of the tariff quota under Regulation 404/93 and the machinery for subdividing did indeed alter the competitive position of economic operators on the German market.[87] It was then held that the restrictions imposed by Regulation 404/93 correspond to objectives of general EC interest and did not impair the very substance of that right.[88]

Breach of the principle of proportionality: Germany, then, argued that the introduction of the tariff quota under Regulation 404/93 violated the principle of proportionality, both as regards the formula for allocating the quota and the prohibitive rate for imports over and

85 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 79 and 80.

86 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 78.

87 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 81.

88 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 87.

above the quota.[89] It was alleged that the arrangements for trade with third countries violated the principle of proportionality, in that the objectives of supporting ACP producers and guaranteeing the income of EC producers could have been achieved by measures having less effect on competition and on the interests of certain categories of economic operators. This position was rejected by the Court,[90] finding that Germany has not shown that the Council adopted measures which were manifestly inappropriate having regard to the objective which the competent institution was seeking to pursue or that it carried out a manifestly erroneous assessment of the information available to it at the time Regulation 404/93 was adopted.[91]

For all those reasons the plea in law alleging breach of substantive rules of EC law was rejected.[92]

Infringement of Article 168 of the Lomé Convention, of the GATT, and of the Banana Protocol:

Germany argued that Article 168 of the Lomé Convention exempted imports of ACP products from all customs duties. It also argued that the Council could not rely on Article 168 (2) (a) to apply different treatment to traditional and non-traditional imports of ACP bananas. The Court found no breach of the Lomé Convention.[93]

It was alleged that Regulation 404/93 infringed certain basic provisions of GATT.[94] The Council, supported by the Commission, argued that in view of the nature of GATT 1947,

89 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 88.

90 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 94-97.

91 While alternative measures for achieving the objective of the integration of markets, which is the basis of any common organization of a market, were indeed conceivable, the Court cannot substitute its assessment for that of the Council (at para 94).

92 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 98-99.

93 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 100.

94 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 103.

provisions of GATT cannot be relied on to challenge the lawfulness of an EC act, except in the special case where the EC provisions were adopted to implement GATT obligations.[95]

The reasons that prevented GATT provisions from being directly effective also 'preclude[d] the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State [under ex-Article 230 TEC (Article 263 TFEU)]'.[96]

Germany argued that the Regulation was adopted in breach of the Protocol on bananas (hereinafter "the Banana Protocol"), annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community. Germany argued that the Banana Protocol was an integral part of the Treaty and that amendments of that protocol should have been done in accordance with the conditions under ex-Article 309 TEC (Article 354 TFEU).[97] In the Court's view to accept Germany's point of view would effectively make it impossible to set up a common organization of the market in bananas under the conditions set out in ex-Article 37 TEC (Article 43 TFEU). The Protocol cannot have the effect of derogating from basic provisions of the Treaty. Consequently, the plea in law alleging an infringement of the Protocol was rejected.[98]

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95 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 104.

96 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 109. Advocate General Gulmann's Opinion supported this reading. See Case C-280/93 *Germany v Council* EU:C:1994:235, [1994] ECR I-4973, Opinion of AG Gulmann, para 137; see also Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 YEL 263-298, in particular at 267. As indicated by Eeckhout, the ruling in *Germany v Council* clarified that there is no dichotomy between preliminary rulings-cases on validity and direct actions for annulment, nor between the position of private parties and that of EU Member States (Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2005) 249. See also the discussion at 382-386). As indicated by Koutrakos, despite the express reference to the legal position of private parties, it is not accurate to say that the ruling in the *Bananas* case made the direct effect of GATT 1947, or rather the absence thereof, a condition for reliance upon it by a Member State in annulment proceedings (Panos Koutrakos (n 3) 255).

97 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, para 113.

98 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973, paras 117-118.

c) The Court's jurisdiction in preliminary rulings proceedings

Article 267 TFEU replaces Article 234 TEC. Article 267 TFEU (ex-Article 234 TEC) establishes a preliminary reference procedure. International agreements formed the subject-matter of references for preliminary rulings.

aa) The interpretative jurisdiction of the Court of Justice over provisions of international agreements concluded without the participation of Member States

In *International Fruit Company*[99] the Court dealt with a reference from a Dutch court (College van Beroep voor het Bedrijfsleven). The judgment itself concerned a purely Community agreement. The Court established the legal effects of GATT 1947 in the legal order of the Community. In issue was the compatibility of Commission Regulations[100] which restricted the import of apples into the Netherlands with Article XI of the General Agreement on Tariffs and Trade (GATT).

The first question invited the Court to rule whether the validity of measures adopted by the institutions of the (then) Community also referred, within the meaning of Article 234 TEC, to their validity under international law.

In its judgment in *International Fruit Company* case, the Court held as follows:

> According to the first paragraph of [Article 234 TEC] 'The Court of Justice shall have jurisdiction to give preliminary rulings concerning … the validity … of acts of the institutions of the Community'.

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99 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

100 Regarding Commission Regulations Nos 459/70 [1970] OJ L57/20, 565/70 [1970] OJ L69/33 and 686/70 [1970] OJ L84/21, respectively.

> Under that formulation, the jurisdiction of the Court cannot be limited by the grounds on which the validity of those measures may be contested.[101]

In its judgment the Court started by stating that it was taking a broad approach to the interpretation of the wording of ex-Article 234 (1) TEC. The conditions of review were further elaborated. The Court held that, before the incompatibility of a Community measure with a provision of international law could affect the validity of that measure, the Community had first of all to be bound by that provision. The Court further held that, before invalidity could be relied upon before a national court, that provision of international law had also to be capable of conferring rights on citizens of the Community which they could invoke before the courts.[102]

bb) The interpretative jurisdiction of the Court of Justice over provisions of international agreements concluded with the participation of Member States

However, the Court's case law on whether the Court's competence to rule on the interpretation of provisions in international agreements extends to mixed agreements is more complex.

Mixed international agreements are international agreements where there are shared competences and where the Community and Member States are parties.

Craig and de Búrca have essentially argued that, notwithstanding the relatively broad reading given to exclusive external competence, the reality was that many external powers continued to be shared between the Member States and the EC.[103] *Opinion 2/91 (ILO*

[101] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, paras 4 and 5.

[102] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, paras 7 and 8.

[103] Paul P. Craig and Gráinne de Búrca, *EU law, Text, Cases, and Materials* (5th edn OUP, Oxford 2011) 82.

Convention 170),[104] *Opinion 2/00 (Cartagena Protocol)*[105] and *Opinion 1/94 (WTO Agreement)*[106] can be taken by way of example.

In *Haegeman*,[107] the Court dealt with a reference from a Belgian court (Tribunal de première instance de Bruxelles). The judgment concerned a mixed agreement. At issue in *Haegeman* was the Association Agreement with Greece "Athens Agreement". The subject-matter of this reference from Belgium was the existence of the jurisdiction of the Court over mixed international agreements. As the Court put it:

> This Agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of paragraph (b) of the first paragraph of Article 177.
>
> 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.[108]

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104 *Opinion 2/91 (ILO Convention 170)* EU:C:1993:106, [1993] ECR I-1061, paras 16-21.

105 *Opinion 2/00 (Cartagena Protocol)* EU:C:2001:664, [2001] ECR I-9713, paras 45-46.

106 *Opinion 1/94 (WTO Agreement)* EU:C:1994:384, [1994] ECR I-5267, paras 99-105. See the discussion in Panos Koutrakos, 'Interpretation of mixed agreements' in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart, Oxford 2010) 116-137 (Interpretation of mixed international agreements). The broad construction of the duty of cooperation (Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603, para 32) and its application has as a corollary the broad construction of the jurisdiction of the Court of Justice of the European Union to interpret mixed international agreements. The position of the Court is dispelled by paragraphs 108 and 109. Paragraphs 108-109 should be regarded as particularly significant to understanding of the position of the Community and its Member States under mixed international agreements in general and the WTO agreement in particular. See Joni Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its Member States* (Kluwer Law International, The Hague 2001) 228. See further Robert Schütze, *From dual to cooperative federalism: the changing structure of European Law* (OUP, Oxford 2009) 308-11.

107 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449.

108 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449, paras 4-6.

In *Demirel*,[109] the Court dealt with a reference from a German court (Verwaltungsgericht Stuttgart). At issue in *Demirel* was the Association Agreement between the EEC and Turkey "Ankara Agreement on free movement of workers and its Additional Protocol".[110]

Advocate General Darmon delivered his Opinion on 19 May 1987.[111] He provided a broad reading of the Court's position:

> Thus, in the absence of any reservation of powers in the Agreement, and subject to the various prerogatives as to its implementation, both the nature and the scope of its provisions suggest that, having regard to the principles defined in the case-law, the interpretation of those provisions is within the jurisdiction of this Court, particularly with a view to ensuring their uniform application. It does not seem to me that doubt is cast on that view of the matter by Article 25 of the Agreement, which confers powers on the Council of Association only in cases of conflict between States, in accordance with a procedure expressly laid down for the resolution of disputes which could not be brought before this Court by the non-member country concerned. [112]

The Court did not offer answers regarding the scope of its jurisdiction over the provisions of mixed international agreements.

In *Racke*[113] the Court dealt with a reference from a German court (Bundesfinanzhof). At issue was the EEC/Yugoslavia Cooperation Agreement. Subject-matter were the effects of the suspension of the Cooperation Agreement (suspension of trade concessions following the beginning of the war between Serbia and the other Republics of the former Yugoslavia).

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109 Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719.

110 The jurisdiction of the Court was directly challenged (objections to its jurisdiction raised by the German and British governments). The Court addressed the specific objections.

111 Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:232, [1987] ECR 3719, Opinion of AG Darmon.

112 Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:232, [1987] ECR 3719, Opinion of AG Darmon, para 15.

113 Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655.

The Court here held as follows:

> As the Court has already held in Joined Cases 21/72 to 24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraph 5, the jurisdiction of the Court to give preliminary rulings under Article 177 of the Treaty concerning the validity of acts of the Community institutions cannot be limited by the grounds on which the validity of those measures may be contested.
>
> Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law (*International Fruit Company*, paragraph 6).[114]

In the above statement, the Court again interpreted the wording of ex-Article 234 (1) TEC broadly.

In *Hermès*[115] the Court dealt with a reference from a Dutch court (District Court of Amsterdam). The agreement at issue was the Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement).

[114] Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655, paras 26 and 27. The jurisdiction of the Court was directly challenged. In this case, the Commission raised the objection that the Court does not have jurisdiction in cases where individuals are relying on rules of customary international law to challenge the validity of acts of the EC institutions. *Ibid*, para 25.

[115] Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603.

Hermès International invoked Article 50 of the TRIPs Agreement which concerned the infringement of its Benelux trademark rights on its *Hermès* trademark.[116] Advocate General Tesauro delivered his Opinion on 13 November 1997. He provided a broad reading of the Court's position. The Court's reply was based on two separate arguments. In the first place, noting the particular nature and type of the agreement at issue in that case, it had argued that the competence to conclude association agreements pursuant to formerly Article 238 concerned all the fields covered by the Treaty, clearly including freedom of movement for workers, and that therefore the question whether the Court had jurisdiction to rule on the interpretation of a provision in a mixed agreement within the *exclusive* competence of the Member States did not arise. In the second place, the Court also had observed that in ensuring respect for commitments arising from an agreement concluded by the EC institutions, the Member States fulfilled, within the EC system, an obligation in relation to the EC, which had assumed responsibility for the due performance of the agreement, therefore emphasising the EC scope of the Member States' obligation to comply with a mixed agreement in its entirety.

It appeared to follow from those statements, which were, of course, not decisive for the purpose of solving the problem that was in issue in the present case, first, that the Court itself considered that the only matters on which it had no interpretative jurisdiction pursuant to formerly Article 177 were matters within the exclusive competence of the

[116] See Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603. Again, the Court's jurisdiction was directly challenged (objections to its jurisdiction raised by the British, French and Dutch governments). The British, French and Dutch governments raised the objection that the Court does not have jurisdiction over the rules of the Trade Related Aspects of Intellectual Property ("TRIPs)" concerning the enforcement of intellectual property rights. These rules fall within the exclusive competence of the Member States. They refer in that regard to para 104 of *Opinion 1/94* EU:C:1994:384, [1994] ECR I-5267. *Ibid*, para 23. See further the discussion in Andrea Filippo Gagliardi, 'The right of individuals to invoke the provisions of mixed agreements before the national courts: a new message from Luxembourg?' (1999) 24 ELRev. 276-292. This note provides an analysis of Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655 and Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603. The two mixed international agreements before the Court were the Cooperation Agreement concluded between Yugoslavia, the Community and the Member States and the Agreement on Trade Related Aspects of Intellectual Property ("TRIPs").

Member States and, second, that in the case of an agreement (even a mixed agreement) concluded by the EC institutions the EC was competent with respect to the agreement in its entirety. The Advocate General added that he did not think those considerations could be confined merely to association agreements, where the EC's exclusive competence to conclude the agreement was based on the Treaty itself, in that case formerly Article 238. While it had to be recognised that mixed agreements varied considerably in nature and type, depending on the degree of participation by States, the fact remained that the problem, in the present case, inevitably arose in the same terms in the case of an association agreement, when it was concluded in the form of a mixed agreement, and in the case of agreements (also mixed) which had no ad hoc legal basis in the Treaty.[117]

The Court elaborated on its jurisdiction over provisions of international agreements made between the Community, the Member States and third countries. The position of the Court is dispelled by paragraph 29: 'It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPs Agreement.'[118] The Court did not offer an answer regarding the scope of its jurisdiction over the provisions of mixed international agreements.

In *Dior*[119] the Court dealt with a reference from a Dutch court (Arrondissementsrechtbank 's-Gravenhage and Hoge Raad der Nederlanden). The agreement at issue was the Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement). Advocate General Cosmas delivered his Opinion on 11 July 2000. He provided a strict

117 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 18.

118 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603.

119 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307.

reading of *Hermès;*[120] that is, wide scope of the jurisdiction of the Court to interpret mixed agreements:

> In light of the above, it becomes apparent that, in the context of Article 177 of the Treaty, to extend the Court's interpretative jurisdiction to TRIPs provisions relating to areas in which the (potential) Community competence has not yet been exercised would constitute pursuit of a policy of judge-made law in conflict with the constitutional logic of the Treaty and would be difficult to justify on grounds of expediency.[121]

In its judgment in the *Dior* case the Court did offer an answer to the scope of its jurisdiction. The relevant extract is worth mentioning in full: TRIPs, which was set out in Annex 1 C to the WTO Agreement, had been concluded by the Community and its Member States under joint competence (see *Opinion 1/94* [1994] ECR I-5267, paragraph 105). It followed that where a case was brought before the Court in accordance with the provisions of the Treaty, in particular ex-Article 177 thereof, the Court had jurisdiction to define the obligations which the EC had thereby assumed and, for that purpose, to interpret TRIPs.

In particular, the Court had jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of the Member States' courts when they were called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under EC legislation falling within the scope of TRIPs (see *Hermès*, paragraphs 28 and 29).

Likewise, where a provision such as Article 50 of TRIPs could apply both to situations falling within the scope of national law and to situations falling within that of EC law, as was the case in the field of trade marks, the Court had jurisdiction to interpret it in order to forestall future differences of interpretation (see *Hermès*, paragraphs 32 and 33). In that

120 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603.

121 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:378, [2000] ECR I-11307, Opinion of AG Cosmas, para 51.

regard, the Member States and the EC institutions had an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they had concluded the WTO Agreement, including TRIPs (see, to that effect, *Opinion 1/94*, cited above, paragraph 108). Since Article 50 of TRIPs constituted a procedural provision which should have been applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by EC law, that obligation required the judicial bodies of the Member States and the EC, for practical and legal reasons, to give it a uniform interpretation. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to ex-Article 177 of the Treaty was in a position to ensure such uniform interpretation. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs was therefore not restricted merely to situations covered by trade-mark law.[122] The above extract, is construed in broad terms.

[122] Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307, paras 33-39.

The extract clarifies the status of mixed international agreements in the EC legal order. The above analysis indicated that the Judgment of the Court of 12 December 1972,[123] 16 June 1998,[124] 30 April 1974,[125] and 14 December 2000[126] constitute an advancement in the construction of the role of the Court.[127]

C. Jurisdiction of the Court on CFSP and PJC (by now FSJ) agreements

1. Institutional scheme of the Treaties and limitations on review before the Lisbon Treaty reforms

As Denza has argued, ex-Article 35 TEU (as amended by the Treaty of Amsterdam) gave the Court a somewhat circumscribed jurisdiction over the binding instruments which are adopted under pre-Lisbon's "third"-pillar. That is, jurisdiction to give preliminary rulings to national courts on validity and interpretation of framework decisions and decisions, and on interpretation of conventions established under pre-Lisbon's Title VI, and on the

123 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

124 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603.

125 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449.

126 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307.

127 See the discussion in Panos Koutrakos (n 3) 193-202. In Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719 and Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603 the Court did not offer answers regarding the scope of its jurisdiction over the provisions of mixed international agreements. The absence of a clearer line of reasoning is regrettable. However, and, as mentioned earlier, the Advocates-General provided a broad reading of the Court's position (Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:232, [1987] ECR 3719, Opinion of AG Darmon, para 15 and Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1997:539, [1998] ECR I-3603, Opinion of AG Tesauro, para 18).

validity and interpretation of the measures implementing them.[128] However, only if the Member State has accepted jurisdiction,[129] jurisdiction to review legality of framework decisions and decisions (at the suit of a Member State or the Commission; that is, only privileged applicants) on grounds which are the same as those on which pre-Lisbon's Community acts were challenged under ex-Article 230 TEC (new 263 TFEU),[130] and jurisdiction to rule on disputes between Member States regarding the interpretation or the application of any pre-Lisbon's "third"-pillar instrument.[131]

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128 Ex-Article 35 (1) TEU read as follows: 'The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title [Title VI] and on the validity and interpretation of the measures implementing them.'

129 Ex-Article 35 (3) TEU read as follows: 'A Member State making a declaration pursuant to paragraph 2 shall specify that either: (a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or (b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.' As indicated by Hatzopoulos, as of December 2006 only 16 Member States had made a declaration under ex-Article 35 (3) TEU. These include Austria, Belgium, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and Portugal. Of these 16, only Spain and Hungary have restricted the right to refer to the Court to national jurisdictions judging without appeal. Vassilis Hatzopoulos, 'With or without you ... judging politically in the field of Area of Freedom, Security and Justice' (2008) 33 ELRev. 44-65, 47.

130 Ex-Article 35 (6) TEU read as follows: 'The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.'

131 Ex-Article 35 (7) TEU read as follows: 'The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).'

Ex-Article 35 TEU marked progress (the Court now had jurisdiction to rule on matters covered by pre-Lisbon's "third"-pillar) in comparison with the Maastricht Treaty which gave the Court no jurisdiction over Council instruments.[132]

As Albors-Llorens has argued, the Amsterdam changes also presented the fundamental weakness of failing to guarantee the adequate protection of private parties in some of the new areas where the Court had been given jurisdiction. Natural and legal persons had no access to a direct system of judicial review of Council measures in the context of the "Third Pillar" and their access to the system of indirect judicial review through preliminary rulings was plagued with uncertainties. Ex-Article 68 EC (which imposed limitations on the role of the Court in areas communitarised under "old" Title IV) also undermined the judicial protection available to individuals within Title IV (this Title covered asylum, immigration, external border controls and judicial co-operation in civil matters) by modifying the application of ex-Article 234 EC to that Title. The European Parliament was the other great absentee in the system devised by ex-Article 35 TEU and in the new procedural route to the Court laid down by ex-Article 68 (3) EC.[133]

Ex-Article 46 TEU read as follows:

> The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:
>
> (...)

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132 Eileen Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford 2002) 266. See also Jörg Monar, 'Justice and home affairs in the Treaty of Amsterdam: reform at the price of fragmentation' (1998) 23 ELRev. 320, at 330-332.

133 Albertina Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam' (1998) 35 CMLR 1273, 1292.

> (b) provisions of Title VI, under the conditions provided for by Article 35;
>
> (...)
>
> (d) Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty; (...).

Ex-Article 46 TEU listed the powers of the Court exhaustively. In terms of Title V of the (pre-Lisbon) EU Treaty the provision did not confer any competence on the Court; that is, ex-Article 46 TEU imposed limitations on the jurisdiction of the Court in relation to CFSP.

In *Segi and Gestoras Pro Amnistía v Counci*[134] the Court addressed its limited jurisdiction by virtue of ex-Articles 46 and 35 TEU under Title VI of the (pre-Lisbon) Treaty on European Union,[135] and the bite of fundamental rights within areas of limited jurisdiction (3rd "Pillar").

In the light of its limited jurisdiction[136] the General Court (then Court of First Instance) has held in an *obiter*:

> (...) it must be noted that indeed probably no effective judicial remedy is

134 Case C-355/04 P *Segi and Others v Council* EU:C:2007:116, [2007] ECR I-1657; and Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2007:115, [2007] ECR I-1579. For an analysis of the case see Steve Peers, 'Salvation outside the Church: Judicial protection in the third Pillar after the *Pupino* and *Segi* judgments' (2007) 44 CMLR 883, 892-902.

135 In this case a common position (adopted jointly within the Union's former second and third pillars) an instrument not reviewable in the Community courts, with an annexed list of terrorist organisations had been at issue. The claimants – both organisations, with the aim of supporting the claim of Basque independence, identity, culture and language, part of the Basque separatist organisation Euskadi Ta Askatasuna (E.T.A. – an alleged "internal" EU terrorist group) – sought damages for the disadvantages they had faced as a consequence of being listed.

136 Jurisdiction applied, pursuant to ex-Article 46 TEU, under the conditions listed in ex-Article 35 TEU.

> available (...) whether before the Community Courts or national courts, with regard to the inclusion (...) on the list of persons, groups or entities involved in terrorist acts. (...) Moreover, it is not possible to challenge the legality of the inclusion (...) in that annex, in particular through a reference for a preliminary ruling on validity, because of the choice of a common position and not, for example, a decision pursuant to Article 34 EU.[137]

The General Courts' *obiter* did not correspond well with the constitutive elements of a Community based on the rule of law. Advocate General Mengozzi highlighted the internal and external dimension of fundamental freedoms (and rights) and pointed to the fact that the observance of fundamental rights forms the foundation of a Union based on the rule of law:

> As regards the principle of the rule of law, (...) [Union] institutions and the Member States (...) cannot be exempted from judicial review of the compatibility of their acts with the Treaty, in particular Article 6(2) EU, even where they act on the basis of Titles V and VI of the EU Treaty. (...)
>
> (...) Respect for human rights and fundamental freedoms and the principle of the rule of law are (...) an 'internal' dimension, being a foundation of the Union and a criterion for assessing the legality of the action of its institutions and of the Member States in the matters for which the Union has jurisdiction, and an 'external' dimension, as a value to be 'exported' beyond the borders of the Union by means of persuasion, incentives and negotiation.[138]

The Advocate General did not reach the conclusion that Union Courts (CJ and GC) should provide for judicial protection and departed from *Foto-Frost*,[139] suggesting that national

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137 Case T-338/02 *Segi and Others v Council* EU:T:2004:171, [2004] ECR II-1647, para 38.

138 Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, paras 77 and 79.

139 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* EU:C:1987:452, [1987] ECR 4199, para 17; that is, national courts are not authorised to declare Community acts void.

courts should fill this gap based on the principle of loyal cooperation.[140]

In the Advocate General's opinion national authorities were competent to review instruments and to declare them void (e.g. annulment of Common Positions) in areas where there is no system eligible (that is, absence of a preliminary ruling mechanism) to ensure the uniform application of Union law.[141] As Advocate General Mengozzi puts it:

> I consider instead that a correct interpretation of the EU Treaty testifies to the fact that such protection exists, but is entrusted, *in the present state of Union law*, not to the Community court but to the national courts.[142]

However, the Court did not follow its Advocate General. Choosing instead to push the limits[143] of its competence (ex-Articles 46 and 35 under Title VI of the (pre-Lisbon) Treaty

140 Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, paras 105-6 and 138. The arguments put forward by the Advocate General – the fact that the European courts' jurisdiction is excluded has no bearing on the jurisdiction of national courts – are compelling. See Eleanor Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*' (2007) 3 EuConst 5, 23-24. If the Union system were to be perceived as fragmented, then judicial protection would be dependent on purely executive choices.

141 Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, para 121. The same rationale is also reflected in literature – in the absence of a preliminary ruling mechanism *Foto-Frost* is particularly inapplicable. See, for instance, Wyatt and Dashwood's European Union Law (6nd edn Hart, Oxford 2011) 227; Trevor C Hartley, *Constitutional problems of the European Union* (Hart, Oxford 1999) 34-5; and A Arnull, *The European Union and its Court of Justice* (2nd edn OUP, Oxford 2006) 134-5.

142 Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, para 99.

143 For critical perspectives Ulrich Haltern, 'Rechtsschutz in der dritten Säule der EU' (2007) JZ 772–778; or Alicia Hinarejos, 'Recent human rights development in the EU courts: the Charter of Fundamental Rights, the European Arrest warrant and terror lists' (2007) 7 EHRLR 793, 809-811. Although Hinarejos does recognise that the Court was at pains to extend its jurisdiction – so as to allow for more much-needed judicial control in the intergovernmental pillars – she contends that the balance in *Gestoras Pro Amnistía* and *Segi et al.* is a positive one; '[a] multitude of anti-terrorism measures that are bound to affect the rights of individuals are being adopted in these areas, where the pattern of judicial control foreseen by the Treaty is insufficient. The evolution in the type of action that the Union has undertaken in these pillars must be coupled with an evolution in the pattern of judicial control. The [CJ] has shown that it is aware of this, and that it is willing to push the boundaries to some extent until the Treaty undergoes these needed reforms' (810-11).

on European Union; that is, review is not foreseen in the Treaty on European Union), and to extend its jurisdiction as to review the legality of the Common Position. The Court declared that:

> It is true that, as regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty (see, to this effect, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 35). It is even less extensive under Title V. (...) Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. *Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly.* The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (...).[144]

The Court's substantiation strongly relied on the system of legal remedies of former Title VI, which, according to the Court itself, is more extensive than under former Title V TEU.

In general, the Court's judgment and the Advocate General's opinion reached similar conclusions, except that the Court had placed much greater stress on the mechanism of preliminary rulings to ensure the legality of "third" -pillar measures, while the Opinion had laid greater stress on national courts, and furthermore had addressed in detail the issues that national courts would consequently face.[145]

Hillion and Wessel were interested in whether pre-Lisbon's third pillar-related

144 Case C-355/04 P *Segi and Others v Council* EU:C:2007:116, [2007] ECR I-1657, paras 50 and 53 [emphasis added].

145 Steve Peers (n 134) 897.

instruments, other than common positions[146] (notably EU agreements) could equally be subject of a preliminary reference.

Following the approach of the Court, it could not be excluded that the provisions of EU agreements concluded on the bases of ex-Articles 24 and 38 TEU could also be the subject of a preliminary reference, at least in so far as the provisions related to the "third" -pillar, and they produced legal effects in relation to third parties. If that held true, national courts would have been in a position to obtain an interpretation, or indeed question the validity of such EU agreements. In the light of the pronouncement of the Court in the *Pupino* case, and particularly in view of the principle of loyal cooperation, the Member States' courts then would have been compelled to refer to the content of the EU agreement when interpreting the relevant rules of national law, or indeed international agreements. In other words, the *Segi* jurisprudence combined with the *Pupino* decision, could well entail that the Member States' freedom to conclude external agreements might be affected by EU agreements based on ex-Articles 24 and 38 TEU. Of course, the effect of an EU agreement, as envisaged above, would merely have concerned the "third" -pillar related provisions of that agreement but not its CFSP aspects, nor *a fortiori* the provisions of 'pure' CFSP agreements. If that reasoning held true, it would have become decisive to distinguish what belongs to CFSP and what belongs to PJCC in cross-pillar EU agreements, a task which arguably could be performed by the Court under ex-Article 35 TEU.[147]

146 The Court referred to 'all measures adopted by the Council, whatever their nature or form': '(...) The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (see, by analogy, Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263, paragraphs 38 to 42, and Case C-57/95 *France v Commission* [1997] ECR I-1627, paragraph 7 et seq.).' See Case C-355/04 P *Segi and Others v Council* EU:C:2007:116, [2007] ECR I-1657, para 53.

147 By analogy. Case C-355/04 P *Segi and Others v Council* EU:C:2007:116, [2007] ECR I-1657, para 53, see, Christophe Hillion and Ramses Wessel, 'Restraining External Competences of EU Member States under CFSP' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Essays in European law, Hart, Oxford 2008) 113.

This was brief and, at times, thinly argued. The latter view ignored the fact that the Common Position in question was in substance a Decision.[148] It lacked a more convincing analysis (that is, what are the literal, textual, purpose arguments – that could have been marshalled in favour or against using the procedure (preliminary reference procedure) by analogy for international agreements) – and accord to its classification – and was, for that reason, disappointing.

At stake was the extension of judicial control in pre-Lisbon's "third"-pillar. The only reason why the Court concluded on a legal remedy is the presence of a judicial competence in pre-Lisbon's "third" -pillar, it was thus doubtful that the solution adopted by the Court would also be applicable to pre-Lisbon's "second" -pillar, enshrined in Title V of the (pre-Lisbon) Treaty on European Union.[149]

148 In this respect *cf.* Case C-355/04 P *Segi and Others v Council* EU:C:2007:116, [2007] ECR I-1657; and Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2007:115, [2007] ECR I-1579; also reflected in literature. See Eleanor Spaventa, 'Counter-terrorism and Fundamental Rights: judicial challenges and legislative changes after the rulings in *Kadi* and *PMOI*' in A Antoniadis, R Schütze & E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart, Oxford/Portland 2011) 115.

149 See Christophe Hillion and Ramses Wessel, 'Restraining External Competences of EU Member States under CFSP' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Essays in European law, Hart, Oxford 2008) 90-91. See further Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, Oxford 2009) 149. In the same vein, Vincent Kronenberger, 'Coherence and consistency of the EU's action in international crisis management: the role of the European Court of Justice' in Steven Blockmans (ed), *The European Union and crisis management: policy and legal aspects* (TMC Asser Press, 2008 The Hague) 201.

2. Institutional scheme of the Treaties and limitations on review after the Lisbon Treaty reforms

a) Control *ex ante* of legality of CFSP and FSJ agreements

Article 218 (11) TFEU (ex-Article 300 (6) TEC) allows the Court to provide an opinion. As to the former, the Member States, the European Parliament, the Council or the Commission may obtain the opinion of the Court as to whether a proposed EU agreement (CFSP and FSJ agreement) is compatible with the Treaties, TEU or TFEU. Where the opinion of the Court is adverse, the agreement envisaged shall not enter into force unless it is amended or the Treaties are revised.[150] This provision brings CFSP agreements within the scope of the Court's jurisdiction (*ex ante* procedure). Article 218 (11) TFEU (ex Article 300 (6) TEC) provides no derogation for the CFSP; that is, Article 275 TFEU does not exclude Article 218 TFEU itself from the Court's jurisdiction.[151]

150 As indicated by Cremona, Article 218 (11) TFEU (ex-Article 300 (6) TEC) implies that, in the absence of such amendments, institutional decisions concluding incompatible agreements are invalid. See Marise Cremona, 'Coherence in European Union foreign relations law' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, Cheltenham 2011) 79, citing Case C-122/95 *Germany v Council* EU:C:1998:94, [1998] ECR I-973. In *Germany v Council* the Court declared the Council decision concluding the Framework Agreement on Bananas invalid in so far as certain aspects of the Agreement were contrary to the principle of non-discrimination.

151 Alicia Hinarejos (n 149) 164; Geert de Baere (n 4) 190. Apparently dissenting on this point, Jan Wouters, Dominic Coppens and Bart De Meester, 'The European Union's External Relations after the Lisbon Treaty' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, Vienna 2008) 165: 'Under the formulation of the Constitution (Article III-376), the grounds for exclusion of jurisdiction were explicitly spelled out. Because this list did not refer, for example, to Article III-325(11) (concerning [CJ] opinions on envisaged international agreements), it was open for interpretation whether the [CJ] could provide opinions on international agreements in the CFSP field. The Lisbon Treaty, however, answers this question in the negative because the exclusion of jurisdiction in the field of CFSP is formulated more broadly: in general, the [CJ] shall have no jurisdiction with respect to the provisions relating to CFSP nor with respect to acts adopted on the basis of those provisions" (…).'

Article 218 (11) TFEU, which creates the jurisdiction of the Court for an Opinion, is a potentially revolutionary inroad into the CFSP exemption (Article 24 (1) TEU reaffirmed by Article 275 TFEU). In *Opinion 1/09 (European Patent Court)*,[152] Opinion delivered pursuant to Article 218 (11) TFEU, the Court was asked to rule on the compatibility with Union law of the draft agreement on the European and Community Patents Court. The draft agreement established, in essence, a new court structure, by conferring on an international court which is outside the institutional and judicial framework of the EU an exclusive jurisdiction to hear actions brought by individuals in the field of the Community patent and to interpret and apply EU law in that field. Plans for participation in the negotiation of an international agreement relating to patent litigation were thwarted: the envisaged international agreement would deprive Member States' courts of their powers in relation to the interpretation and application of EU law and the Court of its powers to reply, by preliminary ruling, to questions referred.[153]

b) Control *ex post* of legality of CFSP and FSJ agreements

Firstly, "control *ex post*" of legality of EU agreements (FSJ agreements) is considered. The Court acquires, due to the assimilation of Police and Judicial Co-operation in Criminal Matters (PJCC) to the "Community model" of the former first pillar (EC), full jurisdiction on Police and Judicial Co-operation in Criminal Matters (now FSJ).[154]

Suffice it to note that the internal act of approval of an agreement is an act of an institution

152 *Opinion 1/09* EU:C:2011:123, [2011] ECR I-1137.

153 *Opinion 1/09* EU:C:2011:123, [2011] ECR I-1137, paras 60-89. Steve Peers, 'The constitutional implications of the EU patent' (2011) 7 EuConst 229-266 examines the options, in light of *Opinion 1/09*, for establishing a patent litigation system which is both workable in practice from the point of view of users of the patent system, and realistic in light of the political constraints on possible developments. See the section on the 'Proposed Litigation Agreement' (at 245-247) and the section on the 'Future of the EU Patent' (at 256).

154 Alicia Hinarejos, 'The Lisbon Treaty versus standing still: a view from the third pillar' (2009) 5 EuConst 99; Bruno Nascimbene, 'European judicial cooperation in criminal matters: what protection for individuals under the Lisbon Treaty?' (2009) 10 ERA 397.

intended to produce legal effects *vis-à-vis* third parties (Article 263 TFEU).[155] That is, decisions to conclude EU agreements (FSJ agreements) are subject to a review of legality.

For a transitional period of five years the powers of the Court, in relation to acts adopted in the area of Police and Judicial Co-operation in Criminal Matters, adopted before Lisbon, remain those provided under Title VI of the TEU:

> As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.[156]

Secondly, "control e*x post*" of legality of EU agreements (CFSP agreements) is considered. The Court has, save for two exceptions, no jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy;[157] that is, Article 40 TEU, compliance with the Union Treaties' allocation of powers between the Union and the Member States ("mutual non-affectation clause"), and Article 275 (2) TFEU, review of the legality of decisions providing for 'restrictive measures against natural or legal persons' adopted by the Council under the CFSP.

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155 Case 22/70 *Commission v Council* EU:C:1971:32, [1971] ECR 263, para 39; Case C-327/91 *French Republic v Commission* EU:C:1994:305, [1994] ECR I-3641, para 14; Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721 (pleas for annulment of a Council Decision on the conclusion of an agreement (PNR)).

156 See Article 10 (1) of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon [2008] OJ C115/322.

157 See generally, Maria-Gisella Garbagnati Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' (2006) 55 ICLQ 77, 106.

Yet, there are still unsatisfactory features under the current rules. It has been criticised that most national governments have agreed to maintain a provision (now Article 275 TFEU) that expressly excludes CFSP provisions as well as acts adopted on the basis of those provisions from the jurisdiction of the Court:[158]

This might appear to the reasonable observer ‘as wholly unjustified in the light of the developing content of the Union's foreign policy’, and further constituted ‘a substantial breach in the rule of law’ as the CFSP area continued to remain a ‘judicial review-free islet’ notwithstanding two modest reforms laid down in Article 275 (2) TFEU:

The Court of Justice of the European Union could now monitor compliance with the Union Treaties' allocation of powers between the Union and the Member States and, more importantly, rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the CFSP. This first change only codified the case law of the Court but the last one was significant as it largely remedied the gap in fundamental rights protection highlighted by the *Kadi* line of cases. Also welcome was the inclusion of a provision providing that CFSP Council restrictive measures adopted against natural or legal persons had to include ‘necessary provisions on legal safeguards’.[159]

These changes nevertheless remain patently insufficient. The CFSP area continues to remain a ‘judicial review-free islet’ notwithstanding reforms.

As mentioned earlier, jurisdiction of the Court of Justice of the European Union is

158 There is the possibility of subjecting Common Foreign and Security Policy measures to an indirect judicial review, in cases where CFSP measures are implemented. See Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* EU:T:2006:384, [2006] ECR II-4665. In cases where there is no effective judicial review, neither at national or at Union level, the European Court on Human Rights provides the only remedy to review the compatibility of CFSP acts with ECHR standards.

159 See Laurent Pech, ‘ "A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 EuConst 359, 393-94.

severely limited within the CFSP. The TEU acknowledges two express exceptions. First express exception is Article 40 TEU ("mutual non-affectation clause"). The Court shall have jurisdiction to monitor compliance with Article 40 TEU, which reads as follows:

> The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.
>
> Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.[160]

This ensures that the implementation of CFSP does not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the competences referred to in Articles 3 to 6 TFEU (that is, articles containing the division of competences), to avoid encroachment upon the powers conferred by the Treaties,[161] and *vice-versa*.

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160 See on the scope of Article 40 TEU, Peter van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency' (2010) 47 CMLR 987, 1002 et seq. Pre-Lisbon Article 47 TEU read as follows: 'Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.' The Court held in relation to pre-Lisbon Article 47 TEU: 'It is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.' See for example, Case C-91/05 *Commission v Council (ECOWAS)* EU:C:2008:288, [2008] ECR I-3651, in particular para 56; Case C-176/03 *Commission v Council* EU:C:2005:542, [2005] ECR I-7879, para 39 and Case C-170/96 *Commission v Council* EU:C:1998:219, [1998] ECR I-2763, para 16.

161 Case C-170/96 *Commission v Council* EU:C:1998:219, [1998] ECR I-2763, para 16; Case C-176/03 *Commission v Council* EU:C:2005:542, [2005] ECR I-7879, para 39.

According to Hinarejos, there are some differences between Article 40 TEU and its predecessor provision (ex-Article 47 TEU[162]):

The first difference was that, contrary to its counterpart in the Lisbon Treaty, ex-Article 47 TEU could be understood to give power to the Court to check the compliance of (properly adopted) CFSP measures with the TEC. This was because ex-Article 47 TEU only stated that 'nothing in this Treaty shall affect the Treaties establishing the European Communities', whereas Article 40 TEU (after TL) referred specifically to 'the application of the procedures and the extent of the powers of the institutions' laid down in the TEU and TFEU. It had been argued that, within the CFSP, ex-Article 47 TEU should not be read as single-handedly granting the Court competence to review CFSP measures for compliance with Community rules in the absence of any review mechanism in the area; in any case, that possibility then would have been precluded in the Lisbon Treaty.

The second difference was that, within the framework of the Lisbon Treaty, the borders would be set between the CFSP and all other Union policies, where the EC method

[162] Case C-170/96 *Commission v Council* EU:C:1998:219, [1998] ECR I-2763 (Joint Action, airport transit visas); Case C-176/03 *Commission v Council* EU:C:2005:542, [2005] ECR I-7879 (Framework Decision, protection of the environment through criminal law); and Case C-440/05 *Commission v Council* EU:C:2007:625, [2007] ECR I-9097 (Framework Decision, enforcement of the law against ship-source pollution), related to acts adopted pursuant to ex-Title VI TEU. Case C-91/05 *Commission v Council* EU:C:2008:288, [2008] ECR I-3651 was the first occasion when the Court was requested to draw the line between the EC Treaty and Title V of the TEU on the CFSP on the basis of ex-Article 47 TEU. The Commission brought an action seeking to have the Decision annulled and the Joint Action to be declared inapplicable. Taking the view that the Council Decision had not been adopted on the correct legal basis and that by virtue of that fact ex-Article 47 TEU had been infringed (the adoption of such a measure fell within the competence conferred upon the EC in the area of development cooperation). The *Small Arms* case concerned first, the meaning of ex-Article 47; secondly, nature of the EC competence in the assessment as to whether or not ex-Article 47 has been infringed by a measure that has been adopted pursuant to the TEU; and, thirdly, the application of ex-Article 47 TEU to situations where a measure has multiple objectives; that is, some of which fall within Community competence and others within the competence of the Union. The Court drew a demarcation between the areas of Community development co-operation and CFSP respectively (at paras 76-77). Joni Heliskoski, 'Small arms and light weapons within the Union's pillar structure: an analysis of Article 47 of the EU Treaty' (2008) 33 ELRev. 898-912 provides a general analysis of purpose and meaning of ex-Article 47 on the basis of the *Small Arms* case considered in the light of the Court's earlier case law on the subject.

applied fully, rather than between the intergovernmental pillars and the Community pillar. In both cases, the application of the EC method seemed to be the underlying distinction.

The third difference was that whereas ex-Article 47 TEU established the primacy of EC competences over EU ones, Article 40 TEU (after TL) seemed to accord them equal weight. The aim of Article 40 TEU (after TL) would not have been to safeguard the *acquis communautaire* as much as to prevent mutual interference between the CFSP and any other policy. It should nevertheless be borne in mind that the Court already ensured under ex-Article 230 EC that no measure was inappropriately adopted under pre-Lisbon's EC "Pillar" when it should have had an intergovernmental legal basis. The 'two-way street' of Article 40 TEU (after TL) could therefore be seen as the fusion of two functions the Court had already been exercising under two different Treaty headings: it had protected EC competences from EU encroachment under ex-Article 47 TEU, but it had also performed the converse task by enforcing the principle of conferral of powers and without the need to invoke ex-Article 47 TEU. In practice, the difference would have been that, in a situation such as the one at stake in *ECOWAS*, where the Court recognised that the measure had two equally central aims or components, one falling within the scope of the CFSP and another one falling within another area of EU competence, a literal reading of Article 40 TEU would not have necessarily provided for the necessary conflict rule to choose one legal basis over the other.[163]

According to van Elsuwege, this "mutual non-affectation clause" stood in stark contrast to the hierarchic relationship between the "Pillars" under the old treaty regime, where, inspired by a fear of intergovernmental contamination of supranational decision-making, several provisions had underlined the primacy of Community competences (see ex-Article 47 TEU in conjunction with ex-Articles 1 (3) and 2 TEU).[164]

[163] Alicia Hinarejos (n 149) 152 and 153.

[164] Peter van Elsuwege (n 160) 987, 1002.

De Baere points to the use of annulment procedures brought against the legal instrument concluding an agreement alleging a violation of Article 40 TEU.

According to him Article 275 TFEU did not exclude Article 218 TFEU itself from the jurisdiction of the Court. That implied that the Court should have been able to review compliance with the unified treaty-making procedure provided for in Article 218 TFEU, regardless of whether the agreement concerned would have covered EC external relations, or matters belonging to the CFSP. Because the unified treaty-making procedure would have left in place some procedural differences between provisions of the agreement pertaining to those two aspects of foreign policy, the jurisdiction of the Court would have included 'policing the borders' between the two. That would have seemed to include the possibility for the Court to review *ex post* the compliance with those procedural differences corresponding to the horizontal division of competences. One could think of an annulment procedure brought against the legal instrument concluding an agreement alleging a violation of Article 40 EU, which would have fallen under the jurisdiction of the Court according to Article 275 TFEU.[165]

Second express exception is Article 275 (2) TFEU, which reads as follows:

> the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 275 (2) TFEU is again one of the potentially revolutionary inroads into the CFSP for the Court. The inclusion of the provision indicates that the constitution-makers wanted to reinforce judicial review – a break with the pre-Lisbon Treaty status quo.

[165] Geert de Baere (n 4) 190-91.

The Court shall also be able to review the legality of decisions referred to in Article 275 (2) TFEU providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 (containing specific provisions on the Common Foreign and Security Policy) of Title V of the Treaty on European Union (that is, measures referred to in Article 215 TFEU).[166]

Cremona goes as far as to argue that there was no reason in principle why a Council decision concluding a treaty should not have been subject to review under that provision, although it was probably more likely that a measure implementing the agreement would have satisfied those conditions.[167] That is, review of the legality of Council decisions providing for restrictive measures adopted on the basis of the CFSP and CSDP provisions.

166 Article 215 TFEU reads as follows: '1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards.' The practical significance of Article 275 TFEU is limited, as restrictive measures are likely to be normally adopted through Article 75 TFEU (Area of Freedom Security and Justice as regards preventing and combating terrorism and related activities). See Tarcisio Gazzini and Ester Herlin-Karnell, 'Restrictive measures adopted by the EU from the standpoint of international and EU law' (2011) 36 ELRev. 798, 815.

167 See Marise Cremona, 'Who can make treaties? The European Union' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (OUP, 2012 Oxford) 111.

D. The standard of assessment

1. National judicatures

In cases where legal spheres conflict in their substance, Advocate General Mengozzi has suggested that the standard of assessment of validity are, in accordance with the principle of loyal cooperation, the general principles of Union law:

According to him the principle of loyal cooperation dictated that when Member States' courts assessed the legality of acts adopted by the Council under Article 34 TEU (Title VI of the Treaty on European Union), including an assessment made in an action for damages, they should have done so in the light of the relevant provisions and general principles of *Union* law, particularly the fundamental rights under Article 6 (2) TEU, namely those guaranteed by the European Convention on Human Rights and those stemming from the constitutional traditions common to the Member States. Reference by the Member States' courts to the constitutional provisions of their own legal systems might not be sufficient to guarantee the standard of protection of fundamental rights deriving from Article 6 (2) TEU, to the extent that, as was repeatedly observed, that standard was not the 'lowest common denominator' of protection afforded to fundamental rights by the constitutional laws of the Member States but rather a high level of protection appropriate to the needs of Union law.[168]

As indicated by Advocate General Mengozzi, application of the standard of protection required could pose difficulties to the national judicature and involves national judicatures

[168] Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, para 138. This view is also reflected in literature. See Eleanor Spaventa, 'Fundamental What? The Difficult Relationship between Foreign Policy and Fundamental Rights' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Essays in European law, Hart, Oxford 2008) 250 and Monica Claes, *The National Court's Mandate in the European Constitution* (Modern Studies in European Law, Hart, Oxford 2006) 560.

in clarifying the fundamental rights recognised by the Union, a task hitherto performed by the Court of Justice of the European Union.

> Application of the standard of protection required by Article 6(2) EU could undoubtedly pose some difficulties to the national court and involve it in clarifying the fundamental rights recognised by the Union, a task hitherto performed mainly by the Community court. Such difficulties should not, however, be exaggerated. National courts can rely for that purpose on the provisions of the Charter and on Community case-law, as well as on the provisions of the ECHR and the case-law of the European Court of Human Rights. In order to assess the legality of the Council acts described in Article 34 EU, at least those mentioned in Article 35(1) EU, national courts may naturally seek the assistance of the Court, to the extent that the choices made by the respective States under Article 35(2) and (3) EU allow, by making a reference for a preliminary ruling on validity. In any case, the difficulty in question cannot justify preferring the absence of judicial protection of fundamental rights, which result from Article 6(2) EU, in the context of Title VI of the EU Treaty.[169]

Difficulties should not be exaggerated. National judicatures can rely for that purpose on the provisions of the Charter of Fundamental Rights and on Union case law, as well as on the provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights. National judicatures may seek the assistance of the Court, by making references for a preliminary ruling.

2. Union judicature (intensity of judicial review)

In the *Kadi* I ruling of 2008[170] concerning the legality of Community acts listed by the UN Sanction Committee the Court has emphatically emphasised that:

169 Case C-354/04 P *Gestoras Pro Amnistía et al. v Council* EU:C:2006:667, [2007] ECR I-1579, Opinion of AG Mengozzi, para 139.

170 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351.

> obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[171]

The Court held that:

> the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[172]

advancing its own values (fundamental rights protection) and reversing the General Court's ruling; that is, the restrictive notion of the standard of review adopted by the General Court – a strength of the judgment.[173]

As indicated by Eeckhout and Poli/Tzanou, the Court is supported for reversing the General Court's ruling (application of *jus cogens*), thus allaying fears of revitalisation of a 'Solange I rebellion' of Member States' constitutional courts that could have led to a lack of uniformity in protection of fundamental rights within the EU legal order.[174]

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171 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351, para 285.

172 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351, para 326.

173 The General Court confined judicial review to *jus cogens* (review on the basis of *jus cogens* norms), an international – in contrast to a European – standard. See Case T-315/01 *Kadi v Council and Commission* EU:T:2005:332, [2005] ECR II-3649.

174 Piet Eeckhout, 'Community terrorism listings, fundamental rights and the UN Security council resolutions. In search of the right fit' (2007) 3 EuConst 183, 202 and Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 YEL 533, 543.

Aftermath of *Kadi* I and *Kadi* II-developments: *Kadi* II,[175] concerned the re-listing after the judgment in *Kadi* I of 2008. As the General Court itself puts it:

> doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties, and more particularly Article 177(3) EC, Articles 297 EC and 307 EC, Article 11(1) EU and Article 19(2) EU (see, also Article 3(5) TEU and Article 21(1) and (2) TEU, as well as declaration No 13 of the Conference of Representatives of the Governments of the Member States concerning the common foreign and security policy annexed to the Treaty of Lisbon, which stresses that 'the [EU] and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security council and of its members for the maintenance of international peace and security'. [176]
>
> (...)
>
> The General Court acknowledges that those criticisms are not entirely without foundation.[177]

The General Court applied the *Kadi* I approach of 2008 of the Court of Justice of the European Union in full, including full review. The position of the General Court is dispelled by paragraph 125:

> the Court of Justice also stated, in *Kadi*, that the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations must be undertaken in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations (paragraph 298), that it is not a consequence of the principles governing the international legal order

175 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:518.

176 Case T-85/09 *Kadi v Commission* EU:T:2010:418, [2010] ECR II-5177, para 115.

177 Case T-85/09 *Kadi v Commission* EU:T:2010:418, [2010] ECR II-5177, para 121.

> under the United Nations that any judicial review of the internal lawfulness of a Community measure such as the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to such a resolution (paragraph 299), that such immunity from jurisdiction for such a measure cannot find a basis in the EC Treaty (paragraph 300), that the review, by the Court of Justice, of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an 'international agreement' (paragraph 316), and that accordingly 'the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which … are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations' (paragraph 326).

As Cuyvers has said, a sort of "Bosphorus" approach (developed to determine the European Court of Human Rights' relation to the EU) – creating falsifiable presumptions that the Union provides a sufficient degree of fundamental rights protection.[178]

In paragraph 151 the General Court considered that:

> once there is acceptance of the premiss, laid down by the judgment of the Court of Justice in *Kadi,* that freezing measures such as those at issue in this instance enjoy no immunity from jurisdiction merely because they are intended to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.

[178] See Armin Cuyvers, 'The *Kadi II* judgment of the General Court: the ECJ's predicament and the consequences for Member States' (2011) 7 EuConst 481, 491.

The position of Advocate General Bot is dispelled by paragraphs 67, 85 and 86:[179]

> there are several reasons against a judicial review as thorough as that undertaken by the General Court in the judgment under appeal, with reference to its judgment in *OMPI*. (…) the preventative nature of the measures in question, the international context of the contested act, the need to balance the requirements of combating terrorism and the requirements of protection of fundamental rights, the political nature of the assessments made by the Sanctions Committee in deciding to list a person or an entity, and the improvements in the procedure before that body in recent years and, in particular, since the judgment of the Court of Justice in *Kadi*.[180]

Context-sensitive forms of judicial reviews reflect:

> confidence and collaboration between the participating international, regional and national institutions, rather than mistrust. The mutual confidence which must exist between the European Union and the United Nations is justified by the fact that the values concerning respect for fundamental rights are shared by those two organisations.[181]

Advocate General Bot further argued that:

> the EU courts should not adopt a standard of review which would require the EU institutions to examine systematically and intensively the merits of the decisions taken by the Sanctions Committee, on the basis of evidence or information available to that body, before giving effect to them. The improvements to the listing and delisting procedure should strengthen the confidence that the EU institutions and judicature have in the decisions

[179] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:176, Opinion of AG Bot.

[180] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:176, Opinion of AG Bot, para 67.

[181] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:176, Opinion of AG Bot, para 85.

> taken by the Sanctions Committee.[182]

As Advocate General Bot has said, limited reviews (context-sensitive) reflect confidence/ collaboration between the participating international, regional/ national institutions. The Court of Justice of the European Union's position is dispelled by paragraphs 119 and 120. Review entails:

> a verification of the allegations factored in the summary of reasons underpinning that decision (…), with the consequence that judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons (…) deemed sufficient in itself to support that decision, is substantiated.
>
> (…)
>
> it is for the Courts of the European Union (…) to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such examination.[183]

The Court of Justice of the European Union confirmed that the standard required by the EU legal order requires more than limited – procedural – review.[184] That is, review must concern whether those reasons, or, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

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182 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:176, Opinion of AG Bot, para 86.

183 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:518.

184 See especially Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:518, para 120. See in this regard also Niamh Nic Shuibhne, 'Being bound (Editorial Comment)' (2013) 38 EuConst 435-436.

E. Conclusion

This chapter gave an overview of the jurisdiction of the Court on EC (by now EU) agreements and CFSP and PJC (by now FSJ) agreements.

Section 1 discussed the jurisdiction of the Court on EC (by now EU) agreements before the Lisbon Treaty reforms. The relevant case law of the Court was examined in the present contribution. The following conclusions are in order: In terms of routes to *ex ante* challenges, Opinions of the Court of Justice pursuant to Article 218 (11) TFEU (ex-Article 300 (6) TEC) are relevant. Under this provision the European Parliament, the Council, the Commission or a Member State are entitled to challenge the constitutionality of a draft agreement. The actors in this provision (the Member States, the European Parliament, the Council and the Commission) are privileged applicants. Private parties, so called non-privileged applicants, cannot seek judicial review. *Opinion 1/75 (Local Cost Standard)*[185] was the first such opinion. The Court has delivered fourteen Opinions on international agreements before the entry into force of the Lisbon Treaty. In terms of routes to *ex post* challenges, the main provisions of the Court's jurisdiction can be summarised as follows: first, judgments of the Court delivered in the course of Article 258 TFEU (ex-Article 226 TEC), second, Article 263 TFEU (ex-Article 230 TEC) and third, Article 267 TFEU (ex-Article 234 TEC). Article 5 TEU (ex-Articles 5 (1), (2) and (3) TEC) defines limits to Article 19 TEU (ex-Article 220 TEC). Under Article 258 TFEU (ex-Article 226 TEC) in cases where the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, the Commission may, after having delivered a reasoned opinion, bring proceedings before the Court. For instance, as the *Commission v Germany*[186] case on the International Dairy Arrangement has shown. Under Article 263 TFEU (ex-Article 230 TEC) the Court can review EC acts, demonstrated, for

185 *Opinion* 1/75 *(Local Cost Standard)* EU:C:1975:145, [1975] ECR 1355.

186 Case C-61/94 *Commission v Germany* EU:C:1996:313, [1996] ECR I-3989.

instance in the *Germany v Council*[187] case.

Under Article 267 TFEU (ex-Article 234 TEC) the Court has jurisdiction to give preliminary rulings, in this respect *International Fruit Company,*[188] *Haegeman*,[189] *Demirel*,[190] *Racke*,[191] *Hermès*[192] and the *Dior*[193] case are examples.

Section 2 discussed the jurisdiction of the Court on CFSP and PJC (by now FSJ) agreements. In terms of a legal point, it must be emphasised that whether decisions to conclude CFSP agreements can be challenged as if they were a normal internal act under Article 263 TFEU is open to question. To make this argument one would have to explore the scope of Article 263 TFEU and see whether there are any jurisdictional limitations in Title V of the TFEU. In the writer's view, it is not yet certain that this is the case. Article 40 TEU, as one of the heads of jurisdiction that the Court had and now has (on a reformed basis), could be relevant for giving it *ex post* jurisdiction on an international agreement, at least as far as the competence question is concerned.

Section 3 discussed the standard of review in general, and *Yusuf/ Kadi*[194] in particular.

187 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973.

188 Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219.

189 Case 181/73 *Haegeman v Belgian State* EU:C:1974:41, [1974] ECR 449.

190 Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, [1987] ECR 3719.

191 Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, [1998] ECR I-3655.

192 Case C-53/96 *Hermès International v FHT Marketing Choice BV* EU:C:1998:292, [1998] ECR I-3603.

193 Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* EU:C:2000:688, [2000] ECR I-11307.

194 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* EU:C:2013:518.

GENERAL CONCLUSION

This dissertation aimed to provide an analysis of the institutional and legal effects of international agreements.

The oldest agreements are those of the European Community. The procedure for negotiating and concluding Community agreements was set out in Article 300 TEC. International agreements concluded by the European Community were binding on the EC institutions and on Member States, pursuant to Article 300 (7) TEC. The Council and Parliament approved the conclusion of such agreements, according to Article 300 (3) TEC. The Court had accepted on a broad basis direct effect of provisions of free trade associations, accession associations, development associations and the EEA. In 1972 it denied direct effect of the GATT.[1] In 1999 it also denied direct effect of the WTO agreements.[2]

The first chapter highlighted the structural differences between WTO law and other agreements. The demarcation between relevant and irrelevant parameters for the recognition of direct effect was thematised. It was argued that the similarity of terms (that is, provisions of the agreement/ provisions of the Treaty), the imbalance between obligations assumed (that is, a certain asymmetry of obligations/ non-reciprocity), the position to dominate the framing of an agreement (that is, the ability to preserve and pursue interests) and the degree of integration (that is, the question of whether there is any 'special link' with the European Union), and (jointly) applied safeguard clauses, are criteria which do not affect the direct enforceability. It was also stressed that unilaterally applied safeguard clauses indicate that the contracting parties did not intend direct enforceability; that is, obligations assumed are not sufficiently unconditional.

1 The Court had consistently refused to recognise the direct effect of GATT rules. See Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* EU:C:1972:115, [1972] ECR 1219, para 27; Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I- 4973, para 110.

2 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395, para 48.

Subsequently, it was shown that, due to the contractual nature of obligations of international agreements, the *efficient breach* and *pacta sunt servanda* methodology provided a possible conceptual framework for the denial or recognition of direct effect of international agreements.

The *Incurse* in this chapter turned to the technical aspects of the question of indirect effects. The ruling in *Fediol*[3] and *Nakajima*[4] addressed the issue of indirect effects of GATT rules. In *Portugal v Council,*[5] the Court confirmed its holdings in the *Fediol* and *Nakajima* cases under GATT and extended them to WTO.

The second chapter discussed the general issues and practice of EU international agreements (CFSP and PJC (by now FSJ) agreements). This chapter first dealt with the international legal personality of the European Union prior to the Lisbon Treaty. It has been argued in legal scholarship that the European Union was not a subject of international law; that is, powers rested with the Member States and the Council acted on behalf of the Member States which were the contracting parties. Others, however, contended that the European Union possessed an implicit legal personality; that is, the Council acted on behalf of the European Union and not on behalf of the Member States.

Prior to the Lisbon Treaty the actual practice only (the European Union did already conclude international agreements) allowed to argue that the European Union possessed an implicit legal personality. Article 47 TEU made the legal personality of the European Union explicit and designated the Union as a contracting party; as such the debate on the question whether ex-Article 24 TEU conferred implicitly legal personality to the European Union became irrelevant.

This chapter subsequently dealt with the practice on EU agreements and respectively with direct effects and indirect effects and addressed a vertical dimension (*vis-à-vis* national

3 Case 70/87 *Fediol v Commission* EU:C:1989:254, [1989] ECR 1781.

4 Case C-69/89 *Nakajima All Precision Co. Ltd v Council* EU:C:1991:186, [1991] ECR I-2069.

5 Case C-149/96 *Portugal v Council* EU:C:1999:574, [1999] ECR I-8395.

legislation). The purpose was to give an overview of arguments against and in favour of direct effects before and after the Lisbon Treaty reforms.

First of all, CFSP and individual enforcement was addressed. The ability of a norm to be self-executing or justiciable is, even after the de-pillarisation following the TL, severely limited under the CFSP. The Court continues to lack jurisdiction under Article 267 TFEU with regard to CFSP measures. This resulted in a second argument against direct enforcement. The distinct nature of CFSP competences (Article 24 TEU), reflected in the continued exclusion of the Court in these matters, was an additional reason for being careful with the Union-wide application of Community concepts. A further argument against individual enforcement was that, although the area of the CFSP is an object of European co-operation within the framework of the Union, the Member States decided not to incorporate them into the supra-national jurisdiction system.

Secondly, FSJ and individual enforcement was addressed. The starting points for any discussion of judicial protection (which national courts must secure as regards areas of Freedom, Security and Justice) were national constitutional rights, and the process of "communitarisation". It was argued that a full extension of the "Community" method is superficial and difficult to draw.

It has been shown that CFSP and PJC (by now FSJ) agreements do not have direct effect; arguments in favour of individual enforcement are less thorough and less elaborated on. This was followed by an analysis of contractual exclusions of direct effect.

The third chapter discussed the jurisdiction of the Court on EU international agreements before and after the Lisbon Treaty reforms to conclude that the jurisdiction of the CJEU has expanded.

The first part of the chapter concentrated on the jurisdiction of the Court on EC (by now EU) agreements. With regard to *ex ante* challenges, Article 218 (11) TFEU provides for the right to obtain an opinion of the Court about the validity of an international agreement

(compatibility with the Treaties).[6] The Court identified the general purpose of the ex-ante procedure which is to forestall complications resulting from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the Union, and with regard to routes to *ex post* challenges the main provisions of the Court's jurisdiction are Article 258 TFEU, Article 263 TFEU and Article 267 TFEU.

Under Article 258 TFEU the Commission may, after having issued a reasoned opinion, bring proceedings before the Court where it considered that a Member State has failed to fulfil an obligation under the Treaties. The European Commission made use of that provision. For example, in *Commission v Germany*[7] on the International Dairy Arrangement, the Commission challenged the authorisation granted by German authorities for the importation under inward processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the International Dairy Arrangement.

Under Article 263 TFEU the Court has jurisdiction to review the legality of any act adopted by the institutions and which have legal effects. The provision governing direct review includes, as grounds of review, lack of competences, misuse of powers, breach of essential procedural requirements, or infringement of the Treaty or of any rule of law relating to its application. The different strands of case law were discussed. *France v Commission*[8] could be subsumed within the ground of lack of competences. *Parliament v Council*,[9] *Portugal v Council*,[10] *Parliament v Council*,[11] *Spain v Council*,[12]

6 E.g. The Commission made a request to the CJEU for an Opinion according to Article 218 (11) TFEU on the compatibility of the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms with the EU legal order (*Opinion 2/13 on EU Accession to the ECHR* EU:C:2014:2454).

7 Case C-61/94 *Commission v Germany* EU:C:1996:313, [1996] ECR I-3989.

8 Case C-327/91 *France v Commission* EU:C:1994:305, [1994] ECR I-3641.

9 Case C-360/93 *Parliament v Council* EU:C:1996:84, [1996] ECR I-1195.

10 Case C-268/94 *Portugal v Council* EU:C:1996:461, [1996] ECR I-6177.

11 Case C-189/97 *Parliament v Council* EU:C:1999:366, [1999] ECR I-4741.

12 Case C-36/98 *Spain v Council* EU:C:2001:64, [2001] ECR I-779.

Commission v Council,[13] *Commission v Council*,[14] the judgment on the Rotterdam Convention[15] and the PNR ruling[16] were cases on legal base issues. "Legal base cases" brought by Community institutions and Member States could be subsumed within the ground of infringement of essential procedural requirements. The most general ground of review is infringement of the Treaty or of any rule relating to its application. The Court has used this ground of review in *Germany v Council.*[17] That case exemplified that infringement of the Treaty or of any rule relating to its application can overlap with the other grounds of review.

Under Article 267 TFEU the national courts of the EU Member States may refer to the Court questions concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. International agreements formed the subject-matter of references for preliminary rulings. Two strands of the case law concerning the interpretative jurisdiction of the Court over provisions of international agreements concluded with (mixed agreements) and without the participation of the Member States (purely Community agreements) were discussed.

The second part of the chapter concentrated on the Court's jurisdiction on EU international agreements (CFSP and PJC (by now FSJ) agreements). Article 24 (1) TEU, reaffirmed in Article 275 TFEU, excluded the CJEU from issues concerning the CFSP. There are two situations where the CJEU might have jurisdiction.

Firstly, Article 218 (11) TFEU brought CFSP provisions within the scope of the Court's jurisdiction. It was argued that this provision is a potential inroad into the CFSP exemption (Article 275 TFEU).

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13 Case C-281/01 *Commission v Council* EU:C:2002:761, [2002] ECR I-12049.

14 Case C-211/01 *Commission v Council* EU:C:2003:452, [2003] ECR I-8913.

15 Case C-94/03 *Commission v Council* EU:C:2006:2, [2006] ECR I-1.

16 Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721.

17 Case C-280/93 *Germany v Council* EU:C:1994:367, [1994] ECR I-4973.

Secondly, it is questionable whether decisions to conclude CFSP agreements can be challenged as if they were a normal internal act under Article 263 TFEU. It could be argued that the scope of Article 263 TFEU has to be explored and find whether there are any jurisdictional limitations in Title V of the TFEU. There still remains uncertainty whether this will be the case.

Article 40 TEU is conceptualised to prevent mutual encroachment between CFSP and non-CFSP. The CJEU monitors compliance with Article 40 TEU, successor provision to Article 47 TEU, and that provision, as one of the heads of jurisdiction, is relevant for giving it *ex post* jurisdiction on an international agreement, at least as far as the competence question is concerned. An example would be an annulment procedure brought against the legal instrument concluding an international agreement alleging a violation of Article 40 TEU.

As pointed out above, there is evidence for wanted reinforced judicial review. Changed post- Lisbon constitutional environment has been shown and discussed, having interactions between CFSP and TFEU competences referred to in Articles 3-6 TFEU, and it remains to be seen how the CJEU will go on, especially with regard to the scope of application of Article 40 TEU. The effective protection of interests and rights of private parties would be better served by a more extensive judicial review of international agreements exercised by the CJEU.

APPENDICES EU AGREEMENTS (CFSP AND PJC (BY NOW FSJ) AGREEMENTS) PRE-TL

Appendix I: Status and activities of the European Union with host States

I-1. European Union Monitoring Mission (EUMM)
Agreement between the European Union and ...
… Georgia on the status of the European Union Monitoring Mission in Georgia [2008] OJ L310/31 (Treaty EU, Article 24).[1] … the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel [2006] OJ L273/9 (Treaty EU, Article 24). … the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel [2006] OJ L176/108 (Treaty EU, Article 24). … the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitorino Mission — AMM) and its personnel [2006] OJ L71/55 (Treaty EU, Article 24). … the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel [2005] OJ L288/60 (Treaty EU, Article 24). … the Republic of Albania on the activities of the European Union Monitoring Mission (EUMM) in the Republic of Albania [2003] OJ L93/50 (Treaty EU, Article 24). … the Former Yugoslav Republic of Macedonia on the activities of the European Union Monitoring Mission (EUMM) in the Former Yugoslav Republic of Macedonia [2001] OJ L241/2 (Treaty EU, Article 24). … the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia [2001] OJ L125/2

[1] Published in the Official Journal of the European Union. This list is not exhaustive. Article 17 (1) (h) of Council Decision 2004/338/EC of 22 March 2004 adopting the Council's Rules of Procedure 2004/338/EC [2004] OJ L106/22 reads as follows: '1. The following shall be published in the Official Journal of the European Union (…) (h) international agreements concluded in accordance with Article 24 of the Treaty on European Union, unless the Council decides otherwise on the grounds of Articles 4 and 9 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.'

(Treaty EU, Article 24).

I-2. European Union Police Mission (EUPM)
Agreement between the European Union and ...
… the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) [2005] OJ L256/58 (Treaty EU, Article 24). … the Former Yugoslav Republic of Macedonia on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima) [2004] OJ L16/66 (Treaty EU, Article 24). … Bosnia and Herzegovina (BiH) on the activities of the European Union Police Mission (EUPM) IN BiH [2002] OJ L293/2 (Treaty EU, Article 24).

I-3. European Union-led forces (EUF)
Agreement between the European Union and ...
… the Republic of Seychelles on the status of the European Union-led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta [2009] OJ L323/14 (Treaty EU, Article 24). ... the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta [2009] OJ L33/43 (Treaty EU, Article 24). … the Central African Republic on the status of the European Union-led forces in the Central African Republic [2008] OJ L136/46 (Treaty EU, Article 24). … the Republic of Chad on the status of the European Union-led forces in the Republic of Chad [2008] OJ L83/40 (Treaty EU, Article 24). … the Republic of Cameroon on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon [2008] OJ L57/31 (Treaty EU, Article 24). … the Gabonese Republic on the status of the European Union-led forces in the Gabonese Republic [2006] OJ L187/43 (Treaty EU, Article 24). … the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46 (Treaty EU, Article 24).

I-4. European Union Rule of Law Mission
Agreement between the European Union and ...

… Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42 (Treaty EU, Article 24).

I-5. European Union Special Representative and his/her support team
Agreement between the European Union and ...
… the Government of Georgia on the status in Georgia of the European Union Special Representative for the South Caucasus and his/her support team [2006] OJ L135/15 (Treaty EU, Article 24).

I-6. European Union Mission in Support of Security Sector Reform
Agreement between the European Union and ...
… the Republic of Guinea-Bissau on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau [2008] OJ L219/66 (Treaty EU, Article 24).

I-7. Joint naval operations, conducted by the European Union-led naval force (EUNAVFOR)
Agreement between the European Union and ...
… the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37 (Treaty EU, Article 24). … the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 (Treaty EU, Article 24).

Appendix II: Participation in European Union Missions

II-1. Participation in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN)
Agreement between the European Union and …
… New Zealand on the participation of New Zealand in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L274/18 (Treaty EU, Article 24).

… the Republic of Croatia on the participation of the Republic of Croatia in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L270/28 (Treaty EU, Article 24).

II-2. Participation in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima')
Agreement between the European Union and …
… the Republic of Turkey on the participation of the Republic of Turkey in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/90 (Treaty EU, Article 24). … the Kingdom of Norway on the participation of the Kingdom of Norway in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/86 (Treaty EU, Article 24). … Ukraine on the participation of Ukraine in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/82 (Treaty EU, Article 24). … the Swiss Confederation on the participation of the Swiss Confederation in the European Union police mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/78 (Treaty EU, Article 24).

II-3. Participation in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH)
Agreement between the European Union and …
… the Slovak Republic on the participation of the Slovak Republic in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/44 (Treaty EU, Article 24). … the Republic of Bulgaria on the participation of the Republic of Bulgaria in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/41 (Treaty EU, Article 24). … Ukraine on the participation of Ukraine in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/38 (Treaty EU, Article 24). … the Republic of Turkey on the participation of the Republic of Turkey in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/35 (Treaty EU, Article 24). … the Kingdom of Norway on the participation of the Kingdom of Norway in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/32 (Treaty EU, Article 24). … the Republic of Slovenia on the participation of the Republic of Slovenia in the

European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/29 (Treaty EU, Article 24).

… the Republic of Estonia on the participation of the Republic of Estonia in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/26 (Treaty EU, Article 24).

… Romania on the participation of Romania in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/23 (Treaty EU, Article 24).

… the Republic of Hungary on the participation of the Republic of Hungary in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/20 (Treaty EU, Article 24).

… the Republic of Latvia on the participation of the Republic of Latvia in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/17 (Treaty EU, Article 24).

… the Government of the Swiss Confederation, represented by the Federal Department of Foreign Affairs, on the participation of Switzerland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/14 (Treaty EU, Article 24).

… the Republic of Lithuania on the participation of the Republic of Lithuania in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/11 (Treaty EU, Article 24).

… the Czech Republic on the participation of the Czech Republic in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/8 (Treaty EU, Article 24).

… the Republic of Iceland on the participation of the Republic of Iceland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/5 (Treaty EU, Article 24).

… the Republic of Cyprus on the participation of the Republic of Cyprus in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/2 (Treaty EU, Article 24).

… the Russian Federation on the participation of the Russian Federation in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L197/38 (Treaty EU, Article 24).

… the Republic of Poland on the participation of the Republic of Poland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L64/38 (Treaty EU, Article 24).

II-4. Participation of the Republic of Cyprus in the European Union Forces (EUF) in the Democratic Republic of Congo

Agreement between the European Union and …

… the Republic of Cyprus on the participation of the Republic of Cyprus in the European Union Forces (EUF) in the Democratic Republic of Congo [2003] OJ L253/23

(Treaty EU, Article 24).

II-5. Participation in the European Union-led forces (EUF) in the former Yugoslav Republic of Macedonia
Agreement between the European Union and …
… Romania on the participation of Romania in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia [2004] OJ L120/62 (Treaty EU, Article 24). … the Slovak Republic on the participation of the armed forces of the Slovak Republic in the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia [2004] OJ L12/54 (Treaty EU, Article 24). … the Government of Latvia on the participation of the Republic of Latvia in the European Union-led forces (EUF) in the former Yugoslav Republic of Macedonia [2003] OJ L313/79 (Treaty EU, Article 24). … the Republic of Poland on the participation of Polish armed forces in the European Union force (EUF) in the former Yugoslav Republic of Macedonia [2003] OJ L285/44 (Treaty EU, Article 24). … the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L234/23 (Treaty EU, Article 24). … the Republic of Lithuania on the participation of the Republic of Lithuania in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia [2003] OJ L234/19 (Treaty EU, Article 24). … the Czech Republic on the participation of the Czech Republic in the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia [2003] OJ L229/39 (Treaty EU, Article 24). … the Republic of Estonia on the participation of the Republic of Estonia in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia [2003] OJ L216/61 (Treaty EU, Article 24).

II-6. Participation in the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM)
Agreement between the European Union and …
… the Philippines on the participation of the Philippines in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/76 (Treaty EU, Article 24). … Thailand on the participation of Thailand in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/70 (Treaty EU,

Article 24).
… Malaysia on the participation of Malaysia in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/64 (Treaty EU, Article 24).
… Singapore on the participation of Singapore in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/58 (Treaty EU, Article 24).
… Brunei on the participation of Brunei in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/52 (Treaty EU, Article 24).
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2005] OJ L349/31 (Treaty EU, Article 24).

II-7. Participation in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA)

Agreement between the European Union and …

… the former Yugoslav Republic of Macedonia on the participation of the former Yugoslav Republic of Macedonia in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2006] OJ L188/10 (Treaty EU, Article 24).
… the Republic of Chile on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L202/40 (Treaty EU, Article 24).
… the Argentine Republic on the participation of the Argentine Republic in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L156/22 (Treaty EU, Article 24).
… New Zealand on the participation of New Zealand in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L127/28 (Treaty EU, Article 24).
… the Republic of Albania on the participation of the Republic of Albania in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L65/35 (Treaty EU, Article 24).
… the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L34/47 (Treaty EU, Article 24).
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L20/42 (Treaty EU, Article 24).

II-8. Participation in the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC)
Agreement between the European Union and …
… the Government of the Swiss Confederation on the participation of the Swiss Confederation in the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (Operation EUFOR RD Congo) [2006] OJ L276/111 (Treaty EU, Article 24).

II-9. Participation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA)
Agreement between the European Union and ...
… the Russian Federation on the participation of the Russian Federation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA) [2008] OJ L307/16 (Treaty EU, Article 24). … the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] OJ L268/33 (Treaty EU, Article 24). … the Republic of Albania on the participation of the Republic of Albania in the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] OJ L217/19 (Treaty EU, Article 24).

II-10. Participation in the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO)
Agreement between the European Union and …
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L317/20 (Treaty EU, Article 24). … the United States of America on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L282/33 (Treaty EU, Article 24). … the Swiss Confederation on the participation of the Swiss Confederation in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L217/24 (Treaty EU, Article 24).

II-11. Framework for the participation in the European Union crisis management operations
Agreement between the European Union and …
… the Republic of Turkey establishing a framework for the participation of the Republic of Turkey in the European Union crisis management operations [2006] OJ L189/17 (Treaty EU, Article 24). … Canada establishing a framework for the participation of Canada in the European Union crisis management operations [2005] OJ L315/21 (Treaty EU, Article 24). … Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations [2005] OJ L182/29 (Treaty EU, Article 24). … Romania establishing a framework for the participation of Romania in the European Union crisis-management operations [2005] OJ L67/14 (Treaty EU, Article 24). … the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway in the European Union crisis-management operations [2005] OJ L67/8 (Treaty EU, Article 24). … the Republic of Iceland establishing a framework for the participation of the Republic of Iceland in the European Union crisis-management [2005] OJ L67/2 (Treaty EU, Article 24). … the Republic of Bulgaria establishing a framework for the participation of the Republic of Bulgaria in the EU crisis management operations [2005] OJ L46/50 (Treaty EU, Article 24).

II-12. Participation in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast
Agreement between the European Union and ...
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) [2009] OJ L202/84 (Treaty EU, Article 24).

Appendix III: Exchange of classified information

III-1. Exchange of classified information between the European Union and third States
Agreement between the European Union and ...
… the Government of the Russian Federation on the protection of classified information

[2010] OJ L155/57 (Treaty EU, Articles 24, 38). … Australia on the security of classified information [2010] OJ L26/31 (Treaty EU, Article 24). … Israel on security procedures for exchanging classified information [2009] OJ L192/64 (Treaty EU, Article 24). … the Swiss Confederation on the security procedures for the exchange of classified information [2008] OJ L181/58 (Treaty EU, Articles 24, 38). … the government of the United States of America on the security of classified information [2007] OJ L115/30 (Treaty EU, Articles 24, 38). … the Republic of Iceland on security procedures for the exchange of classified information [2006] OJ L184/35 (Treaty EU, Articles 24, 38). … the Republic of Croatia on security procedures for the exchange of classified information [2006] OJ L116/74 (Treaty EU, Articles 24, 38). … Ukraine on the security procedures for the exchange of classified information [2005] OJ L172/84 (Treaty EU, Articles 24, 38). … the Republic of Bulgaria on the security procedure for the exchange of classified information [2005] OJ L118/53 (Treaty EU, Articles 24, 38). … Romania on security procedures for the exchange of classified information [2005] OJ L118/48 (Treaty EU, Articles 24, 38). … the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information [2005] OJ L94/39 (Treaty EU, Articles 24, 38). … the Kingdom of Norway on security procedures for the exchange of classified information [2004] OJ L362/29 (Treaty EU, Articles 24, 38). … Bosnia and Herzegovina on security procedures for the exchange of classified information [2004] OJ L324/16 (Treaty EU, Article 24).

III-2. Exchange of classified information between the European Union and international institutions
Agreement between the European Union and ...
… the European Space Agency on the security and exchange of classified information [2008] OJ L219/59 (Treaty EU, Article 24). … the International Criminal Court on cooperation and assistance [2006] OJ L115/50 (Treaty EU, Article 24). … the North Atlantic Treaty Organisation on the Security of Information [2003] OJ L80/36 (Treaty EU, Article 24).

Appendix IV: Terrorist Finance Tracking Program (TFTP)

Agreement between the European Union and ...
… the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11 (Treaty EU, Articles 24, 38).[2]

Appendix V: Enhanced cooperation in the field of extradition and mutual legal assistance

V-1. The Norway-Iceland participation
Agreement between the European Union and ...
… the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L26/3 (Treaty EU, Articles 24, 38).

V-2. Mutual legal assistance
Agreement between the European Union and ...
… Japan on mutual legal assistance in criminal matters [2010] OJ L39/20 (Treaty EU, Articles 24, 38). … the United States of America on mutual legal assistance [2003] OJ L181/34 (Treaty EU, Articles 24, 38).

V-3. Extradition and surrender procedures
Agreement between the European Union and ...
… the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/2 (Treaty EU, Articles 24, 38). … the United States of America on extradition [2003] OJ L181/27 (Treaty EU, Articles 24, 38).

[2] 'As soon as the Treaty of Lisbon enters into force, the Parties shall endeavour to conclude a long-term agreement to succeed this Agreement', according to Article 15 (4).

Appendix VI: Processing /and transfer of PNR data

Agreement between the European Union and ...
… Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service [2008] OJ L213/49 (Treaty EU, Articles 24, 38). … the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (PNR II Agreement) [2007] OJ L204/18 (Treaty EU, Articles 24, 38); replaces the interim agreement. … the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security [Interim]Agreement [2006] OJ L298/29 (Treaty EU, Articles 24, 38).[3]

Appendix VII: Schengen Association

Agreement between the European Union and ...
… the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L53/52 (Treaty EU, Articles 24, 38). … the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis [1999] OJ L176/36 (Treaty EU, Articles 24, 38).[4]

[3] Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] (PNR I Agreement) OJ L183/84 (Treaty EC, Articles 95, 300) – annulled (Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission (PNR)* EU:C:2006:346, [2006] ECR I-4721).

[4] Information relating to the entry into force of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway on the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Republic of Iceland and the Kingdom of Norway, on the other, in areas of the Schengen acquis which apply to these States, signed at Brussels on 30 June 1999 [2000] OJ L149/36.

DESCRIPTIVE REPOSITORY

A. Descriptive repository of provisions in EU agreements (CFSP and PJC (by now FSJ) agreements) with persons-related provisions

EU agreements (CFSP and PJC (by now FSJ) agreements) incorporate fundamental rights guarantees. For example, the EU-Kenya Exchange of Letters on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, the EU-US Agreement on mutual legal assistance, the EU-Japan Agreement on mutual legal assistance, the EU-US Extradition Agreement, the Iceland/Norway and the Switzerland Association Agreement and the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program.

1. Status and activities of the EU with host States and persons-related provisions

According to Treves, detailed provisions for the protection of the human rights of pirates, and armed robbers, captured by EUNAVOR and transferred to Kenya, are set out in Articles 3 and 4 of the Exchange of Letters. The Exchange of Letters does not mention shipriders – though not ruling out their involvement.[1]

[1] [2009] OJ L79/49. See Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 E.J.I.L. 399, 412.

Articles 3 and 4 of the Exchange of Letters read as follows:

3. Treatment, prosecution and trial of transferred persons

(a) Any transferred person will be treated humanely and will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance.

(b) Any transferred person will be brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.

(c) Any transferred person will be entitled to trial within a reasonable time or to release.

(d) In the determination of any criminal charge against him, any transferred person will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

(e) Any transferred person charged with a criminal offence will be presumed innocent until proved guilty according to law.

(f) In the determination of any criminal charge against him, every transferred person will be entitled to the following minimum guarantees, in full equality:

(1) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(2) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice;

(3) to be tried without undue delay;

(4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(7) not to be compelled to testify against himself or to confess guilt.

(g) Any transferred person convicted of a crime will be permitted to have the right to his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.

(h) Kenya will not transfer any transferred person to any other State for the purposes of investigation or prosecution without prior written consent from EUNAVFOR.

4. Death penalty

No transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment.

Article 5 (e) of the Exchange of Letters requires that Kenya notifies EUNAVFOR of the transferred person's place of detention, deterioration of his physical condition and of allegations of alleged improper treatment. Representatives of the EU/EUNAVFOR have access to persons transferred under the Exchange of Letters while in custody and are entitled to question them. Article 5 (f) of the Exchange of Letters requires that national/international humanitarian agencies will, at their request, be allowed to visit persons transferred under the Exchange of Letters.

Article 5 (e)-(f) of the Exchange of Letters read as follows:

> (e) In addition, Kenya will notify EUNAVFOR of the place of detention of any person transferred under this Exchange of Letters, any deterioration of his physical condition and of any allegations of alleged improper treatment. Representatives of the EU and EUNAVFOR will have access to any persons transferred under this Exchange of Letters as long as such persons are in custody and will be entitled to question them.
>
> (f) National and international humanitarian agencies will, at their request, be allowed to visit persons transferred under this Exchange of Letters.

Article 9 of the Exchange of Letters provides for implementing arrangements to be concluded:

> (b) Implementing arrangements may cover, inter alia:
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> (1) the identification of competent law enforcement authorities of Kenya to whom EUNAVFOR may transfer persons;
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> (2) the detention facilities where transferred persons will be held;
>
> (3) the handling of documents, including those related to the gathering of evidence, which will be handed over to the competent law enforcement authorities of Kenya upon transfer of a person;
>
> (4) points of contact for notifications;
>
> (5) forms to be used for transfers;
>
> (6) provision of technical support, expertise, training and other assistance upon request of Kenya in order to achieve the objectives of this Exchange of Letters.

According to Guilfoyle, the Exchange of Letters incorporates guarantees drawn from the International Covenant on Civil and Political Rights (ICCPR), also found in ECHR; that is, rights protection to transferees.[2]

Article 3 (b)-(g) of the Exchange of Letters read as follows:

> (b) Any transferred person will be brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.[3]
>
> (c) Any transferred person will be entitled to trial within a reasonable time or to release.[4]
>
> (d) In the determination of any criminal charge against him, any transferred person will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[5]
>
> (e) Any transferred person charged with a criminal offence will be presumed innocent until proved guilty according to law.[6]
>
> (f) In the determination of any criminal charge against him, every transferred person will be entitled to the following minimum guarantees,

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2 Douglas Guilfoyle, 'Counter-piracy law enforcement and human rights' (2010) 59 ICLQ 141, 165.

3 ICCPR, which all Member States have ratified, Article 9 (4); and ECHR, Article 5 (3) which reads as follows: 'Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

4 ICCPR, Article 9 (3); and ECHR, Article 5 (3).

5 ICCPR, Article 14 (1), second sentence; and ECHR, Article 6 (1) first sentence which reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

6 ICCPR, Article 14 (2); and ECHR, Article 6 (2) which reads as follows: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

in full equality:[7]

(1) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(2) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice;

(3) to be tried without undue delay;

(4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(7) not to be compelled to testify against himself or to confess guilt.

(g) Any transferred person convicted of a crime will be permitted to have the right to his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.[8]

7 ICCPR, Article 14 (3) (a)-(g); and ECHR, Article 6 (3) (a)-(e) which read as follows: 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

8 ICCPR, Article 14 (5).

2. Enhanced cooperation in the field of extradition and mutual legal assistance and persons-related provisions

a) EU-US Agreement on mutual legal assistance and persons-related provisions

Article 3 of the EU-US Agreement on mutual legal assistance[9] addresses the scope of application of the Agreement in relation to bilateral mutual legal assistance treaties with Member States and in the absence thereof. It stipulates in recital 3 (3a) that the Union, pursuant to the TEU, shall ensure the application of the provisions of the Agreement in the absence of a bilateral mutual legal assistance treaty in force between a Member State and the United States.

The EU-US Agreement on mutual legal assistance contains provisions related to the refusal of assistance. Article 4 of the EU-US Agreement on mutual legal assistance concerns the exchange of bank information. It applies to provide for the identification of financial accounts and transactions in addition to any authority already provided under bilateral treaty provisions, as displayed in Article 3 (1a).

In case of offences or designated serious offences punishable under the laws of both the requested and requesting States and offences involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State – and at least two years in the requested State – the requested State may, pursuant to Article 15, limit its obligation to provide assistance, as displayed in Article 4 (4a) (i), (ii) and (iii). In cases of limited assistance, pursuant to Article 4 (4a) (ii) or (iii), the requested State shall, at a minimum, enable identification of accounts associated with terrorist activities, and the laundering of proceeds generated from a comprehensive range of serious criminal activities, as displayed in Article 4 (4b). The communication of the information requested

[9] [2003] OJ L181/34.

may not be refused on grounds of bank secrecy, as displayed in Article 4 (5).

The Contracting Parties shall avoid the imposition of extraordinary burdens on requested States through application of Article 4, and shall take measures required to reduce pending and future burdens. Where extraordinary burdens on a requested State nonetheless result, consultations shall take place between the requested and requesting State, with a view to facilitating the application of this Article, as displayed in Article 4 (7).

Provisions related to the protection of personal data: The EU-US Agreement on mutual legal assistance contains provisions related to the protection of personal data; that is, the requested State may refuse assistance on data protection grounds.[10]

If the request cannot be executed without breaching confidentiality the requested state may refuse the communication of the information, as displayed in Article 10 of the EU-US Agreement on mutual legal assistance. Article 10 applies in the absence of bilateral treaty provisions pertaining to the circumstances under which a requesting State may seek confidentiality, as displayed in Article 3 (1g).

Article 9 of the EU-US Agreement on mutual legal assistance limits the use of personal and other data requested and imposes restrictions. Article 9 may be applied in place of or in the absence of bilateral treaty provisions governing limitations on use to protect personal and other data, as displayed in Article 3 (1f).

[10] Article 10 [Requesting State's request for confidentiality] of the EU-US Agreement on mutual legal assistance reads as follows: 'The requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting State. If the request cannot be executed without breaching the requested confidentiality, the central authority of the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed.'

The data requested may be used for the purpose of criminal investigations and proceedings, for preventing an immediate and serious threat to its public security, in non-criminal judicial or administrative proceedings directly related to investigations or proceedings, and for any other purpose, only with the prior consent of the requested State, as displayed in Article 9 (1a-e).

Article 9 of the EU-US Agreement on mutual legal assistance does not prejudice the ability of the requested State to impose additional conditions, where the request for assistance cannot be complied with in the absence of such conditions, as displayed in Article 9 (2a). A requested State may apply the use limitation provision of the applicable bilateral mutual legal assistance treaty in lieu of Article 9, where doing so will result in less restriction on the use of information and evidence than provided for in the EU-US Agreement on mutual legal assistance, as displayed in Article 9 (4).[11]

The Explanatory Note on the EU-US Agreement on mutual legal assistance reflects understandings regarding the application of certain provisions of the Agreement, and points to the fact that a categorical, or systematic, application of data protection principles by the requested State to refuse cooperation shall be precluded. The Explanatory Note on Article 9 reads as follows:

> Article 9(2)(b) is meant to ensure that refusal of assistance on data protection grounds may be invoked only in exceptional cases. Such a situation could arise if, upon balancing the important interests involved in the particular case (on the one hand, public interests, including the sound administration of justice and, on the other hand, privacy interests), furnishing the specific data sought by the requesting State would raise difficulties so fundamental as to be considered by the requested State to

[11] The Agreement also obliges the contracting parties to try to resolve differences by consultation before they refuse mutual legal assistance, as displayed in Article 11 of the EU-US Agreement on mutual legal assistance. Article 11 [Consultations] reads as follows: 'The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.'

> fall within the essential interests grounds for refusal. A broad, categorical, or systematic application of data protection principles by the requested State to refuse cooperation is therefore precluded. Thus, the fact the requesting and requested States have different systems of protecting the privacy of data (such as that the requesting State does not have the equivalent of a specialised data protection authority) or have different means other than the process of deletion to protect the privacy or accuracy of the personal data received by law enforcement authorities), may as such not be imposed as additional conditions under Article 9(2a).

According to Georgopoulos, a closer look demonstrates that the rapprochement between the European level of protection and the EU-US Agreement on mutual legal assistance is partial. The Explanatory Note on the EU-US Agreement on mutual legal assistance makes clear that – despite the different conceptions existing in the EU/US legal systems on personal data protection, no refusal to cooperate can be justified by invoking general principles. The absence of a body in charge of the protection of data, or the erasure of personal information to protect confidentiality, in themselves are not sufficient grounds on which the requested state could refuse legal assistance. In consequence, the freedom left to Member States by the EU-US Agreement on mutual legal assistance is particularly circumscribed– as such – and this is important – provisions of the EU-US Agreement on mutual legal assistance introduce exceptions to what should be inviolable, constitutional principles.[12]

[12] Theodore Georgopoulos, 'What kind of treaty making power for the EU? Constitutional problems related to the conclusion of the EU-US agreements on extradition and mutual legal assistance' (2005) 30 ELRev. 190, 200.

b) EU-Japan Agreement on mutual legal assistance and persons-related provisions

Article 3 of the EU-Japan Agreement on mutual legal assistance[13] in criminal matters addresses the scope of assistance.[14] Article 10 of the EU-Japan Agreement on mutual legal assistance concerns the execution of requests. In case the execution of the request in the manner or procedure described in the request is contrary to the laws of the requested State or poses a practical problem for the requested State, consultations shall take place between the requested and requesting States in order to solve the practical problem, as displayed in Article 10 (2).

In case the execution of a request is deemed to interfere with an ongoing investigation, prosecution or other proceeding in the requested State, the requested State may postpone the execution or may make the execution subject to conditions deemed necessary after consultations with the requesting State, as displayed in Article 10 (2). If a request for assistance cannot be executed in whole or in part, the requested State shall inform the requesting State of the reasons therefore, as displayed in Article 10 (6).

The EU-Japan Agreement on mutual legal assistance contains provisions related to the refusal of assistance; that is, refusal of the communication of the information requested. Article 11 (1) (a-e), (2) of the EU-Japan Agreement on mutual legal assistance stipulates that assistance may be refused if a request concerns a political offence. Further, assistance may be refused if the requested State considers that the execution of a request prejudices

13 [2010] OJ L39/20.

14 Article 3 [Scope of assistance] of the EU-Japan Agreement on mutual legal assistance reads as follows: 'Assistance shall include the following: (a) taking testimony or statements; (b) enabling the hearing by videoconference; (c) obtaining items, including through the execution of search and seizure; (d) obtaining records, documents or reports of bank accounts; (e) examining persons, items or places; (f) locating or identifying persons, items or places; (g) providing items in the possession of the legislative, administrative or judicial authorities of the requested State as well as the local authorities thereof; (h) serving documents and informing a person of an invitation to appear in the requesting State; (i) temporary transfer of a person in custody for testimony or other evidentiary purposes; (j) assisting in proceedings related to freezing or seizure and confiscation of proceeds or instrumentalities; and (k) any other assistance permitted under the laws of the requested State and agreed upon between a Member State and Japan.'

the sovereignty, security, ordre public or other essential interests of the requested State (e.g. the execution of a request concerning an offence punishable by death under the laws of the requesting State or an offence punishable by life imprisonment under the laws of the requesting State, unless the requested State and the requesting State agree on the conditions under which the request can be executed).

It is stipulated that assistance may be refused if the request has been made with a view to prosecution or punishment for reason of race, religion, nationality, ethnic origin, political opinions or sex. Assistance may be refused if the person, who is the subject of the investigation, prosecution or other proceeding, for which the assistance is requested, has already been finally convicted or acquitted for the same facts; or if the conduct that is the subject of the investigation, prosecution or other proceeding, including judicial proceeding, in the requesting State does not constitute a criminal offence under the laws of the requested State /or a request does not conform to the requirements of the EU-Japan Agreement on mutual legal assistance.

Article 11 (2) stipulates that the requested State may refuse assistance which necessitates coercive measures. The communication of the information requested can not be refused on grounds of bank secrecy, as displayed in Article 11 (3) of the EU-Japan Agreement on mutual legal assistance.

Before refusing assistance – the requesting State has to consult with the requesting State when it is considered that assistance may be provided subject to certain conditions, as displayed in Article 11 (4). If assistance is refused, the requested State shall inform the requesting State of the reasons therefore, as displayed in Article 11 (5) of the EU-Japan Agreement on mutual legal assistance.

A provision, on use to protect personal data, is contained in Article 10 (4) of the EU-Japan

Agreement on mutual legal assistance, which stipulates that the requested state may refuse the communication of the information requested if a request cannot be executed without disclosure of confidential information. Article 10 (4) of the EU-Japan Agreement on mutual legal assistance reads as follows:

> The requested State shall make its best efforts to keep confidential the fact that a request has been made, the contents of the request, the outcome of the execution of the request and other relevant information concerning the execution of the request if such confidentiality is requested by the requesting State. If a request cannot be executed without disclosure of such information, the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed.

The requesting State shall not use personal data, provided or otherwise obtained under the EU-Japan Agreement on mutual legal assistance, other than described in the request without prior consent of the requested State. The requested State may request that personal data, provided or otherwise obtained under the Agreement, be kept confidential, as displayed in Article 13 (1), (2).[15]

[15] Article 13 (1) and (2) [Limitations on use of testimony, statements, items or information] of the EU-Japan Agreement on mutual legal assistance read as follows: '1. The requesting State shall not use testimony, statements, items or any information, including personal data, provided or otherwise obtained under this Agreement other than in the investigation, prosecution or other proceeding, including judicial proceeding, described in the request without prior consent of the requested State. In giving such prior consent, the requested State may impose such conditions as it deems appropriate. 2. The requested State may request that testimony, statements, items or any information, including personal data, provided or otherwise obtained under this Agreement be kept confidential or be used only subject to other conditions it may specify. If the requesting State agrees to such confidentiality or accepts such conditions, it shall comply with them.' The Agreement also obliges the contracting parties to try to resolve differences by consultation before they refuse mutual legal assistance, as displayed in Article 28 of the EU-Japan Agreement on mutual legal assistance. Article 28 [Consultations] reads as follows: '1. The Central Authorities of the Member States and Japan shall, if necessary, hold consultations for the purpose of resolving any difficulties with regard to the execution of a request, and facilitating speedy and effective assistance under this Agreement, and may decide on such measures as may be necessary for this purpose. 2. The Contracting Parties shall, as appropriate, hold consultations on any matter that may arise in the interpretation or application of this Agreement.'

c) EU-US Extradition Agreement and persons-related provisions

Article 3 of the EU-US Extradition Agreement[16] addresses the scope of application of the Agreement in relation to bilateral extradition treaties with Member States. If a requested Member State receives simultaneous extradition requests from the US, and a request for surrender pursuant to the European arrest warrant, the competent authority of the requested Member State shall determine to which State, if any, it will surrender the accused person, as displayed in Article 10 (2). Article 17 (2) of the EU-US Extradition Agreement stipulates that in case where the constitutional principles of the requested State may impede the fulfilment of its obligation to extradite, and resolution of the matter is not provided for in the Agreement or the applicable bilateral treaty, consultations shall be held between the requesting and requested States.

General references – The Preamble to the EU-US Extradition Agreement refers to contracting parties having 'due regard for rights of individuals (…) mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law, (…)'.[17]

The EU-US Extradition Agreement contains provisions related to the refusal of assistance. Article 13 of the EU-US Extradition Agreement, a substantive provision, guarantees,[18] in

16 [2003] OJ L181/27.

17 See the Preamble to the EU-US Extradition Agreement [2003] OJ L181/27.

18 Article 13 [Capital punishment] of the EU-US Extradition Agreement reads as follows: 'Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punish- able by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.'

light of Article 3 of the European Convention on Human Rights,[19] that capital punishment will not be carried out. The latter provision foresees that cooperation shall be refused if the requesting State cannot offer guarantees that capital punishment shall not be imposed. Article 13 may be applied in place of or in the absence of bilateral treaty provisions governing capital punishment, as displayed in Article 3 (1) (j). If a requested State cannot protect the information in the manner sought by the requesting State, the requested state may refuse the communication of the information requested, as displayed in Article 14 of the EU-US Extradition Agreement. Article 14 applies, pursuant to Article 3 (1) (k), in the absence of bilateral treaty provisions governing the treatment of sensitive information in a request.

Contracting parties are obliged to try to resolve differences by consultation before they refuse an extradition request, as displayed in Article 15 of the EU-US Extradition Agreement.[20]

Article 17 (2) of the EU-US Extradition Agreement stipulates that where the constitutional principles or final judicial decisions (to be read as covering decisions by the CJEU) binding upon the requested State pose an impediment to fulfilment of the request, and resolution of the matter is not provided for in the Agreement, or the applicable bilateral treaty, consultations will take place.

The EU-US Extradition Agreement does not contain specific references to the standards set by the Charter of Fundamental Rights and by the ECHR – or to specific data

[19] See *Soering v United Kingdom* (App no 14038/88) (1989) 11 EHRR 439, para 91: '(...) the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'

[20] Article 15 [Consultations] of the EU-US Extradition Agreement reads as follows: 'The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.'

protection instruments – such as the 1981 Council of Europe Data Protection Convention or Data Protection Directives.[21]

3. Schengen Association: The Iceland/Norway and the Switzerland Association Agreement and persons-related provisions

Annex A of the Iceland/Norway and Switzerland Association Agreements excludes a certain number of provisions of the Schengen acquis from application; these exceptions include provisions on responsibility for processing applications for asylum, firearms/ ammunition, transport and movement of goods.[22]

Rights for any person are set out in Articles 110, 111 (1) and 114 (2) of the Convention implementing the Schengen Agreement (CISA).

Article 110 CISA stipulates that any person may have factually inaccurate data – relating to them – corrected, or unlawfully stored data deleted. Article 111 (1) CISA stipulates that any person in the territory of each Member State may:

> bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in

[21] See generally, Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757-779 and Valsamis Mitsilegas, 'The new EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 E.F.A.Rev. 515, 531-2 and 534.

[22] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/13 supplemented by the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19.

connection with an alert involving them.[23]

According to Colvin, this means that the exercise of the individual rights is governed by the different national laws of each Member State (variable geometry).[24]

Article 114 (2) CISA reads as follows:

> Any person shall have the right to ask the supervisory authorities to check data entered in the Schengen Information System which concern them and the use made of such data. That right shall be governed by the national law of the Contracting Party to which the request is made. If the data have been entered by another Contracting Party, the check shall be carried out in close coordination with that Contracting Party's supervisory authority.

That is, any person shall have the right to ask the supervisory authorities to check the processing/use of data entered in the SIS – which concern them.

4. EU-US TFTP Agreement and persons-related provisions

The Preamble to the EU-US TFTP Agreement[25] refers to the guarantee of effective exercise of rights; that is, any person, irrespective of nationality, can lodge a complaint before an independent data protection authority, other similar authority, independent and impartial court /or tribunal, to seek effective remedies.

Article 5 (2) (a-m) of the EU-US TFTP Agreement contain safeguards applicable to the

[23] Case C-150/05 *Van Straaten* EU:C:2006:614, [2006] ECR I-9327. The *Van Straaten* case concerns the application of these rules – *ne bis in idem* principle, laid down in Articles 54 et seq. of the 1990 CISA. Fundamental rights protection, and the logic of border security – a borders paradox. See e.g. Steve Peers, 'Key Legislative Developments on Migration in the European Union: SIS II' (2008) 10 Eur.J.Migration&L 77-104.

[24] Madeleine Colvin, 'The Schengen Information System: a human rights audit' (2001) 3 EHRLR 271, 273.

[25] [2010] OJ L8/11.

processing of provided data:

> (e) Access to Provided Data shall be limited to analysts investigating terrorism or its financing and to persons involved in the technical support, management, and oversight of the TFTP;
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> ...
>
> (i) During the term of this Agreement, the U.S. Treasury Department shall undertake a review to identify all non-extracted data that are no longer necessary to combat terrorism or its financing. Where such data are identified, procedures to delete those data shall commence within two (2) months of the date that they are so identified and shall be completed as soon as possible thereafter but in any event not later than eight (8) months after identification, absent extraordinary technological circumstances;
>
> (j) If it transpires that financial payment messaging data were transmitted which were not requested, the U.S. Treasury Department shall promptly and permanently delete such data and shall inform the relevant Designated Provider and central authority of the requested Member State;
>
> (k) Subject to subparagraph (i), all non-extracted data received prior to 20 July 2007 shall be deleted not later than five (5) years after that date;
>
> (l) Subject to subparagraph (i), all non-extracted data received on or after 20 July 2007 shall be deleted not later than five (5) years from receipt; and
>
> (m) Information extracted from Provided Data, including information shared under subparagraph (h), shall be subject to the retention period applicable to the particular government authority according to its particular regulations and record retention schedules.

Rights for any person are set out in Article 11 (1) and (3) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program. Article 11 (2), (3) of the EU-US TFTP

Agreement read as follows:

> 1. Any person has the right to obtain, following requests made at reasonable intervals, without constraint and without excessive delay or expense, confirmation from his or her data protection authority whether all necessary verifications have taken place within the European Union to ensure that his or her data protection rights have been respected in compliance with this Agreement, and, in particular, whether any processing of his or her personal data has taken place in breach of this Agreement. Such right may be subject to necessary and proportionate measures applicable under national law, including for the protection of public security or national security or to avoid prejudicing the prevention, detection, investigation, or prosecution of criminal offences, with due regard for the legitimate interest of the person concerned.
>
> (...)
>
> 3. Any person who considers his or her personal data to have been processed in breach of this Agreement is entitled to seek effective administrative and judicial redress in accordance with the laws of the European Union, its Member States, and the United States, respectively.

B. Descriptive repository of dispute settlement procedures

According to Bonafé, the nature of dispute settlement mechanisms created by international agreements[26] plays an important role in determining the way in which the international agreement intends to secure the enforceability of its obligations.[27]

The specific provisions of the dispute settlement systems are examined in more detail. These provisions are not uniform. The detail in which EU agreements (CFSP and PJC (by now FSJ) agreements) deal with the issue varies.

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[26] See generally David Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D. Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement. A comparative Study* (CUP, Cambridge 2009) 60 (analysis of judicial practice; that is, practice of national courts, in eleven states) and Sean D. Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?' in D. Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement. A comparative Study* (CUP, Cambridge 2009) 107 (discussing, *LaGrand* and *Avena*).

[27] Dispute settlement mechanisms serve the purpose of securing compliance with international primary obligations. Beatrice I. Bonafé,'Direct Effect of International Agreements in the EU Legal Order: Does it depend on the Existence of an International Dispute Settlement Mechanism?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 229-248 for example addresses the specific question of whether the existence of dispute settlement mechanisms at the international level can play a role in the recognition by the CJEU of direct effects to international agreements binding on the European Union.

From the standpoint of international law – as indicated by Beatrice I. Bonafé – dispute settlement mechanisms are – in principle – neutral and can either militate in favour/against direct effects. The existence of an international dispute settlement mechanism, or at least of such mechanisms possessing certain characteristics, does play a role in determining direct effects not *per se* – but as an element to be taken into consideration when examining nature/ purpose of the particular international agreement. In particular, at least as far as the WTO is concerned. The new system for the settlement of disputes is set out in Uruguay Round of Multilateral Trade Negotiations (1986-1994) – Annex 2 – Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) [1994] OJ L336/234.

According to Beatrice I. Bonafé – it is the framework of 'clear, precise, and not subject, in their implementation or effects, to the adoption of any subsequent measure'–requirement that the existence of international dispute settlement mechanisms is usually taken into consideration. The existence of international dispute settlement mechanisms demonstrates the particular intention of the contracting parties as to the means for securing the execution of the international agreement; that is, how the contracting parties intended to secure compliance with treaty provisions, and shed some light on the 'nature and purpose' test constantly applied by the Court.

1. Status and activities of the European Union with host States and dispute resolution

It is the agreement between the European Union and,

… Georgia on the status of the European Union Monitoring Mission in Georgia [2008] OJ L310/31 (Treaty EU, Article 24).
… the Republic of Seychelles on the status of the European Union-led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta [2009] OJ L323/14 (Treaty EU, Article 24).
... the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta [2009] OJ L33/43 (Treaty EU, Article 24).
… the Central African Republic on the status of the European Union-led forces in the Central African Republic [2008] OJ L136/46 (Treaty EU, Article 24).
… the Republic of Chad on the status of the European Union-led forces in the Republic of Chad [2008] OJ L83/40 (Treaty EU, Article 24).
… the Republic of Cameroon on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon [2008] OJ L57/31 (Treaty EU, Article 24).
… the Gabonese Republic on the status of the European Union-led forces in the Gabonese Republic [2006] OJ L187/43 (Treaty EU, Article 24).
… the Republic of Guinea-Bissau on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau [2008] OJ L219/66 (Treaty EU, Article 24).

– EU agreements (CFSP agreements) – which refer to arbitration.

a) European Union Monitoring Mission (EUMM)

In relation to any damage to or loss of civilian or government property which are related to operational necessities or caused by activities in connection with civil disturbances or protection of the mission, the Agreement between the European Union and Georgia on

the status of the European Union Monitoring Mission in Georgia excludes liability. For other activities; that is, damage to or loss of civilian or government property, as well as claims for death of or injury to persons and for damage to or loss of mission's property, the arrangement in the Agreement between the European Union and Georgia on the status of the European Union Monitoring Mission in Georgia sets out a three-stage procedure. Article 17 (1) and (2) of the Agreement read as follows:

> 1. EUMM Georgia and EUMM Georgia personnel shall not be liable for any damage to or loss of civilian or government property which are related to operational necessities or caused by activities in connection with civil disturbances or protection of EUMM Georgia.
>
> 2. With a view to reaching an amicable settlement, claims for damage to or loss of civilian or government property not covered by paragraph 1, as well as claims for death of or injury to persons and for damage to or loss of EUMM Georgia property, shall be forwarded to EUMM Georgia via the competent authorities of the Host State, as far as claims brought by legal or natural persons from the Host State are concerned, or to the competent authorities of the Host State, as far claims brought by EUMM Georgia are concerned.[28]

Paragraphs 3-6 of Article 17 refer to reaching an amicable settlement, the deliberation of a claims commission, and an arbitration tribunal:

> 3. Where no amicable settlement can be found, the claim shall be submitted to a claims commission composed on an equal basis of representatives of EUMM Georgia and representatives of the Host State. Settlement of claims shall be reached by common agreement.
>
> 4. Where no settlement can be reached within the claims commission, the dispute shall:
>
> (a) for claims up to and including EUR 40000, be settled by diplomatic means between the Host State and EU representatives;

[28] [2008] OJ L310/31.

> (b) for claims above the amount referred to in point (a), be submitted to an arbitration tribunal, the decisions of which shall be binding.

Where no amicable settlement can be found, claims are submitted to a claims commission composed equally by representatives of the mission and the Host State. Settlement of claims is reached by common agreement. Where no settlement can be reached within the claims commission, disputes are submitted to an arbitration tribunal, the decisions of which are binding – with no further report back, or action, by the claims commission. For claims below a specific amount, provision is made for settlement by diplomatic means between the High Representative and the Host State. Article 17 (5) and (6); that is, specifications on the appointment process and the composition of the arbitral tribunal, read as follows:

> 5. The arbitration tribunal shall be composed of three arbitrators, one arbitrator being appointed by the Host State, one arbitrator being appointed by EUMM Georgia and the third one being appointed jointly by the Host State and EUMM Georgia. Where one of the parties does not appoint an arbitrator within two months or where no agreement can be found between the Host State and EUMM Georgia on the appointment of the third arbitrator, the arbitrator in question shall be appointed by the Court of Justice of the European Communities.
>
> 6. An administrative arrangement shall be concluded between EUMM Georgia and the administrative authorities of the Host State in order to determine the terms of reference of the claims commission and the tribunal, the procedure applicable within these bodies and the conditions under which claims are to be lodged.[29]

The arbitration tribunal is composed of three arbitrators. In cases where one of the parties does not appoint an arbitrator, within two months, or where no agreement can be found on the appointment of the third arbitrator, the arbitrator in question shall be appointed by the CJEU. Administrative arrangements are concluded in order to determine the terms of reference of the claims commission/ tribunal, the procedures applicable and the

[29] [2008] OJ L310/31.

conditions under which claims are to be lodged.

As for the interpretation of the Agreement between the European Union and Georgia on the status of the European Union Monitoring Mission in Georgia, they are to be settled exclusively by diplomatic means between EU representatives and the Host State. Article 18 of the Agreement reads as follows:

> 1. All issues arising in connection with the application of this Agreement shall be examined jointly by representatives of EUMM Georgia and the Host State's competent authorities.
>
> 2. Failing any prior settlement, disputes concerning the interpretation or application of this Agreement shall be settled exclusively by diplomatic means between the Host State and EU representatives.

Article 16 (a)-(c) of the Agreement in the form of an exchange of letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel read as follows:

> (a) The GOI, Sending States, the AMM and AMM personnel shall not be liable for any damage to or loss of civilian or government property which are related to operational necessities or caused by activities in connection with civil disturbances or protection of the AMM.
>
> (b) with a view to reaching an amicable settlement, claims for damage to or loss of civilian or government property not covered by paragraph 1, as well as claims for death or injury to persons and for damage to or loss of AMM property, shall be forwarded to the AMM via the competent authorities of the GOI, as far as damage sustained by legal or natural persons from the Republic of Indonesia is concerned, or to the competent authorities of the Republic of Indonesia, as far as damage sustained by the AMM and its personnel are concerned. Claims may concern both issues related to contractual or non-contractual liability.
>
> (c) Where no amicable settlement can be found, the claim shall be

> submitted to a claims commission composed on an equal basis of representatives of the AMM and representatives of the GOI. Settlement of claims shall be reached by common agreement.[30]

In cases where no amicable settlement can be found, claims are submitted to a claims commission. This commission shall be composed on an equal basis of representatives of the AMM and representatives of the GOI. Settlements are reached by common agreement.

The Agreement in the form of an exchange of letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel does not refer to arbitration.

As for the application of the Agreement in the form of an exchange of letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel, they shall be examined jointly by representative of the AMM and the GoI's competent authorities. Article 17 of the Agreement reads as follows:

> (a) All issues arising in connection with the application of these Provisions shall be examined jointly by representative of the AMM and the GoI's competent authorities.
>
> (b) Failing any prior settlement, disputes concerning the interpretation or application of these Provisions shall be settled exclusively by diplomatic means.

b) European Union Police Mission (EUPM)

Article 14 of the Agreement between the European Union and the Democratic Republic

[30] [2005] OJ L288/60.

of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) reads as follows:

> 1. The Member States, other States participating in EUPOL Kinshasa, or EU Institutions, shall not be obliged to reimburse claims arising out of activities in connection with civil disturbances, protection of the EUPOL Kinshasa or its personnel, or which are incidental to operational necessities.
>
> 2. Any other claim of a civil law character, including claims of personnel locally employed by EUPOL Kinshasa, to which EUPOL Kinshasa or any member thereof is a party and over which the courts of the Host Party do not have jurisdiction because of any provision of the present Agreement, shall be submitted through the authorities of the Host Party to the Head of Mission/Police Commissioner and shall be dealt with by separate arrangements, as referred to in Article 17, whereby procedures for settling claims and for addressing claims shall be established. Settlement of claims will occur after previous consent of the State concerned.

The Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) provides for a Joint Coordination Group. Article 15 of the Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) reads as follows:

> 1. All issues arising in connection with the application of this agreement shall be discussed by a Joint Coordination Group. This Group shall be composed of representatives of EUPOL Kinshasa and the competent authorities of the Host Party.
>
> 2. Failing any prior settlement, disputes with regard to the interpretation or application of this Agreement shall be settled between the Host Party and EU representatives by diplomatic means.[31]

[31] [2005] OJ L256/58.

Pursuant to Article 15 of the Agreement issues arising in connection with the application of this agreement shall be discussed by a Joint Coordination Group. A body composed of representatives of EUPOL Kinshasa and the competent authorities of the Host Party.

See also the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima). Article 14 of the Agreement with FYROM reads as follows:

> 1. The Member States, other States participating in EUPOL Proxima, or EU Institutions, shall not be obliged to reimburse claims arising out of activities in connection with civil disturbances, protection of the EU Mission or its personnel, or which are incidental to operational necessities.
>
> 2. Any other claim of a civil law character, including claims of personnel locally employed by EUPOL Proxima, to which the Mission or any member thereof is a party and over which the courts of the Host Party do not have jurisdiction because of any provision of the present Agreement, shall be submitted through the authorities of the Host Party to the Head of Mission and shall be dealt with by separate arrangements, as referred to in Article 17, whereby procedures for settling claims and for addressing claims shall be established. Settlement of claims will occur after previous consent of the State concerned.

Article 15 of the Agreement with TFYRM reads as follows:

> 1. All issues arising in connection with the application of this agreement shall be discussed by a Joint Coordination Group. This Group shall be composed of representatives of EUPOL Proxima and the competent authorities of the Host Party.
>
> 2. Failing any prior settlement, disputes with regard to the interpretation or application of the present Agreement shall be settled between the Host Party and EU representatives by diplomatic means.[32]

Pursuant to Article 15 of the Agreement issues arising in connection with the application

[32] [2004] OJ L16/66.

of the agreement shall be discussed by a Joint Coordination Group composed of representatives of EUPOL Proxima and the competent authorities of the Host Party.

c) European Union-led forces (EUF)

See for example the dispute settlement procedure referred to in Article 15 (3) and (4) of the Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta. Article 15 refers to reaching an amicable settlement:

> 3. Where no amicable settlement can be found, the claim shall be submitted to a claims commission composed on an equal basis of representatives of EUNAVFOR and representatives of the Host State. Settlement of claims shall be reached by common agreement.
>
> 4. Where no settlement can be reached within the claims commission, the dispute shall:
>
> (a) for claims up to and including EUR 40000, be settled by diplomatic means between the Host State and EU representatives;
>
> (b) for claims above the amount referred to in point (a), be submitted to an arbitration tribunal, the decisions of which shall be binding.[33]

The claims commission shall be composed on an equal basis of representatives of EUNAVFOR and representatives of the Host State. For claims below a specific amount, provision is made for the settlement by diplomatic means between the High Representative and the Host State.

In the same vein, for example, the dispute settlement procedure referred to in Article 15 (3) and (4) of the Agreement between the European Union and the Republic of Djibouti

[33] [2009] OJ L323/14.

on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta,[34] the dispute settlement procedures referred to in Articles 15 (3) and (4) of the Agreement between the European Union and the Central African Republic on the status of the European Union-led forces in the Central African Republic,[35] the dispute settlement procedures referred to in Articles 15 (3) and (4) of the Agreement between the European Union and the Republic of Chad on the status of the European Union-led forces in the Republic of Chad,[36] the dispute settlement procedures referred to in Articles 15 (3) and (4) of the Agreement between the European Union and the Gabonese Republic on the status of the European Union-led forces in the Gabonese Republic,[37] and the dispute settlement procedure referred to in Article 15 (3) and (4) of the Agreement between the European Union and the Republic of Cameroon on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon.[38] Article 15 of the Agreement between the European Union and the Republic of Cameroon on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon is less detailed – with no reference to specific figures. For example, according to Koutrakos, 'possibly because its subject-matter was the transit, rather than the establishment, of EUFOR Tchad forces.'[39]

d) European Union Rule of Law Mission

Article 13 of the Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS

34 [2009] OJ L33/43.

35 [2008] OJ L136/46.

36 [2008] OJ L83/40.

37 [2006] OJ L187/43.

38 [2008] OJ L57/31.

39 See Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2011) 179-180.

reads as follows:

> 1. The EU Member States or EU Institutions shall not be obliged to reimburse claims arising out of activities in connection with civil disturbances, protection of the EU Mission or its personnel, or which result from the execution of the Mission.
>
> 2. Any other claim of a civil law character, including claims of personnel locally employed by EUJUST THEMIS, to which the Mission or any member thereof is a party and over which the courts of the Host Party do not have jurisdiction because of any provision of this Agreement, shall be submitted through the authorities of the Host Party to the Head of Mission and shall be dealt with by separate arrangements, as referred to in Article 16, whereby procedures for settling claims and for addressing claims shall be established. Settlement of claims shall occur after previous consent of the State concerned.

Article 14 of the Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS reads as follows:

> 1. All issues arising in connection with the application of this Agreement shall be discussed by a Joint Coordination Group. This Group shall be composed of representatives of EUJUST THEMIS and the competent authorities of the Host Party.
>
> 2. Failing any prior settlement, disputes with regard to the interpretation or application of this Agreement shall be settled between the Host Party and EU representatives by diplomatic means.[40]

Pursuant to Article 14 of the Agreement issues arising in connection with the application of the agreement shall be discussed by a Joint Coordination Group. The Joint Coordination Group is composed of representatives of EUJUST THEMIS and the competent authorities of the Host Party.

[40] [2004] OJ L389/42.

e) European Union Mission in support of Security Sector Reform

See the dispute settlement procedure referred to in Article 16 (3) and (4) of the Agreement between the European Union and the Republic of Guinea-Bissau on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau. Article 16 (3) and (4) read as follows:

> 3. Where no amicable settlement can be found, the claim shall be submitted to a claims commission composed on an equal basis of representatives of EU SSR Guinea-Bissau and representatives of the Host State. Settlement of claims shall be reached by common agreement.
>
> 4. Where no settlement can be reached within the claims commission, the dispute shall:
>
> (a) for claims up to and including EUR 40000, be settled by diplomatic means between the Host State and EU representatives;
>
> (b) for claims above the amount referred to in point (a), be submitted to an arbitration tribunal, the decisions of which shall be binding.[41]

Pursuant to Article 17 issues arising in connection with the application of the agreement shall be examined jointly by representatives of the mission and the Host State's competent authorities:

> 1. All issues arising in connection with the application of this Agreement shall be examined jointly by representatives of EU SSR Guinea-Bissau and the Host State's competent authorities.
>
> 2. Failing any prior settlement, disputes concerning the interpretation or application of this Agreement shall be settled exclusively by diplomatic means between the Host State and EU representatives.

[41] [2008] OJ L219/66.

f) Joint naval operations, conducted by the European Union-led naval force (EUNAVFOR)

For example, Article 8 of the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer stipulates that:

> (a) All issues arising in connection with the application of these provisions will be examined jointly by Kenyan and EU competent authorities.
>
> (b) Failing any prior settlement, disputes concerning the interpretation or application of these provisions will be settled exclusively by diplomatic means between Kenyan and EU representatives.[42]

Issues arising in connection with the application of the provisions of the EU- Kenya Agreement are examined jointly by Kenyan/ EU competent authorities.

[42] [2009] OJ L79/49.

A number of international agreements provide for their denunciation.[43] The denunciation shall take effect 45, or 60[44] days after receipt by the other contracting party of the notification of denunciation. Denunciation shall not affect any rights or obligations arising from the execution of the international agreement prior to its denunciation. E.g. 45 days are provided in the Agreement with the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia.[45]

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43 See Article 18 of the EU-Congo Agreement on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) [2005] OJ L256/58; Article 18 of the EU-FYROM Agreement on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima) [2004] OJ L16/66; Article 17 of the EU-FYROM Agreement on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46; Article 17 of the EU-Georgia Agreement on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42; Article 8 of the EU-Georgia Agreement on the status in Georgia of the European Union Special Representative for the South Caucasus and his/her support team [2006] OJ L135/15; Article 16 of the EU-Turkey Agreement establishing a framework for the participation of the Republic of Turkey in the European Union crisis management operations [2006] OJ L189/17; Article 16 of the EU-Canada Agreement establishing a framework for the participation of Canada in the European Union crisis management operations [2005] OJ L315/21; Article 16 of the EU-Ukraine Agreement establishing a framework for the participation of Ukraine in the European Union crisis management operations [2005] OJ L182/29; Article 16 of the EU-Romania Agreement establishing a framework for the participation of Romania in the European Union crisis- management operations [2005] OJ L67/14; Article 16 of the EU-Norway Agreement establishing a framework for the participation of the Kingdom of Norway in the European Union crisis-management operations [2005] OJ L67/8; Article 16 of the EU-Iceland Agreement establishing a framework for the participation of the Republic of Iceland in the European Union crisis-management [2005] OJ L67/2; Article 16 of the EU-Bulgaria Agreement establishing a framework for the participation of the Republic of Bulgaria in the EU crisis management operations [2005] OJ L46/50.

44 See Article 18 (4), (5) of the EU-Congo Agreement on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) [2005] OJ L256/58; Article 18 (4), (5) of the EU-FYROM Agreement on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima) [2004] OJ L16/66; Article 17 (4), (5) of the EU-Georgia Agreement on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42; Article 8 (4), (5) of the EU-Georgia Agreement on the status in Georgia of the European Union Special Representative for the South Caucasus and his/her support team [2006] OJ L135/15.

45 See Article 17 (4), (5) of the EU-FYROM Agreement on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46.

2. Participation in European Union Missions and dispute resolution

According to Koutrakos,[46] the more recent agreements provide for the settlement of disputes concerning their interpretation. Provided for the first time in the Agreement about the participation of the Republic of Turkey in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima').[47]

The agreement between the European Union and,

… New Zealand on the participation of New Zealand in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L274/18 (Treaty EU, Article 24).
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) [2007] OJ L270/28 (Treaty EU, Article 24).
… the Republic of Turkey on the participation of the Republic of Turkey in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/90 (Treaty EU, Article 24).
… the Kingdom of Norway on the participation of the Kingdom of Norway in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/86 (Treaty EU, Article 24).
… Ukraine on the participation of Ukraine in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/82 (Treaty EU, Article 24).
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union police mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/78 (Treaty EU, Article 24).
… the Republic of Cyprus on the participation of the Republic of Cyprus in the European Union Forces (EUF) in the Democratic Republic of Congo [2003] OJ L253/23 (Treaty EU, Article 24).

46 See Panos Koutrakos (n 39) 174.

47 See Article 8 of the EU-Turkey Agreement on the participation of the Republic of Turkey in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2004] OJ L354/90.

… the Philippines on the participation of the Philippines in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/76 (Treaty EU, Article 24).
… Thailand on the participation of Thailand in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/70 (Treaty EU, Article 24).
… Malaysia on the participation of Malaysia in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/64 (Treaty EU, Article 24).
… Singapore on the participation of Singapore in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/58 (Treaty EU, Article 24).
… Brunei on the participation of Brunei in the European Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2007] OJ L183/52 (Treaty EU, Article 24).
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) [2005] OJ L349/31 (Treaty EU, Article 24).
… the former Yugoslav Republic of Macedonia on the participation of the former Yugoslav Republic of Macedonia in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2006] OJ L188/10 (Treaty EU, Article 24).
… the Republic of Chile on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L202/40 (Treaty EU, Article 24).
… the Argentine Republic on the participation of the Argentine Republic in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L156/22 (Treaty EU, Article 24).
… New Zealand on the participation of New Zealand in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L127/28 (Treaty EU, Article 24).
… the Republic of Albania on the participation of the Republic of Albania in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L65/35 (Treaty EU, Article 24).
… the Kingdom of Morocco on the participation of the Kingdom of Morocco in the

European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L34/47 (Treaty EU, Article 24).
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) [2005] OJ L20/42 (Treaty EU, Article 24).
… the Government of the Swiss Confederation on the participation of the Swiss Confederation in the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (Operation EUFOR RD Congo) [2006] OJ L276/111 (Treaty EU, Article 24).
… the Russian Federation on the participation of the Russian Federation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA) [2008] OJ L307/16 (Treaty EU, Article 24).
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] OJ L268/33 (Treaty EU, Article 24).
… the Republic of Albania on the participation of the Republic of Albania in the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] OJ L217/19 (Treaty EU, Article 24).
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L317/20 (Treaty EU, Article 24).
… the United States of America on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L282/33 (Treaty EU, Article 24).[48]
… the Swiss Confederation on the participation of the Swiss Confederation in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L217/24 (Treaty EU, Article 24).
… the Republic of Turkey establishing a framework for the participation of the Republic of Turkey in the European Union crisis management operations [2006] OJ L189/17 (Treaty EU, Article 24).
… Canada establishing a framework for the participation of Canada in the European

[48] EULEX KOSOVO was the first CSDP mission in which the US had participated. EULEX KOSOVO reflects the addition in Article 43 TEU of the fight against terrorism as one of aims of the Common Security and Defence Policy tasks. See Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP, Oxford 2013) 133-182.

Union crisis management operations [2005] OJ L315/21 (Treaty EU, Article 24).
… Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations [2005] OJ L182/29 (Treaty EU, Article 24).
… Romania establishing a framework for the participation of Romania in the European Union crisis- management operations [2005] OJ L67/14 (Treaty EU, Article 24).
… the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway in the European Union crisis-management operations [2005] OJ L67/8 (Treaty EU, Article 24).
… the Republic of Iceland establishing a framework for the participation of the Republic of Iceland in the European Union crisis-management [2005] OJ L67/2 (Treaty EU, Article 24).
… the Republic of Bulgaria establishing a framework for the participation of the Republic of Bulgaria in the EU crisis management operations [2005] OJ L46/50 (Treaty EU, Article 24).
… the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) [2009] OJ L202/84 (Treaty EU, Article 24).

provide for a dispute settlement mechanism concerning their interpretation. The settlement of disputes is carried out by diplomatic means between the parties. That is, the contracting parties shall endeavour to resolve by mutual accord problems or doubts arising from the interpretation of the international agreement.

A number of participation agreements does not provide for dispute resolution.[49] Dispute resolution clauses are not the only vehicle for ensuring treaty performances. Alternatives include 'non-compliance' clauses.

All participation agreements include a non-compliance clause which enables either contracting party to terminate the agreement.

According to Koutrakos,[50] there are two provisos attached. The first is substantive (that is,

[49] See the EU-Slovakia Agreement on the participation of the Slovak Republic in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) [2003] OJ L239/44; EU-Bulgaria Agreement on the participation of the Republic of Bulgaria in the EUPM in BiH [2003] OJ L239/41; EU-Ukraine Agreement on the participation of Ukraine in the EUPM in BiH [2003] OJ L239/38; EU-Turkey Agreement on the participation of the Republic of Turkey in the EUPM in BiH [2003] OJ L239/35; EU-Norway Agreement on the participation of the Kingdom of Norway in the EUPM in BiH [2003] OJ L239/32; EU-Slovenia Agreement on the participation of the Republic of Slovenia in the EUPM in BiH [2003] OJ L239/29; EU-Estonia Agreement on the participation of the Republic of Estonia in the EUPM in BiH [2003] OJ L239/26; EU-Romania Agreement on the participation of Romania in the EUPM in BiH [2003] OJ L239/23; EU-Hungary Agreement on the participation of the Republic of Hungary in the EUPM in BiH [2003] OJ L239/20; EU-Latvia Agreement on the participation of the Republic of Latvia in the EUPM in BiH [2003] OJ L239/17; EU-Switzerland Agreement on the participation of Switzerland in the EUPM in BiH [2003] OJ L239/14; EU-Lithuania Agreement on the participation of the Republic of Lithuania in the EUPM in BiH [2003] OJ L239/11; EU-Czechia Agreement on the participation of the Czech Republic in the EUPM in BiH [2003] OJ L239/8; EU-Iceland Agreement on the participation of the Republic of Iceland in the EUPM in BiH [2003] OJ L239/5; EU-Cyprus Agreement on the participation of the Republic of Cyprus in the EUPM in BiH [2003] OJ L239/2; EU-Russia Agreement on the participation of the Russian Federation in the EUPM in BiH [2003] OJ L197/38; EU-Poland Agreement on the participation of the Republic of Poland in the EUPM in BiH [2003] OJ L64/38; EU-Romania Agreement on the participation of Romania in the European Union-led forces (EUF) in the Former Yugoslav Republic of Macedonia (FYROM) [2004] OJ L120/62; EU-Slovakia Agreement on the participation of the armed forces of the Slovak Republic in the EUF in the FYROM [2004] OJ L12/54; EU-Latvia Agreement on the participation of the Republic of Latvia in the EUF in the FYROM [2003] OJ L313/79; EU-Poland Agreement on the participation of Polish armed forces in the EUF in the FYROM [2003] OJ L285/44; EU-Turkey Agreement on the participation of the Republic of Turkey in the EUF in the FYROM [2003] OJ L234/23; EU-Lithuania Agreement on the participation of the Republic of Lithuania in the EUF in the FYROM [2003] OJ L234/19; EU-Czechia Agreement on the participation of the Czech Republic in the EUF in the FYROM [2003] OJ L229/39; EU-Estonia Agreement on the participation of the Republic of Estonia in the EUF in the FYROM [2003] OJ L216/61.

[50] See Panos Koutrakos (n 39) 173.

'[s]hould one of the Participating Parties fail to comply with its obligations laid down in the previous Articles, the other Party shall have the right to terminate this agreement'), and requires that one of the Participating Parties must have failed to comply with its obligations as laid down in the agreement in question. The second is procedural and requires notice. The length varies – that is, a one-month,[51] or two months' notice.[52] By way of exception, a number of participation agreements provide for their denunciation.[53] The period following written notification, which is required for denunciations to take effect, is six months.

In some cases there is binding dispute settlement – through arbitration at the election of one party. A case in point is the Agreement between the European Union and the Russian Federation on the participation of the Russian Federation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA) which is very detailed in certain aspects. Article 8 of the Agreement between the European Union and the Russian Federation on the participation of the Russian Federation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA) reads as follows:

> 1. Disputes between the Parties concerning the interpretation or application of this Agreement and its implementing arrangements shall be settled by the relevant authorities of the Parties at the appropriate level or by diplomatic means.
>
> 2. Any financial claims or disputes, that have not been resolved in

[51] See, for instance, Article 7 of the EU-Russia Agreement [2008] OJ L307/16; Article 8 of the EU-Croatia Agreement [2008] OJ L268/33; Article 7 of the EU-Albania Agreement [2008] OJ L217/19; Article 7 of the EU-Croatia Agreement [2008] OJ L317/20; Article 7 of the EU-Switzerland Agreement [2008] OJ L217/24; Article 8 of the EU-Croatia Agreement [2009] OJ L202/84.

[52] See, for instance, Article 7 of the EU-Slovakia Agreement [2003] OJ L239/44; Article 8 (2) of the EU-US Agreement on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L282/33.

[53] See Article 9 (3) of the EU-Turkey Agreement [2004] OJ L354/90; Article 9 (4) of the EU-Norway Agreement [2004] OJ L354/86; Article 9 (4) of the EU-Ukraine Agreement [2004] OJ L354/82; Article 9 (4) of the EU-Switzerland Agreement [2004] OJ L354/78.

> accordance with paragraph 1 of this Article, may be submitted to a mutually agreed conciliator or mediator.
>
> Any claims or disputes which have failed to be settled by such conciliation or mediation may be submitted by either Party to an arbitration tribunal. Each Party appoints one arbitrator to the arbitration tribunal. The two arbitrators so appointed shall appoint a third arbitrator, who will be the Chairman. Where one of the Parties fails to appoint an arbitrator within two months from the receipt of the other Parties notification of submitting the dispute to the arbitration tribunal or where no agreement can be found, within two months from their appointment, between the two arbitrators on the appointment of the third arbitrator, either Party may ask the President of the International Court of Justice to make an appointment. Where the President of the International Court of Justice is a national of either Party or is unable to discharge the said function for any other reason, the necessary appointments shall be made by the next most senior Member of the International Court of Justice who is not a national of either Party. The arbitration tribunal shall decide ex aequo et bono. The arbitrators have no authority to award punitive damages. The arbitrators shall agree on the procedures for arbitration. The seat of the arbitration shall be in Brussels and the language of the arbitration shall be English. The arbitral award shall contain a statement of reasons on which it is based and is accepted by the Parties as the final adjudication of the dispute. Each Party shall bear its own expenses, and all common costs shall be shared between the Parties in equal parts.[54]

That is, dispute settlement with reference to the International Court of Justice, for appointments. The second paragraph of Article 8 provides that the arbitration tribunal is empowered to decide *ex aequo et bono* (the decision of the parties to obtain such a solution). In all cases the arbitral tribunal decides in accordance with the terms of the agreement. The award contains a statement of reasons.

[54] [2008] OJ L307/16.

3. Exchange of classified information between the European Union and third States and international institutions and dispute resolution

Procedures involving Parties themselves – through consultation or negotiation. Any dispute arising between the parties with respect to interpretation or application shall be settled by consultation or negotiation.[55] During the negotiation both Parties shall continue to fulfil all of their obligations under the Agreement.[56] Whilst not all agreements provide for their denunciation (for instance the recent ones with Australia and Israel do not),[57] most of them do.[58] The period following written notice, which is required for denunciation

[55] See Article 17 of the EU-Australia Agreement [2010] OJ L26/31; Article 17 of the EU-Israel Agreement [2009] OJ L192/64; Article 16 of the EU-Switzerland Agreement [2008] OJ L181/58; Article 16 of the EU-US Agreement [2007] OJ L115/30; Article 16 of the EU-Iceland Agreement [2006] OJ L 184/35; Article 16 of the EU-Croatia Agreement [2006] OJ L116/74; Article 15 of the EU-Ukraine Agreement [2005] OJ L172/84; Article 16 of the EU-Bulgaria Agreement [2005] OJ L118/53; Article 16 of the EU-Romania Agreement [2005] OJ L 118/48; Article 16 of the EU-FYROM Agreement [2005] OJ L94/39; Article 16 of the EU-Norway Agreement [2004] OJ L362/29; Article 16 of the EU-BiH Agreement [2004] OJ L324/16; Article 16 of the Agreement between the European Space Agency and the European Union on the security and exchange of classified information [2008] OJ L219/59; Article 18 of the Agreement between the International Criminal Court and the European Union on cooperation and assistance [2006] OJ L115/50.

[56] See Article 17 of the Agreement on security procedures for exchanging classified information between the European Union and Israel [2009] OJ L192/64.

[57] [2010] OJ L26/31 and [2009] OJ L192/64.

[58] See Article 16 of the EU-Russia Agreement [2010] OJ L155/57; Article 18 of the EU-Switzerland Agreement [2008] OJ L181/58; Article 20 of the EU-US Agreement [2007] OJ L115/30; Article 18 of the EU-Iceland Agreement [2006] OJ L184/35; Article 18 of the EU-Croatia Agreement [2006] OJ L116/74; Article 17 of the EU-Ukraine Agreement [2005] OJ L172/84; Article 18 of the EU-Bulgaria Agreement [2005] OJ L118/53; Article 18 of the EU-Romania Agreement [2005] OJ L118/48; Article 18 of the EU-FYROM Agreement [2005] OJ L94/39; Article 18 of the EU-Norway Agreement [2004] OJ L362/29; Article 18 of the EU-BiH Agreement [2004] OJ L324/16; Article 18 of the Agreement between the European Space Agency and the European Union on the security and exchange of classified information [2008] OJ L219/59; Article 20 of the Agreement between the International Criminal Court and the European Union on cooperation and assistance [2006] OJ L115/50; Article 17 of the Agreement between the European Union and the North Atlantic Treaty Organisation Agreement on the Security of Information [2003] OJ L80/36; Articles 16 and 17 of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis [1999] OJ L176/36.

to take effect, varies from ninety days[59] to six months.[60] The agreements also provide that, notwithstanding such denunciation, obligations regarding the protection of classified information provided or exchanged pursuant to the international agreement shall continue to be protected in accordance with the provisions set forth therein.

4. TFTP and dispute resolution

Procedures involving Parties themselves – through consultations only. Article 12 of the EU-US Agreement on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program reads as follows:

> 1. The Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.
>
> 2. The Parties shall take measures to avoid the imposition of extraordinary burdens on one another through application of this Agreement. Where extraordinary burdens nonetheless result, the Parties shall immediately consult with a view to facilitating the application of this Agreement, including the taking of such measures as may be required to reduce pending and future burdens.
>
> 3. The Parties shall immediately consult in the event that any third party, including an authority of another country, challenges or asserts a legal claim with respect to any aspect of the effect or implementation of this Agreement.[61]

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59 Article 20 (4) of the EU-US Agreement [2007] OJ L115/30.

60 [2010] OJ L155/57; [2008] OJ L181/58; [2006] OJ L184/35; [2006] OJ L116/74; [2005] OJ L172/84; [2005] OJ L118/53; [2005] OJ L118/48; [2005] OJ L94/39; [2004] OJ L362/29; [2004] OJ L324/16; [2008] OJ L219/59; [2006] OJ L115/50; [2003] OJ L80/36.

61 [2010] OJ L8/11.

There is a general duty upon the Parties to consult each other in order to 'enable the most effective use to be made of the Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application'. The European Union and the US have the obligation to take measures to avoid extraordinary burdens as the result of the application of the EU-US Agreement on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, and in cases in which such burdens nonetheless may result, they must immediately consult with a view to facilitating the application of the Agreement. The third paragraph of Article 12 provides that the Parties must immediately consult in the event that any third party, including authorities of another country, challenges/ asserts a legal claim with respect to aspects of the effects/ implementation of the Agreement.

Article 14 of the EU-US Agreement provides for termination:

> 1. Either party may suspend or terminate this Agreement at any time by notification through diplomatic channels. Suspension shall take effect 10 days from the date of receipt of such notification.
>
> 2. Notwithstanding the suspension or termination of this Agreement, all data held by the U.S. Treasury Department pursuant to this Agreement shall continue to be processed in accordance with this Agreement.

5. Enhanced cooperation in the field of extradition and mutual legal assistance and dispute resolution

a) The Norway-Iceland participation and dispute resolution

Article 4 of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29

may 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto reads as follows:

> Any dispute between either Iceland or Norway and a Member State of the European Union regarding the interpretation or the application of this Agreement or of any of the provisions referred to in Article 1 thereof may be referred by a Party to the dispute to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months.[62]

There is a termination clause in the contract. Article 8 of the Norway-Iceland participation Agreement reads as follows:

> 1. This Agreement may be terminated by the Contracting Parties. In the event of termination by either Iceland or Norway, this Agreement shall remain in force between the European Union and the State for which it has not been terminated.
>
> 2. Termination of this Agreement pursuant to paragraph 1 shall take effect six months after the deposit of the notification of termination. Procedures for complying with requests for mutual legal assistance still pending at that date shall be completed in accordance with the provisions of this Agreement.
>
> 3. This Agreement shall be terminated in the event of termination of the Agreement of 18 May 1999 concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the latters' association with the application, implementation and development of the Schengen acquis.
>
> 4. Termination of this Agreement pursuant to paragraph 3 shall take effect for the same Party or Parties and on the same date as the termination of the Agreement of 18 May 1999 referred to in paragraph 3.[63]

62 [2004] OJ L26/3.

63 See Article 8 of the Agreement with the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 may 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L26/3.

b) Mutual legal assistance and dispute resolution

Procedures involving Parties themselves – through consultations only. Article 28 of the EU-Japan Agreement on mutual legal assistance in criminal matters reads as follows:

> 1. The Central Authorities of the Member States and Japan shall, if necessary, hold consultations for the purpose of resolving any difficulties with regard to the execution of a request, and facilitating speedy and effective assistance under this Agreement, and may decide on such measures as may be necessary for this purpose.
>
> 2. The Contracting Parties shall, as appropriate, hold consultations on any matter that may arise in the interpretation or application of this Agreement.[64]

There is a termination clause in the contract. Article 31 (3) of the EU-Japan Agreement reads as follows:

> Either Contracting Party may terminate this Agreement at any time by giving written notice to the other Contracting Party, and such termination shall be effective six months after the date of such notice.

Article 11 of the EU-US Agreement on mutual legal assistance; that is, a general consultation duty, reads as follows:

> The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.[65]

Articles 4 (7) and 8 (3) of the EU-US Agreement on mutual legal assistance provide for a specific consultation duty.

Article 4 (7) of the EU-US Agreement on mutual legal assistance reads as follows:

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64 [2010] OJ L39/20.

65 [2003] OJ L181/34.

> Identification of bank information
>
> …
>
> 7. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested State nonetheless result, including on banks or by operation of the channels of communications foreseen in this Article, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.[66]

Article 8 (3) of the EU-US Agreement on mutual legal assistance stipulates that:

> Mutual legal assistance to administrative authorities
>
> …
>
> 3. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested state nonetheless result, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.[67]

There is a termination clause in the contract. Article 16 (2) of the EU-US Agreement on mutual legal assistance stipulates that:

> The application of this Agreement to any territory or country in respect of which extension has been made in accordance with subparagraph (b) of paragraph 1 may be terminated by either Contracting Party giving six months' written notice to the other Contracting Party through the diplomatic channel, where duly confirmed between the relevant Member State and the United States of America.

66 [2003] OJ L181/34.

67 [2003] OJ L181/34.

c) Extradition and surrender procedures and dispute resolution

Article 36 of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway stipulates that:

> Any dispute between either Iceland or Norway and a Member State of the European Union regarding the interpretation or the application of this Agreement may be referred by a party to the dispute to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months.[68]

There is a termination clause in the contract. Article 41 of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway reads as follows:

> 1. This Agreement may be terminated by the Contracting Parties. In the event of termination by either Iceland or Norway, this Agreement shall remain in force between the European Union and the Contracting Party for which it has not been terminated.
>
> 2. Termination of this Agreement pursuant to paragraph 1 shall take effect six months after the deposit of the notification of termination. Procedures for complying with requests for surrender still pending at that date shall be completed in conformity with the provisions of this Agreement.

Article 15 of the EU-US Extradition Agreement; that is, a general consultation duty, reads as follows:

> The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.[69]

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68 [2006] OJ L292/2.

69 [2003] OJ L181/27.

Article 17 of the EU-US Extradition Agreement provides for a specific consultation duty:

> Non-derogation
>
> …
>
> 2. Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.[70]

There is a termination clause in the contract. Article 22 of the EU-US Extradition Agreement reads as follows:

> Either Contracting Party may terminate this Agreement at any time by giving written notice to the other party, and such termination shall be effective six months after the date of such notice.

Should any measures set forth in the EU-US Extradition Agreement create an operational difficulty for either one or more Member States or the United States, such difficulty should be resolved, if possible, through consultations between the Member State or Member States concerned and the United States, or, if appropriate, through the consultation procedures set out in the EU-US Extradition Agreement.

The Explanatory Note on the Agreement on Extradition between the European Union and the United States of America reflects understandings regarding the application of certain provisions of the Agreement. The Explanatory Note on Article 18 reads as follows:

> On Article 18
>
> Article 18 provides that the Agreement shall not preclude the conclusion, after its entry into force, of bilateral agreements on extradition between a Member State and the United States of America consistent with the

[70] [2003] OJ L181/27.

Agreement.

> Should any measures set forth in the Agreement create an operational difficulty for either one or more Member States or the United States of America, such difficulty should in the first place be resolved, if possible, through consultations between the Member State or Member States concerned and the United States of America, or, if appropriate, through the consultation procedures set out in this Agreement. Where it is not possible to address such operational difficulty through consultations alone, it would be consistent with the Agreement for future bilateral agreements between the Member State or Member States and the United States of America to provide an operationally feasible alternative mechanism that would satisfy the objectives of the specific provision with respect to which the difficulty has arisen.[71]

6. PNR and dispute resolution

Any dispute arising between the parties with respect to interpretation/ application shall be settled by consultation or negotiation, and shall not be referred to any third party or tribunal. Article 10 of the Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service reads as follows:

> Any dispute arising between the Parties under this Agreement with respect to its interpretation, application or implementation shall be settled by consultation or negotiation between the Parties; it shall not be referred to any third party or tribunal for resolution.[72]

There is a termination clause in the contract. Article 13 of the Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service reads

[71] Explanatory Note on the Agreement on Extradition between the European Union and the United States of America.

[72] [2008] OJ L213/49.

as follows:

> 1. Either party may terminate this Agreement at any time by notification through diplomatic channels. Termination shall take effect ninety (90) days from the date of the other party being notified thereof.
>
> 2. Notwithstanding the termination of this Agreement, all EU-sourced PNR data held by competent Australian authorities pursuant to this Agreement shall continue to be processed in accordance with the data protection standards laid down herein.
>
> 3. This Agreement and any obligations thereunder, other than the obligation under Article 13(2), shall expire and cease to have effect seven years after the date of signing, unless the parties mutually agree to replace this Agreement.

Article 5 of the Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) reads as follows:

> DHS expects that it is not being asked to undertake data protection measures in its PNR system that are more stringent than those applied by European authorities for their domestic PNR systems. DHS does not ask European authorities to adopt data protection measures in their PNR systems that are more stringent than those applied by the U.S. for its PNR system. If its expectation is not met, DHS reserves the right to suspend relevant provisions of the DHS letter while conducting consultations with the EU with a view to reaching a prompt and satisfactory resolution. (…).[73]

There is a termination clause in the contract. Article 9 of the 2007 PNR Agreement reads as follows:

> (…) Either Party may terminate or suspend this Agreement at any time by notification through diplomatic channels. Termination will take effect 30

[73] [2007] OJ L204/18.

> days from the date of notification thereof to the other Party unless either Party deems a shorter notice period essential for its national security or homeland security interests. (…)

Attached to the (2007) PNR Agreement is the US letter to EU (DHS letter 2007),[74] which contains assurances provided by the DHS, and the EU letter to US (EU letter 2007), accepting the DHS letter (assurance of adequacy).[75] Substantial provisions are included in the letter exchanges.

DHS letter 2007, Ch. IX. reads as follows:

> DHS does not ask European authorities to adopt data protection measures in their PNR systems that are more stringent than those applied by the U.S. for its PNR system. If its expectation is not met, DHS reserves the right to suspend relevant provisions of the DHS letter while conducting consultations with the EU with a view to reaching a prompt and satisfactory resolution. (…)[76]

The exclusive remedy if the EU determines that the US has breached the (2007) PNR Agreement is the termination of the Agreement and the revocation of the adequacy determination referenced in paragraph 6. The exclusive remedy if the US determines that the EU has breached the (2007) PNR Agreement is the termination of the Agreement and the revocation of the DHS letter 2007 as set out in paragraph 8 of the (2007) PNR Agreement.

74 [2007] OJ L204/21.

75 [2007] OJ L204/25.

76 [2007] OJ L204/21.

7. Schengen Association and dispute resolution

Article 9 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis reads as follows:

> 1. Each year Switzerland shall report to the Mixed Committee on the way in which its administrative authorities and courts have applied and interpreted the provisions referred to in Article 2, as interpreted, where relevant, by the Court of Justice.
>
> 2. If, within two months of being notified of a substantial divergence between Court of Justice case-law and that of Switzerland's courts or of a substantial divergence between the authorities of the Member States concerned and the Swiss authorities in their application of the provisions referred to in Article 2, the Mixed Committee is unable to ensure a uniform application and interpretation, the procedure provided for in Article 10 shall be initiated.[77]

If the Mixed Committee is unable to ensure a uniform application/ interpretation, the procedure provided for in Article 10 is initiated. Article 10 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis reads as follows:

> 1. In the event of a dispute about the application of this Agreement or where the situation provided for in Article 9(2) occurs, the matter shall be officially entered as a matter of dispute on the agenda of the Mixed Committee, meeting at ministerial level.
>
> 2. The Mixed Committee shall have 90 days to settle the dispute, counting from the date of adoption of the agenda on which the dispute has been placed.

[77] [2008] OJ L53/52.

> 3. Where the dispute cannot be settled by the Mixed Committee within the 90-day deadline provided for in paragraph 2, this deadline shall be extended by 30 days with a view to reaching a final settlement.
>
> If no final settlement is reached, this Agreement shall be terminated six months after the expiry of the 30-day period.

Disputes about the application of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, or where the situation provided for in Article 9 (2) occurs, are entered as a matter of dispute on the agenda of the Mixed Committee, meeting at ministerial level.

There is a termination clause in the contract. Article 17 reads as follows:

> 1. This Agreement may be terminated by Switzerland or by decision of the Council acting by unanimity of its Members. The depositary shall be notified of termination, which shall take effect six months after notification.
>
> 2. This Agreement shall be considered to have been terminated if Switzerland terminates one of the agreements referred to in Article 13 or the agreement referred to in Article 15(4).

The Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis also provides a dispute settlement mechanism with respect to application, or in a case where the situation provided for in Article 10 (2) occurs.

The second paragraph of Article 10 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis reads as follows:

> If the Mixed Committee, within two months after a substantial difference in the case law of the Court of Justice and the courts of Iceland or Norway or a substancial difference in application between the authorities of the Member States concerned and those of Iceland or Norway in respect of the provisions referred to in Article 2 has been brought before it, has not been able to ensure the preservation of a uniform application and interpretation, the procedure in article 11 shall apply.[78]

If the Mixed Committee is not able to ensure the preservation of a uniform application/ interpretation, the procedure in Article 11 applies.

Article 11 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis reads as follows:

> 1. In the case of a dispute about the application of this Agreement or in a case where the situation provided for in Article 10(2) occurs, the matter shall be officially entered as a matter of dispute on the agenda of the Mixed Committee at ministerial level.
>
> 2. The Mixed Committee shall have ninety days from the date of the adoption of the agenda on which the dispute has been entered within which to settle the dispute.
>
> 3. In a case where the dispute cannot be settled by the Mixed Committee within the period of ninety days envisaged in paragraph 2, a further period of thirty days shall be observed for reaching a final settlement.
>
> If no final settlement is reached, this Agreement shall be considered as terminated with respect to Iceland or Norway, depending on which State the dispute concerns. Such termination shall take effect six months after the expiry of the thirty day period.

The Agreement concluded by the Council of the European Union and the Republic of

[78] [1999] OJ L176/36.

Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis provides for denunciation. Article 16 of the Agreement reads as follows:

> This Agreement may be denounced by Iceland or by Norway or by decision of the Council, acting by the unanimity of its members representing the Member States which participate in the closer cooperation authorised by the Schengen Protocol. Such denunciation shall be notified to the depositary. It shall take effect six months after notification.

The period following notification is six months. The consequences of denunciation are mentioned in Article 17:

> The consequences of denunciation of this Agreement by, or its termination with respect to, Iceland or Norway shall be the subject of an agreement between the remaining Parties and the Party which has denounced this Agreement or with respect to which the termination is to take effect. If no agreement can be reached, the Council shall decide after consultation of the remaining associated Contracting Party on the necessary measures. However, these measures shall be binding upon that Party only if they are accepted by it.

To conclude, the options are manifold. They range from calling for negotiations to binding judicial proceedings. Dispute resolution clauses tend to take one of three forms:

First, procedures involving the contracting parties themselves. Second, procedures involving a third party. Third, binding dispute settlement. E.g. the Agreement between the European Union and the Russian Federation on the participation of the Russian Federation in the European Union military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA).[79]

According to Koutrakos,[80] a number of agreements were silent on this issue.[81] Interesting aspect of the international agreements is the reference to the Joint Coordination Committee. A small number of international agreements provide for a Joint Coordination Group composed of representatives of the mission and the competent authorities of the Host Party.[82]

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79 [2008] OJ L307/16.

80 See Panos Koutrakos (n 39) 179.

81 E.g. EU-Albania Agreement on the activities of the European Union Monitoring Mission (EUMM) in the Republic of Albania [2003] OJ L93/50; EU-FYROM Agreement on the activities of the European Union Monitoring Mission (EUMM) in the Former Yugoslav Republic of Macedonia [2001] OJ L241/2; EU-Yugoslavia Agreement on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia [2001] OJ L125/2; EU-BiH Agreement on the activities of the European Union Police Mission (EUPM) in BiH [2002] OJ L293/2; EU-Georgia Agreement on the status in Georgia of the European Union Special Representative for the South Caucasus and his/her support team [2006] OJ L135/15; EU-Seychelles Agreement on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37.

82 See Article 15 (1) of the EU-Congo Agreement on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa) [2005] OJ L256/58; Article 14 (1) of the EU-Georgia Agreement on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS [2004] OJ L389/42; Article 15 (1) of the EU-FYROM Agreement on the status and activities of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima) [2004] OJ L16/66; Article 14 (1) of the EU-FYROM Agreement on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia [2003] OJ L82/46.

The more recent ones provide for joint examination.[83] That is, issues arising in connection with the application of the agreements are to be examined jointly by representatives of the mission and the competent authorities of the Host Party. As for the interpretation of the agreements, they shall be settled exclusively by diplomatic means between the Host State and EU representatives.

Sloss and Murphy have argued that the establishment of dispute settlement mechanisms can be seen as a presumption against the recognition of direct effect.

As Sloss has described, domestic courts should not enforce a treaty that expressly precluded domestic judicial enforcement. Similarly, if a treaty created an alternative mechanism for private parties to vindicate their treaty-based primary rights, a court might reasonably conclude that the treaty drafters implicitly had precluded domestic judicial enforcement. (However, courts should not infer an implied limitation on domestic judicial enforcement if the alternative mechanism was accessible only to states, not private parties.) Finally, the right to a remedy for treaty violations was subject to limitations in cases where the private party waited too long to seek a remedy, failed to follow the

[83] See, for instance, Article 16 (1) of the EU-Seychelles Agreement on the status of the European Union-led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta [2009] OJ L323/14; Article 16 (1) of the EU-Djibouti Agreement on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta [2009] OJ L33/43; Article 8 (a) of the EU-Kenya Agreement on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49; Article 18 (1) of the EU-Georgia Agreement on the status of the European Union Monitoring Mission in Georgia [2008] OJ L310/31; Article 17 (1) of the EU-Guinea-Bissau Agreement on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau [2008] OJ L219/66; Article 16 (1) of the EU-RCA Agreement on the status of the European Union-led forces in the Central African Republic [2008] OJ L136/46; Article 16 (1) of the EU-Chad on the status of the European Union-led forces in the Republic of Chad [2008] OJ L83/40; Article 16 (1) of the EU-Cameroon Agreement on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon [2008] OJ L57/31; Article 16 (1) of the EU-Gabon Agreement on the status of the European Union-led forces in the Gabonese Republic [2006] OJ L187/43; Article 17 (a) of the EU-Indonesia Agreement on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel [2005] OJ L288/60.

prescribed procedure, or was otherwise at fault for the failure to obtain a remedy that the legal system made available.[84]

As Murphy has described, if the treaty itself provided a mechanism for private individuals to vindicate private rights, then an alternative mechanism (access to national courts to vindicate a treaty norm) should not be implied. Certainly that was the case when the international agreement both created an alternative mechanism and expressly precluded the pursuit of actions in national courts, as occurred under the 1981 Iran-United States Algiers Accords. In that instance, the two states had created an international arbitral tribunal in the Hague for the resolution of commercial claims, had provided access to that tribunal for individuals with large claims, and expressly had foreclosed U.S. Nationals whose claims had fallen within the scope of that tribunal from pursuing actions in U.S. Courts. To imply that the agreements obliged the United States to allow individuals access to U.S. Courts would fly in the face of the express terms of the agreements.[85]

According to a different view, the establishment of dispute settlement mechanisms is in principle neutral – with respect to the question of direct effect.[86]

In *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA* the Court held:

> 26 As regards the GATT, the Court has consistently held, most recently in Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 106, that the GATT, which according to its preamble is based on the principle of negotiations undertaken on "the basis of reciprocal and mutually advantageous arrangements", is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

84 See David Sloss (n 26) 60.

85 See Sean D. Murphy (n 26) 107.

86 See Beatrice I. Bonafé (n 27) 230.

27 The Court stated (at paragraph 107) that those measures included, for the settlement of conflicts, depending on the case, written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the GATT, and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

28 It also noted (at paragraph 108) that where, by reason of an obligation assumed under the GATT or of a concession relating to a preference, some producers suffered or were threatened with serious damage, Article XIX gave a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter was urgent and on a temporary basis, without prior consultation (see the judgments in Joined Cases 21/72 to 24/72 *International Fruit Company*, cited above, paragraphs 21, 25 and 26; Case 9/73 *Schlueter v Hauptzollamt Loerrach* [1973] ECR 1135, paragraph 29; Case 266/81 *SIOT v Ministero delle Finanze* [1983] ECR 731, paragraph 28; and Joined Cases 267/81, 268/81 and 269/81 *SPI and SAMI* [1983] ECR 801, paragraph 23).

29 Consequently, those features preclude an individual from invoking provisions of the GATT before the national courts of a Member State in order to challenge the application of national provisions.

(...)

31 In that regard, it should be noted that the Fourth ACP-EEC Convention, like the ACP-EEC Conventions which preceded it or the Conventions of Association between the European Economic Community and the African States and Madagascar, is not of the same nature as the GATT, as follows from paragraphs 26 to 29 above.

(...)

36 That conclusion is not affected by the argument of the Italian Government to the effect that the Fourth ACP-EEC Convention lays down a special procedure for settling disputes between the contracting parties;

> Article 53 of the Second Yaoundé Convention also contained similar arrangements and yet, in the judgment cited above, the Court recognized that some of its provisions had direct effect.[87]

That is, the CJEU has provided no clear answer as to whether the existence of international dispute settlement mechanisms plays a role in the recognition of direct effect to international agreements.

[87] Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA* EU:C:1995:435, [1995] ECR I-4533.

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