Small But Precious: the Actual and Potential Direct Effect of the Partnership and Cooperation Agreement Between the European Communities and the Russian Federation

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A. Introductory Remarks

The EU-Russian relations are reaching new challenging stage in developing political, economic and cultural cooperation. In the middle of summer 2006, the European Commission has already agreed on the draft negotiating directives for the new EU-Russia Agreement aiming at the progressive improvement, intensification and facilitation of trade and energy relations accompanied with intensive cooperation on political and security issues.[1] Undoubtedly, the debate over the nature, scope and content of the post-PCA agreement between the two leading European powers is likely to dominate bilateral agenda for the year to come.[2] Although admitting its great importance in the medium and long-term perspective, the debate over the post-PCA agreement is taking the focus away from the current PCA, which remains largely neglected for almost ten years of its actual operation.[3] The present article is intended to fill in this gap by providing an in-depth analysis of the EC-RF PCA in the light of the recent developments regarding EU law of external relations.

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1 *See*, Press Release of 3 July 2006, *The European Commission Approves Terms for Negotiating New EU-Russia Agreement*, Reference: IP/06/910. 2006.

2 *See e.g.*, S. Andoura & M. Vahl, *A New Agreement between Russia and the European Union: Legal and Political Aspects*, 5 The EU-Russia Review 5, at 5 (2006). *See also*, M. Emerson, F. Tassinari & M. Vahl, *A New Agreement between the EU and Russia: Why, What and When?*, Centre for European Policy Studies, Policy Brief No. 103, at 1 *et seq*. (2006).

3 It is well-known that the EC-RF PCA has initially been concluded for a period of 10 years only. However, Art. 106 EC-RF PCA foresees its automatic renewal on a yearly basis "[p]rovided that neither Party gives the other Party written notice of denunciation of the Agreement at least six months before it expires." Undoubtedly, the PCA will remain in force after 1 December 2007 to avoid legal vacuum in relations between the Community and the Russian Federation. Moreover, the negotiation, conclusion and ratification of the post-PCA agreement is likely to take considerable time. Thus, the relevance of the detailed analysis of the PCA and effect of its provisions within the Community legal order is rather obvious.

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The EC-RF PCA was negotiated and concluded at the times of reticent attempts on behalf of both sides to shape their respective policies towards each other (Chapter B). Indeed, it became a testing ground for the new approaches articulated by the EC/EU to meet the growing demands of its rising potential as a full-fledge international actor (Chapter C). Despite a rather limited scope and intensity of the cooperative link envisaged under the EC-RF PCA, the ECJ has included it into the family of mixed international agreements benefiting from judicial review and direct effect (Chapters D and E).[4] However, the following analysis of the PCA provisions demonstrates that the individual applicants have underestimated the potential of the PCA in terms of its ability to serve as a directly effective law within the Community legal system (Chapter F).

B. A Brief Reflection on the Historical, Political and Legal Aspects of EC/EU Relations with the Russian Federation

I. Filling in the Legal Vacuum: The Mutual Diplomatic Recognition and First Generation Trade Agreement

It took three years for the famous Mikhail Gorbachev's 'perestroika' aiming at democratisation of the socialist system to bring its first fruits of facilitating cooperation on the international arena between the capitalistic West and communistic East.[5] The 1988 joint declaration on the mutual diplomatic recognition[6] concluded between the Council for Mutual Economic Assistance (CMEA) and the European Economic Community (EEC) laid down a legal foundation for the future cooperation between the two antagonistic ideological blocs.[7] In the immediate aftermath of the declaration, the Rhodes European Council has called upon to use a positive momentum in the EEC-CMEA relations for overcoming "[t]he division of the continent" and reaffirming a common "[w]illingness to further economic relations and cooperation … in a mutually

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4 It must be emphasised that the ECJ has adopted an opposite approach to GATT 1947 and WTO Agreement and its annexes, which remained outside the scope of this favourable framework with a consequence of being denied direct effect within the Community legal order.

5 *See e.g.*, V. Perlo, *The Economic and Political Crisis in the USSR*, 70 Political Affairs 10, at 10 (1991).

6 A Joint Declaration of the European Economic Community and the Council for Mutual Economic Assistance (CMEA) of 24 June 1988, OJ 1988 L 157/35. The second indent of the Joint Declaration provides as follows: "The Parties will develop cooperation in areas which fall within their respective spheres of competence and where there is a common interest."

7 *See, e.g.*, M. P. Ferreira, *The Liberalisation of East-West Trade: An Assessment of its Impact on Exports from Central and Eastern Europe*, 47 Europe-Asia Studies 1205, at 1207-1209 (1995). *See also*, K. Grzybowski, *The Council for Mutual Economic Assistance and the European Community*, 84 AJIL 284, at 284-292 (1990).

beneficial way."[8] However, the EEC refusal to conclude a comprehensive collective trade agreement with the Eastern partners due to CMEA deficiency in conducting common commercial policy on behalf of its members dragged the bloc-to-bloc negotiations into a deadlock.[9] The two years stalemate forced the Union of Soviet Socialist Republics (USSR) to cut the Gordian knot by approving the CMEA member states' discretion to conclude bilateral trade agreements with EEC on an individual basis.[10] The aforementioned developments opened a hopeful perspective for the reciprocal relations between EEC and individual CMEA member states, which was subsequently institutionalized in the bouquet of Trade and Cooperation Agreements (TCAs).[11] The EEC-USSR TCA,[12] like others, aimed at "strengthening and multiplying links between the economic actors", thus facilitating "harmonious development and trade diversification in areas of common interest" on the basis of equality, non-discrimination and reciprocity.[13] The TCA key provisions on trade and commercial cooperation provided for reciprocal application of most-favoured-nation (MFN) principle[14] and mutual commitment to "[r]elief from duties, taxes and other charges … of goods temporarily remaining in their territories for re-exportation either in the unaltered state or after inward processing."[15] The Community had also consigned to the progressive elimination and suspension of the specific quantitative restrictions operating in relation to the goods originated in the territory of the USSR.[16] The TCA provisions on commercial and economic cooperation encouraged collaboration between the

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[8] Declaration of the European Council on the International Role of the European Community of 2 and 3 December 1988, Conclusions of the Presidency of the Rhodes European Council, 3/S – 88, at 19.

[9] D. Kennedy & D. E. Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 Colum. J. Transnat'l. L. 633, at 636 (1990). *See also*, Grzybowski, *supra* note 7, at 288-290.

[10] C. Piening, Global Europe. The European Union in World Affairs 55 (1997). *See also*, Y. Shishkov, *Russia's Policy towards the EU*, *in* J. Pinder & Y. Shishkov (Eds.), The EU and Russia. The Promise of Partnership, 71 at 71 (2002).

[11] L. E. Ramsey, *The Implications of the Europe Agreements for an Expanded European Union*, 44 ICLQ 161, at 161-163 (1995). *See also*, D. Kennedy & D. E. Webb, *The Limits of Integration: Eastern Europe and the European Communities*, 30 CMLR 1095, at 1100-1101 (1993). This article focuses primarily on the analysis of EEC-USSR TCA, while leaving outside its scope TCAs concluded by the EEC with other CMEA member states.

[12] 1990 Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on Trade and Commercial and Economic Cooperation OJ 1990 L068/2 (EEC-USSR TCA). *See also*, Council Decision 90/116/EEC of 26 February 1990, OJ 1990 L 068/1.

[13] C. Hillion, *Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union*, 3 EFAR 399, at 402 (1998). *See also*, the 5th indent of the Preamble and Arts. 1; 17 and 20 of the EEC-USSR TCA.

[14] *See*, Art. 3 EEC-USSR TCA, *supra* note 12. It must be emphasised that a grant of most-favoured-nation (MFN) treatment was of a particular significance for the USSR, because it was not a signatory to 1947 General Agreement on Tariffs and Trade (GATT).

[15] *See*, Art. 4 EEC-USSR TCA, *supra* note 12.

[16] *See, e.g. id.*, Arts. 8, 9 & 11 and Ann. I & II. *See also*, on the quantitative restrictions to imports originating in State-trading countries, Council Regulation 3420/83, OJ 1983 L346/6 and on common rules for imports, Council Regulation 288/82, OJ 1982 L35/1. It must be emphasised that

respective custom services and promoted exchange of relevant commercial and economic information, including production, consumption and foreign trade statistics.[17] The TCA emphasised the temporary and exceptional character of the counter-trade practises[18] and encourage the use of arbitration "[f]or the settlement of disputes arising out of commercial and cooperation transactions concluded by firms, enterprises and economic organisations of the Community and … the USSR."[19] The Contracting Parties has also agreed on the establishment of a joint committee to "[e]nsure the proper functioning of this Agreement and … devise and recommend measures for achieving its objectives."[20] Although evidently providing a fairly limited framework for economic cooperation, the EEC-USSR first-generation trade agreement constituted a significant achievement in comparison with the mutual suspicion of the Cold War decades.[21] However, even prior to its ratification, the EEC-USSR TCA was swiftly overtaken by the rapid disintegration of the Soviet Union with the subsequent emergence of the newly independent states calling for an urgent review of the Community external policy in the light of their commitment to process of political and economic reforms.[22]

II. Shaping EU Policy Towards Post-Soviet Russia: The Partnership and Cooperation Agreement

The fall of the Iron Curtain symbolised the beginning of a new era leading to a "conceptual re-division of the post-communistic Europe" on the Central and East European Countries (CEECs) and the Newly Independent States (NISs).[23] The EC contribution to the emerging geopolitical spit between these two groupings had articulated in the differentiated aid programmes,[24] which corresponded to "the basic difference in the ultimate political orientation of the countries under consideration."[25] An emphasised focus on CEECs and the Baltic States, as potential

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the products covered by the European Coal and Steel Community (ECSC) and textile products fell outside the scope of the EEC-USSR TCA. *See*, Art. 2 ECC-USSR TCA, *supra* note 12.

17 *See*, Art. 17 EEC-USSR TCA, *supra* note 13.

18 *See id.*, Art. 5.

19 *See id.*, Art. 18.

20 *See id.*, Art. 22. *See also*, Arts. 10(2), 11(2), 15(1) and 17(1).

21 Ramsey, *supra* note 11, at 163.

22 M. Maresceau & E. Montaguti, *The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal*, 32 CMLR 1327, at 1338-1339 (1995).

23 J. Hughes, *EU Relations with Russia: Partnership or Asymmetric Interdependence?*, *in* N. Casarini & C. Muzu (Eds.), The EU's Foreign Policy in an Evolving International System: The Road to Convergence, 76 at 77 (2006). *See e.g.*, in general, on the boundaries between EU and the broader European arena, S. Smith, *The European Union and a Changing Europe: Establishing the Boundaries of Order*, 34 JCMS 5, at 5 *et seq.* (1996) and L. Friis & A. Murphy, *The European Union and Central and Eastern Europe: Governance and Boundaries*, 37 JCMS 211, at 211 *et seq.* (1999). *See also*, on cross-border cooperation between EU and the Russian Federation, A. Myrjord, *Governance Beyond the Union: EU Boundaries in the Barents Euro-Arctic Region*, 8 EFAR 239, at 239-257 (2003).

24 Hughes, *supra* note 23, at 77-78.

25 P. C. Muller-Graff, *Legal Framework for Relations between the European Union and Central*

members of the Union, evidenced an exclusionary character of the EU approach towards NISs, whose membership had never been seriously contemplated.[26] The EC foreign policy based on a strict distinction between members and non-members was subsequently implemented through the Europe Agreements (EAs) addressing relations with CEECs and the Baltic States,[27] and the Partnership and Cooperation Agreements (PCAs)[28] regulating relations with NISs,[29] including the Russian Federation (RF).[30]

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and Eastern Europe: General Aspects, *in* M. Maresceau (Ed.), Enlarging the European Union. Relations between the EU and Central and Eastern Europe, 27 at 27-28 (1997). *See also*, C. Hillion, *Institutional Aspects of the Partnership between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine*, 37 CMLR 1211, at 1215 (2000).

[26] Hillion, *supra* note 13, at 403. *See also*, O. Antonenko & K. Pinnick, *The Enlarged EU and Russia: From Converging Interests to a Common Agenda*, *in* O. Antonenko & K. Pinnick (Eds.), Russia and the European Union: Prospects for a New Relationship, 1 at 1. (2005).

[27] *See e.g.*, K. Inglis, *The Europe Agreements Compared in the Light of their Pre-Accession Reorientation*, 37 CMLR 1173, at 1173 *et seq*. (2000).

[28] *See*, M. Maresceau, *On Association, Partnership, Pre-Accession and Accession*, *in* M. Maresceau (Ed.), Enlarging the European Union. Relations between the EU and Central and Eastern Europe, 3 at 12 (1997).

[29] *See*, 1998 Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine OJ 1998 L 49/3, *see also*, Council and Commission Decision 98/149 of 26 January 1998, OJ 1998 L 49/1; *See,* 1998 Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova OJ 1998 L 181/3, *see also*, Council and Commission Decision 98/401 of 28 May 1998, OJ 1998 L 181/1; *See*, 1999 Partnership and Cooperation Agreement between the European Communities and their Member States, on the one part, and the Republic of Armenia, of the other part OJ 1999 L 239/3, *see also*, Council and Commission Decision 1999/602 of 31 May 1999, OJ 1999 L 239/1; *See*, 1999 Partnership and Cooperation Agreement between the European Communities and their Member Stats, of the one part, and the Republic of Azerbaijan, of the other part OJ 1999 L 246/3, *see also*, Council and Commission Decision 99/614 of 31 May 1999, OJ 1999 L 246/1; *See*, 1999 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part OJ 1999 L 205/3, *see also*, Council and Commission Decision 99/515 of 31 May 1999, OJ 1999 L 205/1; *See,* 1999 Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan OJ 1999 L 196/3, *see also*, Council and Commission Decision 1999/490 of 12 May 1999, OJ 1999 L 196/1; *See*, 1999 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part OJ 1999 L 196/48, *see also*, Council and Commission Decision 1999/491 of 12 May 1999, OJ 1999 L 196/46; *See*, 1999 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part OJ 1999 L 229/3, *see also*, Council and Commission Decision 1999/593 of 31 May 1999, OJ 1999 L 229/1. *See e.g.*, on the Central Asian PCAs, B. Berdiyev, *The EU and Former Soviet Central Asia: An Analysis of the Partnership and Co-operation Agreements*, *in* P. Eeckhout & T. Trimidas (Eds.), 22 Yearbook of European Law 463, at 467 *et seq*. (2003).

[30] 1997 Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part OJ 1997 L 327/3 (EC-RF PCA), *See also*, Council and Commission Decision 97/800 of 30 October 1997, OJ 1997 L 327/1.

The negotiations on the EC-RF PCA had enthusiastically commenced with an optimistic intent to "[h]erald a new period … [i]n the political and economic domain" and "[o]pen a new phase in contractual relations" between the parties.[31] However, a strong insistence of the Russian delegation on a legal framework comparable with EA and continuous disagreement between the parties on the status of the Russian economy caused the negotiations stall until late 1993.[32] The compromise was found, when the RF agreed on a vague prospect of a free-trade area,[33] whereas EU recognised Russia as an economy in transition.[34] Thus, after almost two years of tough negotiations, the EC-RF PCA was finally concluded on 24 June 1994.[35] Unfortunately, European and national parliamentarians of some Member States (MSs) temporally suspended its ratification due to arguable violations of human rights in the Chechen Republic of the Russian Federation.[36] The European Commission had further condemned human rights violations by postponing its proposals for the decision of the Council of the European Union on the Interim Agreement (IA), which otherwise could speed up entry into force of trade and trade-related provisions of the PCA *via* exclusive Community action under the Common Commercial Policy (CCP).[37] The EU-RF relations remained "overshadowed by the events in Chechnya" until the Russian government met the ceasefire condition laid down by the EU *Troika,* as a prerequisite for EC-RF PCA ratification.[38] In the short aftermath of the commencement of the peace talks with Chechnyan 'boyeviks', the Council signed IA and the European and national parliaments had subsequently ratified the agreement by the end of 1997.[39]

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[31] Joint Press Release of 23 December 1992, *Negotiation of Partnership and Cooperation Agreement between the European Community and the Russian Federation*, Reference: IP/92/1129.

[32] F. Splidsboel-Hansen, *Trade and Peace: A Classic Retold in Russian*, 9 EFAR 303, at 311 (2004).

[33] *See*, Art. 3 EC-RF PCA, *supra* note 30.

[34] *See*, EC Press Release of 9 December 1993, *Joint Political Declaration on Partnership and Cooperation between the Russian Federation and the European Union,* Reference: IP/93/1102.

[35] Council and Commission Decision 97/800, *supra* note 30.

[36] J. Gower, *Russia and the European Union*, *in* M. Webber (Ed.), Russia and Europe: Conflict or Cooperation?, 66 at 74 (2000) *but cf*., H. Smith, *The Russian Federation and the European Union. The Shadow of Chechnya*, *in* D. Johnson & P. Robinson (Eds.), Perspectives on EU-Russia Relations, 110 at 113 (2005).

[37] EC Press Release of 5 July 1995, *Interim Agreement with Russia*, Reference: IP/95/696.

[38] In must be emphasised that among other conditions put forward by the EU were progress towards a political solution, unhindered access for humanitarian assistance and establishment of an OSCE assistance group in Chechnya. *See e.g*., EC Press Release of 31 May 1995, *The European Union and Russia: The Future Relations – A Strategy Design by the European Commission*, Reference: IP/95/533.

[39] 1996 Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Russian Federation, of the other part OJ 1996 L 247/2. *See also*, Commission Decision 95/415 of 4 October 1995, OJ 1995 L 247/30 and Council Decision 5/414 of 17 July 1995, OJ 1995 L 247/1.

III. Becoming Immediate Neighbours: The EU Eastwards Enlargement

An unpleasant trace of tensions over the long lasting ratification of the EC-RF PCA caused a splash of friendly policy talks on behalf of the EU institutions. Moreover, an emergence of the common border after 1995 Finish accession and an overall close proximity of the European integration system to Russia reinforced a common interest in developing bilateral relations with ever-greater intensity.[40] The European Commission urged for a consolidation of the political dialogue and facilitation of economic cooperation with the RF.[41] The Madrid European Council had also committed EU "[t]o establishing a substantial partnership with Russia in order to promote the democratic and economic reform process, to enhance the respect of human rights, and to consolidate peace, stability and security."[42] It stressed the necessity to encourage integration of Russia into the international economy through the development of trade and investment relations with a perspective of "[e]stablishment of a free trade area between the Community and Russia covering substantially all trade in goods", as well as creation of conditions "[f]or bringing about freedom of establishment of companies, of cross-border trade in services and of capital movement."[43] The Council of the European Union had later reflected those observations in the action plan, which urged fostering economic cooperation through supplementing bilateral agreements and regional cooperation.[44] Furthermore, a year after the entry into force of the EC-RF PCA, the European Parliament (EP) defined the EU-RF partnership aiming at developing of all-encompassing relations as a strategic priority of the EU foreign policy for the decade to come.[45]

However, *ad infinitum* acknowledgment of a friendly policy towards the RF aiming at avoiding new dividing lines was easily shattered by the EU continuous ignorance of an urging necessity to adjust its approach towards Russia in the light of the fifth round of EU enlargement, which unavoidable completion has been threatening with further consolidation of division in Europe. Indeed, EU external policy instruments addressing relations with the RF prior to the official launch

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40 H. Hubel, *The EU's Three-level Game in Dealing with Neighbours*, 9 EFAR 347, at 348 (2004) *but cf*., T. Bordachev, *Russia's European Problem: Eastwards Enlargement of the EU and Moscow's Policy, 1993-2003*, *in* O. Antonenko & K. Pinnick (Eds.), Russia and the European Union: Prospects for a New Relationship, 1 at 52-53 (2005).

41 *See*, Communication from the Commission of 31 May 1995, *The European Union and Russia: The Future Relationship,* COM/95/223 FINAL. *See also*, EC Press Release of 31 May 1995, *supra* note 38 and Speech by Hans van den Broek of 18 March 1996, *EU-Russia: A Challenging Partnership*, Reference: SPEECH/96/66.

42 Presidency Conclusions of the Madrid European Council of 15-16 December 1995. *European Union's Strategy for Future EU/Russia Relations*, Part B: Ann. 8. 1st indent. Available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/ 00400-C.EN5.htm.

43 *Id*., Part B: Ann. 8. 5th indent.

44 EU Bulletin No. 5, *European Union Action Plan for Russia.* 2.3.1. (1996). Available at http://europa.eu/bulletin/en/9605/p203001.htm *See also*, EC Press Release of 14 May 2007, *EU Action Plan for Russia*, Reference: IP/96/412.

45 EP Resolution of 2 April 1998, OJ 1988 C 138/166.

of the enlargement process fell short of making any reference to the EU pre-accession strategy towards CEECs and the Baltic States.[46] The EU enlargement was dogmatically presented by the Luxembourg European Council as "[a] pledge of future stability and prosperity" within and beyond the new borders of the Union.[47] Due to Moscow's initial indifference towards the EU enlargement, legitimate concerns lately raised by the RF had almost completely crushed into *fait accompli*. Despite the fact that the European Commission had finally acknowledged that EU enlargement required "[c]areful management in the Union's relations *with the other partners in Europe and beyond*",[48] EU completely failed to address various important issues, such as the Kaliningrad region[49] and the Schengen regime,[50] as well as arguably detrimental impact of the enlargement on the Russian cross-border trade with CEECs and the Baltic States.[51] Ironically, these problem issues have later become a key stumbling block on the road of negotiating extension of the EC-RF PCA to the new ten Member States of the enlarged Union.[52]

IV. Lacking Mutual Understanding: Two Strategies on a Common Future

Although a final ratification of the EC-RF PCA somehow lessened the tensions between the parties, an evident failure of the EU institutions to find effective policy solutions reanimating bilateral relations with Russia necessitated prompt actions on behalf of the Union. Thus, in order to strengthen fading cooperation with Russia, the Cologne European Council adopted EU common strategy aiming at reinforcement of the EU-RF partnership.[53] The Common Strategy on

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[46] M. Maresceau, *EU Enlargement and EU Common Strategies on Russia and Ukraine: An Ambiguous Yet Unavoidable Connection*, *in* C. Hillion (Ed.), EU Enlargement: A Legal Approach, 181 at 190. (2004).

[47] Presidency Conclusions by Luxembourg European Council of 12-13 December 1997. *Introduction*, 1st indent. Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/032a0008.htm.

[48] Communication from the Commission of 15 July 1997, *Agenda 2000. For a Stronger and Wider Union*, COM/97/2000 FINAL – Vol. I., at 8. (emphasis added).

[49] *See, e.g.,* E. Vinokurov, *Economic Prospects for Kaliningrad. Between EU Enlargement and Russia's Integration into the World Economy*, Centre for European Policy Studies, Working Paper No. 201, at 13-17 (2004). *See also*, Y. Borko, *Russia and the EU: The Kaliningrad Dilemma*, Centre for European Policy Studies, Policy Brief No. 15, at 1 *et seq*. (2002) and J. Baxendale, *EU-Russia Relations: Is 2001 a Turning Point for Kaliningrad?* 6 EFAR 437, at 437 *et seq*. (2001).

[50] *See, e.g.,* S. Prozorov, Understanding Conflict between Russia and the EU. The Limits of Integration 27-33 (2006).

[51] P. Sulama & M. Widgérn, *Economic Effects of Free Trade between the EU and Russia*, European Network of Economic Policy and Research Institutes. Working Paper No. 36, at 7-8 (2005) and A. Köves, *Perspectives for Economic Cooperation between Russia and the Countries of Central and Eastern Europe in the Light of the Enlargement of the European Union*, Discussion Papers No. 64, at 7 *et seq.* (2005).

[52] D. Lynch, *From 'Frontier' Politics to 'Border' Policies Between the EU and Russia*, *in* O. Antonenko & K. Pinnick (Eds.), Russia and the European Union: Prospects for a New Relationship, 1 at 20. (2005).

[53] Presidency Conclusions of the Cologne European Council of 3-4 June 1999. *Common Strategy*

Russia (CSR) was intended to demonstrate the great importance that EU attached to "Russia's inclusion in the process of European cooperation."[54] It welcomed "[R]ussia's return to its rightful place in the European family in a spirit of friendship, cooperation, fair accommodation of interests and on the foundations of shared values." The CSR acknowledged "[t]he future of Russia as an essential element in the future of the continent" free of new dividing lines. It strived for "a stable, open and pluralistic democracy in Russia […] underpinning a prosperous market economy" and encouraged intensive cooperation in "maintaining European stability, promoting global security and responding to the common challenges."[55] The CSR endorsed development of sound economic reforms, adoption of social market economy standards and implementation of a sustainable economic programme on "[e]nterprise restructuring, public finance, the banking system and 'corporate governance'."[56] The EU has reaffirmed its support of the RF efforts in meeting the requirements of World Trade Organisation (WTO) membership and envisaged future establishment of the EU-RF free trade area. However, besides CSR contribution to 'high-level policy-dialogue' on economic and energy issues, which generated "a forward momentum in a process of economic harmonisation and legal approximation," CSR ambitious rhetoric failed to come up to expectations.[57]

Although continuously emphasising that the EU-RF partnership is grounded in common heritage, shared values and mutual interests, the CSR nevertheless required a "full transformation of Russia" in a "heavy conditional and interventionist" way.[58] Due to substantial differences in EU and the RF visions of the 'strategic partnership', EU should hold consultations with the Russian representatives as regards common strategy on the far earlier stage, than it was actually done. Thus, CSR finally resulted in a purely EU unilateral exercise, which drafting and launching remained mostly unnoticed in Russia. The difference in views on the substance of the 'strategic partnership' became even more evident, when the RF presented the Middle-Term Strategy towards the European Union (MTS).[59] The MTS called for a 'strategic partnership' on an equal basis, reminding

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on Russia, paras. 78-79, at 26. Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/57886.pdf

54 H. Timmermann, *European-Russian Partnership: What Future?*, 5 EFAR 165, at 165 (2000).

55 1999/414/CFSP: Common Strategy of the European Union of 4 June 1999 on Russia, OJ 1999 L 157/1.

56 *Id*. Besides integration of the RF into a common European economic and social space, the CSR envisaged cooperation on other principal objectives, such as "[c]onsolidation of democracy, the rule of law and public institutions in Russia" and "[c]ooperation to strengthen stability and security in Europe and beyond."

57 H. Haukkala, *What Went Rights with the EU's Common Strategy on Russia*, *in* A. Moshes (Ed.), Rethinking the Respective Strategies on Russia and the European Union, 62 at 74-75 (2003). *See also*, on the weaknesses of the CSR, Maresceau, *supra* note 46, at 187-198, *but cf*., on supremacy of the CSR, C. Hillion, *Common Strategies and the Interface Between E.C. External Relations and the CFSP: Lessons of the Partnership Between the E.U. and Russia*, *in* A. Dashwood & C. Hillion (Eds.), The General Law of E.C. External Relations, 287 at 295-296 (2000).

58 Lynch, *supra* note 52, at 20.

59 The Russian Federation Middle Term Strategy towards the European Union (2000-2010)

EU of the RF as "[w]orld power situated on two continents," which remained free "[t]o determine and implement its domestic and foreign policies."[60] The RF allocated its strategy in a much broader context of cooperation on "[E]uropean and world problems" and achievement of "[c]ollective objectives of mutual interest."[61] Indeed, the MTS gravitated towards highlighting forms and methods of cooperation between EU and the RF on the international arena, rather than focusing on the RF internal reforms and challenges of the 1990s. Although admitting inevitability of bringing the RF domestic legislation in the line with EU and international standards, the MTS acknowledged that harmonisation and approximation with the EU norms would be implemented on a case-by-case basis "in anticipation of bringing advantages to Russia, rather than of simply expressing obligations of aspiring accession or association."[62] Thus, CSR central weaknesses further aggravated by the unquestionable differences in the vision of the 'strategic partnership' have further belittled modest achievements of the CSR in the field of easing the burden imposed upon the EC-RF PCA, as a current principal legal foundation of the EU-Russia bilateral relationship.[63]

C. The Partnership and Cooperation Agreement Between the European Communities and the Russian Federation

I. Introducing Mixity: Cross-Subunit Extension

The treaty-to-treaty progress in 'widening and deepening' collaboration between MSs has been articulating new fields of intra-Community cooperation on the international arena.[64] A successful realization of the Communities' potential of becoming a full-fledged international actor required a careful balancing of their interests with the legitimate concerns of the MSs and third countries.[65] The concept of mixity whereby one of the Communities jointly with the MSs participated as a contracting party in an international agreement with a non-member country was intended to ensure and preserve this balance of interests.[66] It has originally

(MTS). Available on the official site of the Delegation of the European Commission to Russia at http://www.delrus.ec.europa.eu/en/p_245.htm.

60 *See id.*, the 1st intend of para. 1.

61 *See id.*, the 2nd intend of para. 1.

62 D. Johnson & P. Robinson, *Editor's Introduction*, *in* D. Johnson & P. Robinson (Eds.), Perspectives on EU-Russia Relations, 1 at 8-9 (2005). *See also*, The Russian Federation Middle Term Strategy towards the European Union (2000-2010), paras. 9.1-9.4.

63 H. Haukkala, *Two Reluctant Regionalizers? The European Union and Russia in Europe's North*, 32 UPI Working Papers, at 6 (2001).

64 A. Rosas, *Mixed Union – Mixed Agreement*, *in* M. Koskenniemi (Ed.), International Law Aspects of the European Union, 125 at 125-126 (1998).

65 R. Leal-Arcas, *The European Community and Mixed Agreement*, 6 EFAR 483, at 483-484 (2001).

66 *See e.g.,* on the definition of mixed international agreements, D. McGoldrick, International Relations Law of the European Union 78 (1997). *See also*, N. Lavranos, Legal Interaction Between Decisions of International Organisations and European Law 27 (2004).

been only foreseen under Article 102 EAEC, which regulates entry into force of the "*agreements* […] *concluded with a third state*, an international organisation or a national of a third state *to which, in addition to the community, one or more Member States are parties*."[67] In its *Ruling 1/78*, the European Court of Justice (ECJ) has supported EAEC action in collaboration with MSs under Article 102 EAEC, when "[t]he subject-matter of an agreement or convention falls in part within the power and jurisdiction of the Community and in part within that of the Member States."[68] The ECJ has subsequently approved mixity as a suitable model for EEC as well.[69] In *Opinion 1/78*, the Court insisted on 'mixed procedure' in cases where financing required for the implementation of an international agreement "[c]onstituted an essential financial feature of the scheme [… and its] financing is to be by the Member States."[70] The Court has also approved mixity, when Community external competences are exercised through the medium of the MSs, as the conditions of participation in an international agreement exclude its conclusion by the Community itself.[71] In the *Demirel* case, the ECJ has approved mixity under the EEC-Turkey Association Agreement, thus expressly encouraging common efforts of the Community and MSs under the EEC pillar in the field of cooperation with third countries.[72] Indeed, mixed international agreements were gradually becoming a common feature of the growing *corpus* of the Communities' law of external relations.[73] Undoubtedly, mixity also had

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[67] 1957 Treaty Establishing the European Atomic Energy Community (1957) (EAEC). *See*, Art. 102 EAEC (emphasis added).

[68] Ruling of the Court of 14 November 1978, *Ruling 1/78* (Re Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports) [1978] ECR 02151, at para. 9.

[69] L. Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness, in* M. Koskenniemi (Ed.) International Law Aspects of the European Union, 255 at 256 (1998). *See also*, on the ECJ express reference to mixed agreement, Judgment of 30 September 1987 in *Case 12/86*, *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, at para. 9. *See*, Judgment of 5 November 2002 in *Case C-469/98*, *Commission of the European Communities v. République de Finlande* [2002] ECR I-09627, at para. 71. *See also*, Judgment of 19 March 2002 in *Case C-13/00*, *Commission of the European Communities v. Ireland* [2002] ECR I-02943, at paras. 14 & 20. *See further*, Judgment of the Grand Chamber of 30 May 2006 in *Case C-459/03*, *Commission of the European Communities v. Ireland* [2006] ECR I-04635, at paras. 84 & 86.

[70] Opinion of 4 October 1979, *Opinion 1/78* (Re International Agreement on Natural Rubber) [1979] ECR 2871, at para. 60.

[71] Opinion of 19 March 1993, *Opinion 2/91* (Re Convention Nº 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work) [1993] ECR I-01061, at paras. 2, 5 & 37. It must be emphasised that the conclusion of a mixed agreement is not always imposed by the complexity of the Community competence structure, financing or voting requirements or statutory limitations. Thus, the requests of the third states to have Member States participating alongside the Community in an international treaty have been accepted out of expediency. *See,* N. A. Neuwahl, *Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements*, 28 CMLR 717, at 717 (1991). *See also*, H. van Houtte, *International Law and Community Treaty-Making Power*, 3 Nw. J. Int'l L. & Bus. 621, at 634-635 (1981).

[72] *Case 12/86*, *Demirel*, *supra* note 69.

[73] Neuwahl, *supra* note 71, at 717.

its due influence on the variety of aspects of the EAEC/ECSC/EEC relations with the Russian Federation with utmost reflection accumulated in the nature and scope of cooperation envisaged under the EC-RF PCA.

II. Analysing the Basics: The EC-RF PCA Legal Basis

1. The Initial Legal Bases of the PCA

Due to the fact that ECT provides no specific legal basis for the conclusion of the partnership and cooperation agreements, the EC-RF PCA was originally based on a combination of Articles 133 and 308 ECT, which had previously been utilised for the conclusion of the EEC-USSR TCA.[74] Although similarly aiming at 'normalisation' of bilateral relations between the contracting parties, the EC-RF PCA contains more ambiguous objectives, encourages wider scope of cooperation and envisages broader range of commitments going far beyond economic field *stricto sensu*.[75] Furthermore, the PCA establishes a sophisticated 'three-level' institutional system ensuring collaboration between highest political authorities, parliamentarians and senior civil servants of each contracting party.[76] Despite obvious differences in nature and scope of cooperation envisaged under the 'entry level' TCA and 'transversal' PCA, the European Commission has initially considered that the legal basis used for the EEC-USSR TCA is sufficient for the conclusion of the EC-RF PCA.[77] However, the ECJ *Opinion 1/94* forced the European Commission to reassess the scope of its external competences and subsequently revise the legal bases of the EC-RF PCA in its joint decision with the Council on the conclusion of the agreement.[78]

2. The *Rationale* of ECJ *Opinion 1/94*

The ECJ has confirmed in its earlier case law that Article 133 ECT confers an exclusive external competence on the Community in the CCP matters.[79] However, the scope of the Community exclusive external competence remained "contested and varied over time."[80] In its *Opinion 1/94*, the Court disagreed with the broad interpretation of Article 133 ECT suggested by the European Commission, which argued that Article 133 ECT effectively covered all aspects of the WTO agreement

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74 Maresceau, *supra* note 29, at 12. *See also*, S. Peers, *EC Frameworks of International Relations: Co-operation, Partnership and Association*, *in* A. Dashwood & C. Hillion (Eds.), The General Law of E.C. External Relations, 160 at 164-165 (2000).

75 Hillion, *supra* note 25, at 1219.

76 *See*, Arts. 90, 92 & 96 EC-RF PCA, *supra* note 30.

77 Peers, *supra* note 74, at 164 (2000).

78 *See*, Council and Commission Decision 97/800, *supra* note 30.

79 Opinion of November 1975, *Opinion 1/75* (Re Draft Understanding on a Local Cost Standard Drawn Up under the Auspices of the OECD) [1975] ECR 1355, at 1363-1364.

80 M. Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 CMLR 91, at 95 (2005). *See also*, R. Leal-Arcas, *Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice?*, 30 LIEI 3, at 4 *et seq*. (2003) and K. Lenaerts & P. Van Nuffel, Constitutional Law of the European Union 828-829 (2005).

and its annexes. The Court has clarified that only trade in goods, including trade in EAEC, ECSC and agricultural products, falls exclusively within the competence of the Community, while GATS and TRIPs issues remain predominantly outside the scope of the Community exclusive external competence.[81] It has distinguished between different modes of supply of services indicating that only "[c]ross-frontier supplies not involving any movement of persons" is within the scope of the CCP, whereas services provided thought the presence of a natural person or commercial presence in the recipient's state or services requiring movement of a recipient to the provider's country remain outside of its scope.[82] The ECJ had also favoured a rather limited scope of the Community exclusive external competence as regards trade-related aspects of intellectual property, which only included "[t]he prohibition of the release into free circulation of counterfeit goods."[83]

In its *Opinion 1/94*, the ECJ has also addressed the second contention of the European Commission, namely that

> [t]he Commission's exclusive competence to conclude GATS and TRIPs flows *implicitly from the provisions of the Treaty* establishing its internal competence, or from the *existence of legislative acts of the institutions giving effect to that internal competence*, or else from *the need to enter into international commitments* with a view to achieving an internal Community objectives.[84]

It has clearly ruled out 'a concept of potential external competence' grounded in a wrongful presumption that the ECT provisions empowering the European Commission to adopt measures at the internal level also confer upon the Community external competence.[85] As regards application of the *AETR* doctrine,[86] the Court clarified that the MSs loose their "[r]ight to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being."[87] Thus, the Community implied external competence only arises, when the exercise of the internal competence leads to a complete harmonisation of rules at the internal level. Finally, the Court pronounced on the applicability of Article 308 ECT, which "[e]nabled the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of

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[81] Opinion of the Court of 15 November 1994, *Opinion 1/94* (Re Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property) [1994] ECR I-05267, at paras. 23-24 as regards Euratom products; at paras. 25-27 as regards ECSC products, and at paras. 28-31 as regards agricultural products.

[82] *Id.*, in particular Rec. 44 of the opinion. Thus, CCP covers the 1st mode of trade in services under Art. 1 GATS classification. The 1st mode covers the supply of a service from the territory of one Member into the territory of any other Member.

[83] *Id.*, in particular Rec. 55 of the opinion.

[84] *Id.*, in particular Rec. 72 of the opinion (emphasis added). *See*, on issues of MSs competences under GATS and TRIPs, comment by Rosas, *supra* note 64, at 132.

[85] *Opinion 1/94*, in particular Recs. 74-75 of the opinion. *See also*, M. Hilf, *The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise? –,* 6 EJIL 1, at 10 (1995).

[86] *See*, Opinion of 26 April 1977, *Opinion 1/76* (Re Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741. *See also*, on the *AETR* doctrine, P. Eeckhout, External Relations of the European Union. Legal and Constitutional Foundations 58-100 (2005).

[87] *Opinion 1/94*, in particular Rec. 77 of the opinion.

its objectives." In its brief remark, the ECJ provided that Article 308 ECT could not "[i]n itself vest exclusive competence in the Community at international level"[88] due to its subsidiary status in the ECT institutional system.[89]

3. The Evolution of the PCA Legal Basis

Following the observations presented by the ECJ in *Opinion 1/94*, the European Commission has supplemented the 'original' legal basis of the EC-RF PCA with the ECT provisions governing issues falling outside the scope of Articles 133 and 308 ECT.[90] Nevertheless, Article 133 ECT remained at heart of the PCA legal basis covering provisions on trade in goods and cross-border supply of services. Despite the fact that ECSC and EAEC products fall within the scope of the Community exclusive external competence, Articles 95 ECSC and 101 EAEC were added to the list of the ECT provisions constituting PCA legal bases to back up non-trade aspects of the ECSC and EAEC matters covered by the PCA. Article 44(2) ECT on liberalisation of requirements for the establishment of companies and Article 47(2) ECT on facilitation of taking and pursuit of activities by self-employed persons were added to endorse the PCA provisions encapsulating commitments going beyond trade policy issues.[91] Due to specific commitments on limited liberalisation of investments, the PCA legal bases was further enhanced by Article 57(2) ECT on measures related to the movement of capital to or from third countries.[92] The PCA provisions effecting "the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges

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[88] *Id.*, in particular Rec. 89 of the opinion.

[89] *See e.g.*, J. Heliskoski, Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States 31 (2001). *See also*, Judgment of 26 March 1987 in *Case 45/86*, *Commission of the European Communities v. Council of the European Communities (Commission v Council)* [1987] ECR 1493, at para. 13. It must be emphasised that the ECJ has later elaborated on Art. 308 ECT in greater details. In its *Opinion 2/94*, the Court provided that Art. 308 ECT

> [b]eing an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Art. 308 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.

See, Opinion of the Court of 28 March 1996, *Opinion 2/94* (Re Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECR I-01759, at para. 30.

[90] It must be emphasised that the EC-RF PCA legal bases also contain Art. 300 (2) and (3) on the assent procedure. Its inclusion indicates an increasing political weight attached to the role of the European Parliament in context of EC/EU external relations. *See e.g.*, C. Hillion, *Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union*, 3 EFAR 399, at 405 (1998).

[91] 1992 Treaty establishing the European Community (ECT) OJ 1992 C 224/6. *See*, Arts. 44(2) & 47(2).

[92] Peers, *supra* note 74, at 172.

of shares concerning companies of different Member States" and "the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States" based on Article 94 ECT also required its enclosure into the PCA legal bases.[93] The PCA provisions imposing obligations as regards liberalisation of inland waterways and application of market access principles to maritime transport necessitated inclusion into the PCA legal bases of Article 71 ECT on rail, road and inland waterway transport and Article 80(2) ECT on air and sea transport matters.[94] Finally, Article 308 ECT was maintained to supplement remaining PCA provisions falling short of specific obligations,[95] including those going beyond Community framework *stricto sensu.*[96]

4. The 'Cross-Pillar' Dimension of the PCA

a) An all-encompassing system of the EU international representation

Indeed, the European Union (EU) was gradually becoming "a hybrid conglomerate situated somewhere between a State and an international organisation" with a wide variety of issues falling within the scope of its foreign policy interests.[97] The Treaty on European Union (TEU) was intended to complement Community efforts on assertion of its international identity with common foreign and security policy (CFSP) dimension.[98] However, lack of treaty-making power forced EU to rely on the Communities and MSs in pursuit of implementing CFSP objectives.[99] Furthermore, a growing recognition of the interrelationship between the political, security and economic issues necessitated a 'cross-pillar' fusion of Community and non-Community sub-orders into a solid system of foreign policy instruments aiming at effective representation of the EU on the international arena.[100] In that regards, the EC-RF PCA is offering a telling illustration of a 'tripartite cooperation' between the EU operating on the basis of Title v. and Title VI TEU, the Community acting under ECT and the Member States exercising their sovereign powers.[101]

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[93] Council and Commission Decision 97/800, *supra* note 30. *See also*, Art. 94 ECT, OJ 1992 C 224/1.

[94] *See*, Arts. 71 & 80(2) ECT, *supra* note 91.

[95] Peers, *supra* note 74, at 174.

[96] Hillion, *supra* note 75, at 1219.

[97] Rosas, *supra* note 64, at 125.

[98] 1992 Treaty on European Union, OJ 1992 C 191/1. *See,* Art. B, which provides as follows:

> [a]ssert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy.

[99] M. Cremona, *The European Union as an International Actor: The Issue of Flexibility and Linkage*, 3 EFAR 67, at. 67-69 (1998).

[100] *Id*., at 71.

[101] C. Hillion, The Evolving System of European Union External Relations as Evidenced in the EU Partnerships with Russia and Ukraine, Doctoral thesis on file at Leiden University, Faculty of Law, at 10 (2005).

b) The 'cross-pillar' provisions of the PCA

The EC-RF PCA preamble encourages cooperation between the parties within the framework of the United Nations (UN) and the Conference on Security and Cooperation in Europe (CSCE) for the sake of international peace and security and the peaceful settlement of disputes.[102] It also underlines a firm commitment of the contracting parties to the full implementation of all principles and provisions contained in the Final Act of the CSCE and other documents of the CSCE dimension.[103] Although being fairly evident, the CFSP objectives were not reflected in the PCA legal bases due to the lack of any particular TEU provision endowing the Council with the power to enter into international commitments on the CFSP matters at the time, when the PCA was concluded.[104] Furthermore, a mere presence of the CFSP or JHA provisions in the agreement does not automatically necessitate their reflection in the legal bases, as it has been indicated by the ECJ in the *Portugal v. Council* case.[105] Indeed, the EC-RF PCA provisions inspired by the Title VI of the TEU on JHA matters, in particular Article 81 PCA on money laundering, Article 82 PCA on drugs trafficking and Article 84 PCA on prevention of illegal activities[106] did not require reference to a specific legal basis for the following reasons.[107] Article 81 PCA amounts to a classic 'declaration of intent'[108] aiming at prevention of "[l]aundering of proceeds from criminal activities in general and drugs offences in particular."[109] Article 82 PCA obliges the contracting parties to "[c]ooperate in increasing the effectiveness and efficiency of policies and measures to counter the illicit production, supply and traffic of narcotic drugs and psychotropic substances."[110] Article 84 PCA on prevention of an illegal immigration, corruption and illegal transactions of various goods foresees cooperation on the basis of "[m]utual consultations and close interaction."[111] Although admitting ambiguous rhetoric of these provisions, Articles 81, 82 and 84 PCA fall short of imposing 'extensive obligations' on the contracting parties capable of altering the characterisation of the agreement[112]

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[102] *See*, the 4th indent of the EC-RF PCA preamble, *supra* note 30.

[103] *See,* the 5th indent of the EC-RF PCA preamble, *supra* note 30.

[104] Hillion, *supra* note 75, at 1219.

[105] Judgment of 3 December 1996 in *C-268/94*, *Portuguese Republic v. Council of the European Union* (*Portugal v. Council)* [1996] ECR I-06177. *See also*, *Opinion 1/78*, *supra* note, para. 56.

[106] *See*, Arts. 81, 82 and 84 EC-RF PCA, *supra* note 30.

[107] Hillion, *supra* note 101, at 64.

[108] *C-268/94*, *Portugal v. Council*, *supra* note 105, in particular Rec. 62 of the judgment.

[109] *See*, Art. 81 EC-RF PCA, *supra* note 30.

[110] *See id.*, Art. 82.

[111] *See id.*, Art. 84.

[112] It must be emphasised that in the *Portuguese Republic v. Council of the European Union* case, the ECJ has indicated that

> the fact that […] agreement *contains clauses concerning various matters cannot alter the characterisation of the agreement* which must be determined having regard to its essential object and not in terms of individual clauses, *provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of* […] *agreement*.

within the meaning of the *Portugal v. Council* case and therefore "[r]emains within limits which do not necessitate recourse to a competence and to a [specific] legal basis."[113] Article 308 ECT constitutes a sufficient legal basis for the inclusion into the PCA of the aforementioned forms of cooperation based on the CFSP and JHA objectives. Consequently, the overall analysis of the PCA legal bases demonstrates that the sole cause of the mixity under the PCA is grounded in the issue of delimitation of external competences between the Community and its MSs under the EC pillar.

III. Delimiting Competences Under the PCA: Division of Indivisible

1. The Classification of Competences Under the PCA

The EC-RF PCA constitutes a mixed Community agreement concluded under the EC exclusive external competences on the CCP matters and competences shared between the Community and the MSs covering the remaining parts of the agreement.[114] Although shared competences initially presuppose some division of the rights and obligations between the Community and the MSs, this division is 'inextricably confused' in a case of the PCA due to 'concurrent' nature of the shared competences.[115] Generally, the main cause of concurrency is non-exclusive external Community competence derived from the respective provisions of the ECT.[116] However, the Community external competence may "rest at least partly" on non-exclusivity even after specific competence has been exercised on the internal level within the meaning of *AETR* doctrine,[117] if the common rules adopted on the internal level amount to 'minimum' rules[118] or cover 'distinct areas' regulated by the international agreement.[119] The shared 'concurrent' competences are clearly evident in the case of the EC-RF PCA, as 'common internal rules' only partially cover the areas of cooperation envisaged under the agreement. The shared 'concurrent' competences imply that the provisions of the PCA falling

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Therefore,

> the mere inclusion of provisions for cooperation in specific fields does not […] predetermine *the allocation of spheres of competence between the Community and the Member States* or *the legal basis of Community acts for implementing cooperation in such field*.

See, *C-268/94*, *Portugal v. Council*, *supra* note 105, in particular Recs. 39 & 47 of the judgment (emphasis added).

[113] *See*, *C-268/94*, *Portugal v. Council*, *supra* note 105, in particular Recs. 61 & 68 of the judgment.

[114] C. Hillion, *Introduction to the Partnership and Cooperation Agreements*, *in* A. E. Kellermann, J. W. de Zwaan & J. Czuczai (Eds.), EU Enlargement. The Constitutional Impact at the EU and National Level, 215 at 218 (2001).

[115] P. Allott, *Adherence and Withdrawal from Mixed Agreements*, *in* D. O'Keeffe & H. Schermers (Eds.), Mixed Agreements, 97 at 118 (1983).

[116] 2006 Consolidated Version of the Treaty Establishing the European Community, OJ 2006 C 321 E/37. *See e.g.*, Arts. 111(5), 174(4) & 181.

[117] Rosas, *supra* note 64, at 131.

[118] *See e.g.*, *Opinion 2/91*, *supra* note 71.

[119] *See e.g.*, *Opinion 1/94*, *supra* note 81.

within their scope constitute an indivisible 'whole or totality'.[120] Accordingly, a firm delimitation of rights and obligations between the Community and the MSs as regards negotiation, conclusion and subsequent implementation of the aforementioned PCA provisions is extremely difficult, if not impossible.[121]

2. The Duty of Loyal Cooperation

The ECJ has always been reluctant to clear-cut allocation of competences between the Community and the MSs.[122] In its *Ruling 1/78*, the Court has pragmatically emphasised that "[i]t is not necessary to set out and determine […] the division of powers […] between the Community and the Member States, *particularly as it may change in the course of time*."[123] Thus, besides practical feasibility and political expediency, the tendency of the Community case law towards providing a merely open-ended account of the competences also reflects "the structural principles which govern the attribution of legal authority as between the Member States and the Community."[124] Indeed, the *AETR* doctrine gradually evolutionizes the relationship between the Community and the MSs through broadening the scope of the Community exclusive external competence by means of its extension to the fields, where full harmonisation of legal rules has been achieved at the internal level. Moreover, the relevant "changes of outlook in international relations" leading to the modification of external objectives enshrined in the EC/EU treaties further predetermine the 'unstatic' nature of the relations between the Community and MSs as regards delimitation of external competences.[125] Thus, for instance, in its *Opinion 1/78*, the ECJ had emphasised that an interpretation restricting CCP "[t]o the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms" threatens with "[d]isturbances in intra-community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries."[126] Indeed, an *ex ante* definition of the respective spheres of competences would be rather counter-productive for the dynamically developing system of the EU external relations.[127]

Instead of a strict allocation of competences, the Court has continuously called for a close cooperation between the Community and its MSs.[128] In its *Ruling 1/78*, the ECJ referred to the concept of loyalty enshrined in Article 192 EAEC,[129] thus stressing a necessity of "[a] *close association* between the institutions of

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120 R. Leal-Arcas, *The European Community and Mixed Agreements*, 6 EFAR 483, at 490 (2001).
121 Heliskoski, *supra* note 89, at 50.
122 I. Macleod, I. D. Hendry & S. Hyett, The External Relations of the European Communities 145 (1996).
123 *Ruling 1/78*, *supra* note 68, in particular Rec. 35 of the ruling (emphasis added).
124 Heliskoski, *supra* note 89, at 50.
125 *Case 45/86*, *Commission v. Council*, *supra* note 89, para. 19.
126 *Opinion 1/78*, *supra* note 70, in particular Recs. 44-45 of the opinion.
127 Heliskoski, *supra* note 89, at 50.
128 Macleod, Hendry & Hyett, *supra* note 122, at 145.
129 *See*, EAEC, *supra* note 67, art. 192. *See also*, ECT, *supra* note 91, art. 5 and 1957 Treaty Establishing the European Coal and Steel Community (ECSC), art. 86.

the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into" under the international agreement.[130] The ECJ has suggested a coherent approach, where the Community and MSs negotiate, conclude and implement provisions falling within their respective competences, while the Council of the European Union ensures coordination of their actions. The Court has expressly acknowledged "[t]he necessity for harmony between international action by the Community and the distribution of jurisdiction and powers within the Community."[131] In *Opinion 2/91*, the ECJ has referred to the 'duty of cooperation' steaming under the ECT from "[t]he requirement of unity in the international representation of the Community."[132] Moreover, the Court has reaffirmed an imperative role of the 'duty of cooperation' in the context of the mixed agreements similar in nature with EC-RF PCA, where the allocation of rights and obligations between the Community and its MSs is 'inextricably interlinked'.[133] It emphasised that when "[t]he subject-matter of an agreement […] falls in part within the competence of the Community and in part within that of the Member States, it is essential *to ensure close cooperation* between the Member States and the Community institutions."[134] Thus, the ECJ has continuously relied on the duty of cooperation to overcome the complexities of the EC constitutional structure as regards delimitation of external competences between the Community and the MSs. It appears that the same strategy has also been utilized by the ECJ in the context of the overwhelming debates as regards scope of its interpretive jurisdiction over the provisions of mixed international agreements.

D. The Scope of the Community Courts' Interpretive Jurisdiction as Regards Provisions of Mixed International Agreements

I. Determining the Scope of the Interpretive Jurisdiction: Article 234 ECT

1. The Foundational *Haegeman* Judgement

In the foundational *Haegeman* judgement,[135] the ECJ has confirmed its jurisdiction under Article 234 ECT to interpret provisions of the EEC-Greece Association Agreement, which has been concluded on behalf of the Community under the procedure laid down by Article 300 ECT.[136] The Court has referred to the

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130 *Ruling 1/78*, *supra* note 68, in particular Rec. 34 of the ruling.
131 *Id.,* in particular Rec. 36 of the ruling.
132 *Opinion 2/91*, *supra* note 71, in particular Rec. 36 of the opinion.
133 *Opinion 1/94*, *supra* note 81, in particular Rec. 106 of the opinion.
134 *Id.*, in particular Rec. 108 of the opinion.
135 Judgment of 30 April 1974 in *Case 181-73*, *R. & V. Haegeman v. Belgian State* [1974] ERC 449.
136 A. Dashwood, *Preliminary Rulings on the Interpretation of Mixed Agreements, in* D. O'Keeffe

agreement as "[a]n act of one of the institutions of the Community" constituting "[a]n integral part of Community law" within the meaning of Article 234(1)(b) ECT.[137] Thus, the ECJ has acknowledged its jurisdiction within the framework of the Community law "[t]o give preliminary ruling concerning the interpretation of this agreement."[138] Although being heavily criticised for the assumption of the interpretive jurisdiction,[139] the Court reinforced and extended this approach to other types of Community international agreements in the subsequent line of cases.[140] Thus, in the *Kupferberg* judgment, the ECJ has emphasised a dual nature of the MSs' obligations under the EEC-Portugal Free Trade Agreement (FTA). The MSs have been found obliged to ensure respect for the commitments under the agreement "[n]ot only in relation to the non-member country concerned but also and *above all* in relation to the Community which has assumed responsibility for the due performance of the agreement."[141] The Court called for a uniform interpretation of the provisions of the international agreement concluded by the Community, as their effect "[m]ay not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States."[142]

2. The Irrelevance of the *Demirel* Case

Although addressing mixed agreements *per se* earlier,[143] the ECJ has for the first time faced an argument challenging its interpretive jurisdiction on the grounds of mixity only in the *Demirel* case.[144] A wife of a Turkish migrant worker relied on Article 12 EEC-Turkey Association Agreement and Article 36 of the Additional Protocol in pursuit of challenging an order issued by the German authorities requiring her to leave the country. The Germany and United Kingdom governments argued that the Court had no jurisdiction to interpret provisions, which gave rise to the legal commitments undertaken through the exercise of

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& A. Bavasso (Eds.), Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley, Vol. I, 167 at 167 (2000).

137 *Case 181-73*, *Haegeman*, *supra* note 135, in particular Recs. 4 & 5 of the judgment.

138 *Id.*, in particular Rec. 6 of the judgement.

139 *See e.g.,* critical comments starting with T. C. Hartley, *International Agreements and the Community Legal System: Some Recent Developments*, ELR 383, at 390-391 (1983). *Cf.* P. Eeckhout, External Relations of the European Union. Legal and Constitutional Foundations 234 (2005).

140 *See e.g.*, Judgment of 9 February 1982 in *Case 270/80*, *Polydor Limited and RSO Records Inc. v. Harlequin Records Shops Limited and Simons Records Limited (Polydor Limited)* [1982] ECR 329; Judgment of 26 October 1982 in *Case 104/81*, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A. (Kupferberg)* [1982] ECR 3641; *Case 12/86*, *Demirel*, *supra* note 69. *See also*, on the issue of what constitute an integral part of the Community law comments by J. H. J. Bourgeois, *The European Court of Justice and the WTO: Problems and Challenges*, *in* J. H. H. Weiler (Ed.), The EU, the WTO and the NAFTA: Towards a Common Law of International Trade, 71 at 94-97 (2000).

141 *Case 104/81*, *(Kupferberg)*, *supra* note 140, para. 13 (emphasis added).

142 *Id.*, in particular Rec. 14 of the judgment.

143 *See e.g.*, Judgment of 24 November 1977 in *Case 65/77*, *Jean Razanatsimba* [1977] ECR 2229.

144 *Case 12/86*, *Demirel*, *supra* note 69.

MSs' powers.[145] The Court however favoured much wider interpretation of Article 310 ECT, thus refusing to address the observations submitted by the MSs due to their irrelevance.[146] According to the ECJ, Article 310 EC Treaty empowers the Community to enter into association agreements creating special "[p]rivileged links with a non-member country which must, at least to a certain extent, take part in the Community system."[147] Therefore, the Community is allowed to undertake specific commitments towards associated countries in all fields covered by the Treaty, including free movement of workers. Thus, the Court concluded that the legal commitments under consideration in the main proceedings were not ones "[w]hich *only* the Member States could enter into in the sphere of their own powers."[148] The ECJ had controversially ignored an assumption that an overall availability of the Community powers did not in itself rule out the possibility that the MSs had nevertheless undertaken the aforementioned commitments themselves.[149] Thus, the Court has accepted interpretive jurisdiction on a sole ground of its presumption that the aforementioned provisions were concluded under the Community powers foreseen under Article 310 ECT.[150] Accordingly, the *Demirel* judgement hardly sheds any light on whether the ECJ interpretive jurisdiction extends to the provisions of the international agreement, which have been concluded by the MSs' under the shared competences.[151]

3. The Concept of 'Dually Applicable' Provisions under the *Hermès* Case

Fortunately, the issue on the scope of the ECJ interpretive jurisdiction as regards provisions of mixed international agreements has been brought up again before the Court by the Dutch district court under the preliminary reference on the

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[145] *Id.*, in particular Rec. 8 of the judgment.

[146] *See e.g.*, R. Leal-Arcas, *The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court's Problems with Regards to International Agreements*, 72 NJIL 215, at 229 (2003).

[147] *Case 12/86*, *Demirel*, *supra* note 69, in particular Rec. 9 of the judgment.

[148] *Id*. (emphasised added). It must be emphasised that the *Demirel* case implies that the ECJ interpretive jurisdiction does not cover the provisions falling within the exclusive competence of the MSs. However, these limitations on the Court's interpretive jurisdiction are only relevant in a case of a mixed agreement with coexistent competences. Thus, the implications of the *Demirel* case do not effect the scope of the ECJ jurisdiction as regards interpretation of EC-RF PCA, which contain no provisions falling within the exclusive competence of the MSs. *See e.g.,* M. T. Karayigit, *Why and To What Extent a Common Interpretive Position for Mixed Agreements?*, 11 EFAR 445, at 448-450 (2006).

[149] Dashwood, *supra* note 136, at 170.

[150] P. Koutrakos, *The Interpretation of Mixed Agreements under the Preliminary Reference Procedure*, 7 EFAR 25, at 32-33 (2002). *See also*, further discussed, Advocate General Cosmas in *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 (Christian Dior)* [2000] ECR I-11307, at para. 40. *Cf.* further discussed, Advocate General Tesauro in *Case C-53/96*, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV. (Hermès International)* [1998] ECR 3603, at para. 18.

[151] J. Heliskoski, *The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements*, 69 NJIL 395, at 400-401 (2000).

interpretation of Article 50 TRIPs. In the *Hermès* case, the Netherlands, French and United Kingdom governments have challenged the ECJ interpretive jurisdiction by relying on *Opinion 1/94*, which implies that

> [m]easures […] to secure the effective protection of intellectual property rights […] essentially fall within the competence of the Member States […] [as] the Community had not exercised its internal competence in this area apart from […] measures to prohibit the release for free circulation of counterfeit goods.[152]

Accordingly, MSs have contended that the Court lacks jurisdiction to interpret Article 50 TRIPs due to the fact that it falls outside the scope of the Community law almost in its entirety. Contrary to the observations submitted by the MSs' governments, the European Commission argued that "[t]here was no absolute parallelism between the Community's competence to conclude act and the interpretive jurisdiction of the Court." It insisted on a uniform interpretation based on the same criteria of all the provisions of the WTO agreement and its annexes to avoid "the risk of diverging interpretations by the Court and the national courts on questions of major importance."[153]

Advocate General Tesauro went further along the lines of a liberal interpretation of the *Demirel* case suggesting that "the Court itself considers that the only matters on which it had no interpretive jurisdiction pursuant to Article [234] are matters within the exclusive competence of the Member States." He assumed that the aforementioned considerations should not be confined solely to the association agreements, thus expressly favouring the same approach as regards other mixed agreements, including those having no *ad hoc* legal basis in the ECT.[154] Thus, according to Tesauro's observations, the totality of the EC-RF PCA provisions should fall within the scope of the ECJ interpretive jurisdiction under Article 234 ECT. Although being highly controversial, Tesauro's interpretation of the *Demirel* case is nevertheless fairly reasonable in its outcome. Indeed, if the Court limits its interpretive jurisdiction to the provisions of international agreements falling within the scope of the Community competence, it will automatically get into a mess with competence allocation that it has vigorously tried to escape with the duty of cooperation. According to the Advocate General, an extension of the ECJ interpretive jurisdiction to the provisions falling within the scope of the shared competences was also justified by the fundamental necessity of a uniform approach in interpretation of the WTO agreements. Indeed, differentiated interpretations of provisions of the international agreements by the national courts of the MSs, which would negatively "[a]ffect the application of Community provisions and/or the functioning of the system as a whole." Moreover, Tesauro emphasised "[t]he Community interest in not being obliged to assume responsibility" *vis-à-vis* other contracting parties for infringement committed by one or more MSs could only be ensured by means of "[u]niformity in the interpretation and application of the provisions of the agreement in question throughout the Community."[155]

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[152] *Case C-53/96*, *Hermès International*, *supra* note 150, para. 23.
[153] Advocate General Tesauro in *id.*, para. 16.
[154] *Id.*, at para. 18.
[155] *Id.*, at para. 20.

The Advocate General has further referred to the requirement of unity in the international representation of the Community that extends to the negotiation, conclusion and subsequent implementation of the commitments entered into. Undoubtedly, lack of a centralised interpretation would negate "[t]he results achieved by the obligation to cooperate in the negotiation and conclusion of the provisions in question."[156]

Although taking into account Tesauro's observations, the ECJ has additionally brought in some other grounds justifying extension of its interpretive jurisdiction to the *Hermès* type situations. First, it referred to the fact that "[t]he WTO Agreement was concluded by the Community and ratified by the Member States without any allocation between them of their respective obligations towards the other contracting parties."[157] However, lack of a clear allocation of competences was a rather awkward *pro* argument, which could be relied on with the same degree of success to reach the opposite conclusion.[158] Secondly, the ECJ pointed out that prior to the signature of the Final Act and the WTO Agreement, the Community had already adopted Regulation 40/94 on the Community trademark.[159] The Court subsequently proceeded with identifying the relations between Article 50 TRIPs and Article 99 of the Regulation 40/94. Article 50(1) TRIPs requires the judicial authorities of the contracting parties to be authorised to order "[p]rompt and effective provisional measures" to protect the interests of proprietors of trademark rights conferred under the laws of those parties.[160] Article 99 of the Council Regulation 40/94 similarly provides that rights of the Community trademark may be safeguarded by the adoption of "[p]rovisional, including protective, measures."[161] Subsequently, the ECJ has correctly pointed out that when national courts are "[c]alled upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under the 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" because the Community is also a party to the TRIPs Agreement.[162] The aforementioned interconnection 'in

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[156] *Id.*, at para. 21.

[157] *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 24 of the judgment.

[158] A. F. Gagliardi, *The Rights of Individuals to Invoke the Provisions of Mixed Agreements before the National Courts: A New Message from Luxembourg*, ELR 276, at 285 (1999).

[159] *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 27 of the judgment.

[160] 1994 Marrakech Agreement Establishing the World Trade Organisation (1994). Ann. 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights. Art. 50 TRIPs provides as follows: "The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring."

[161] Council Regulation 40/94, OJ 1994 L 11/1. Art. 99 of the Council Regulation 40/94 provides as follows:

> Application may be made to the courts of a Member State, including Community trade mark courts, for such provisional, including protective, measures in respect of a Community trade mark or Community trade mark application as may be available under the law of that State in respect of a national trade mark, even if, under this Regulation, a Community trade mark court of another Member State has jurisdiction as to the substance of the matter.

[162] *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 28 of the judgment.

any event' established ECJ jurisdiction to interpret Article 50 TRIPs, irrespective of whether or not Article 50 TRIPs was concluded under the Community or MSs' powers. However, bearing in mind contentions submitted by the MSs as regards irrelevance of Article 99 of Regulation 40/94 in the light of the fact that the subject matter of the case at issue was Benelux, rather than Community trademark, the ECJ continued that "[i]t is solely for the national court hearing the dispute […] to assess the need for a preliminary ruling so as to enable it to give its judgement."[163] The aforementioned observation is rather 'a hint of circularity', since the issue referred to the ECJ by the national court was precisely concerned with whether the ECJ is competent to interpret Article 50 TRIPs.[164] Subsequently, the Court continued stating that

> [w]here a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.[165]

Thus, the *rationale* in *Hermès* was that "Article 50 TRIPs affected, in the meaning of the *AETR* judgment, Article 99 of Regulation 40/94, as it concerned the same subject matter," namely adoption of provisional measures for the protection of rights under the trademark.[166] Indeed, if the ECJ declined jurisdiction, the national courts of the MSs would be able to develop their own interpretation of Article 50 TRIPs, which on the later stage could conflict with the interpretation adopted by the Community courts.[167] Accordingly, in the present case, the Court has confirmed its interpretive jurisdiction under Article 234 ECT in situations "where one and the same provision […] might apply to both areas of Community and Member State competences […] irrespective of whether the dispute in the main proceedings concerned a matter within the competence of the Member States."[168] Consequently, the *Hermès* judgement hardly goes beyond previous Community case law on international agreements, as it falls short of definitely resolving the question on whether or not the ECJ is entitled to 'all-encompassing' jurisdiction to interpret provisions concluded under shared competences.[169]

4. The Reinforcement of *Hermès* in the *Christian Dior* Case

An issue on whether the ECJ interpretive jurisdiction under Article 234 ECT covers all provisions concluded under shared competences has been once

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163 *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 31 of the judgment.
164 Dashwood, *supra* note 136, at 173.
165 *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 32 of the judgment.
166 Heliskoski, *supra* note 151, at 405. It must be emphasised that if the *rationale* of *Hermès International* was that Regulation 40/94 had been enacted in the field, it would overrule implicitly the ECJ *Opinion 1/94*. *See e.g.*, Gagliardi, *supra* note 158, at 285-287. *Cf*., on interpretation of the *Hermès International* case Dashwood, *supra* note 136, at 173-174 (2000).
167 Eeckhout, *supra* note 86, at 240 (2005).
168 Heliskoski, *supra* note 156, at 405.
169 *See e.g.*, Karayigit, *supra* note 148, at 451.

again brought before the ECJ *via* a joint preliminary reference from the Dutch courts facing a dispute on the interpretation of Article 50 TRIPs. The essence of the question was whether the jurisdiction of the Court to interpret Article 50 TRIPs extends to the provisions other than 'provisional measures' preventing infringement of trademark rights.[170] Advocate General Cosmas insisted on a restrictive interpretation of the *Hermès* judgment articulating two prerequisites required for the ECJ interpretive jurisdiction over the provisions concluded under the MSs' powers, namely a 'dual applicability' of the provision to both areas of Community and MSs' competences and a 'substantial link' between the respective spheres of Community and national law.[171] The Advocate General considered that only if both of the aforementioned conditions are met, the *Hermès* case confers on the ECJ an interpretive jurisdiction over the provisions of mixed agreements belonging to the area of shared competences exercised by the MSs'.[172]

According to the opinion of Advocate General Cosmas, the Court should have no interpretive jurisdiction in *Christian Dior*, as no 'substantial link' could be established between the Community and national legal orders as regards protection of the industrial design. Subsequently, an extension of the ECJ interpretive jurisdiction to the provisions at issue in the main proceedings would cause an undue interference with the institutional balance within the Community. The Advocate General insisted on the ECJ placing no constraints by means of interpretation "[o]n the future harmonisation of the fields in question, when the (potential) competence to give opinions and make decisions in respect of that harmonisation belongs to other Community institutions."[173] Although accepting legitimacy of the ECJ law-creating role by means of judicial review of the Community secondary legislation, Cosmas admitted that its exercise prior to any legislative measures being adopted could lead to an unjustified interference within the constitutional domain of other Community institutions. Indeed, in the light of the legal 'bindingness' of the ECJ interpretations, an extension of the Court's interpretive jurisdiction to the TRIPs provisions, relating to the areas where Community competence had not yet been exercised, might be considered as substituting the Court's powers for the competence of the Community legislature.[174]

Cosmas has subsequently proceeded addressing an argument continuously raised by the European Commission in favour of extending the ECJ interpretive jurisdiction, namely an overall necessity of a uniform interpretation of the provisions of the international agreements within the Community legal order. Cosmas has first pointed out that "[t]he legal system created by the WTO agreements does not yet appear to reflect completely the idea of a uniform and settled interpretation and

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[170] Advocate General Cosmas in *Joined Cases C-300/98 and C-392/98*, *Christian Dior*, *supra* note 150, para. 31.
[171] Heliskoski, *supra* note 156, at 407.
[172] *Id. See also*, *C-53/96*, *Hermès International*, *supra* note 150, in particular Rec. 28 of the judgment.
[173] Advocate General Cosmas in *Joined Cases C-300/98* and *C-392/98*, *Christian Dior*, *supra* note 150, at para. 47.
[174] *Id*., at para. 48.

application of the provisions of those agreements."[175] Indeed, the WTO inspires coordination of the different interpretations of provisions and negotiations on their application, rather than creates a specific system subject to centrally imposed uniform interpretation resolving any disputes at the international level. Accordingly, the Advocate General believed that it was inappropriate to seek for judicial decisions fixing on the Community level a uniform interpretation of the provisions of the WTO agreements. Although accepting that a uniform application of international agreements within the Community legal order is 'in any event' a legitimate objective, he has nevertheless acknowledged that the uniformity of interpretation is not an absolute requirement.[176] Thus, Cosmas pointed out along the lines of *Opinion 1/94* that "[t]he need for unity of international representation and the absolute legitimacy of the concern to ensure unity of action in external matters" could not reverse "[t]he intra-Community division of powers between the Community and national authorities."[177] Consequently, Cosmas suggested that without prejudice to the *Hermes* type situations the ECJ should have no jurisdiction to interpret TRIPs provisions concluded under the MSs' powers.

The Court started its observations with a broad acknowledgement that TRIPs

> [w]as concluded by the Community and the Member States under joint competence. [Thus] it followed that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article [234] thereof, the Court has jurisdiction to define the obligations which *the Community has thereby assumed* and, for that purpose, to interpret TRIPs.[178]

The Court has subsequently specified that 'in particular' it has jurisdiction

> [t]o interpret Article 50 TRIPs in order to meet the needs of the courts of the Member States when they are called upon to apply national rules with a view to ordering provisional measures for the protection of *rights arising under Community legislation* falling within the scope of TRIPs.[179]

In the aforementioned passage of the *Dior* judgement, the ECJ has merely affirmed its competence to interpret Article 50 TRIPs in cases involving Community legislation harmonising intellectual property rights.[180] The Court continued restating *Hermes* that 'likewise',

> where a provision […] can apply *both to situations falling within the scope of national law and to situations falling within that of Community law*, as is the case in the field of trademarks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation.[181]

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[175] *Id.*, at para. 58.
[176] *Id.*, at para. 61.
[177] *Id.*, at para. 63.
[178] Judgment of 14 December 2000 in Joint cases *C-300/98* and *C-392/98*, *supra* note 150, at para. 33 (emphasis added).
[179] *Id.*, in particular Rec. 34 of the judgment (emphasis added).
[180] Eeckhout, note *supra* 186, at 421.
[181] *Joint Cases C-300/98* and *C-392/98*, *Christian Dior*, *supra* note 150, in particular Rec. 35 of the judgment (emphasis added).

In that regards, the ECJ called for a 'close cooperation' between the MSs and Community institutions in "[f]ulfilling the commitments undertaken by them under joint competence."[182] An express reference to the duty of cooperation should encourage the national courts to refer issues related to the interpretation of the 'dually applicable' provisions of the international agreements, regardless of whether an issue of Community law was actually at stake in the proceedings on the national level. The Court continued persuading national courts to cooperate by emphasising the obligation of the judicial bodies of the Member States and the Community to give Article 50 TRIPs a uniform interpretation due to its procedural nature requiring similar application in every situation falling within its scope.[183] The Court subsequently emphasised that it is in the hands of the Community and national judiciary to ensure such a uniform interpretation of the 'dually applicable' provisions of the international agreements pursuant to Article 234 ECT.[184] Consequently, it flows from the aforementioned observations that the interpretive jurisdiction of the ECJ in regards to Article 50 TRIPs cannot be restricted solely to situations covered by trademark law.[185] Although disagreeing with the restrictive interpretation of the *Hermès* judgement submitted by Advocate General Cosmas, the Court nevertheless did not affirm in the positive terms its interpretive jurisdiction under Article 234 ECT as regards all provisions of international agreement falling within the scope of shared competences, but 'dually applicable' procedural provisions.[186]

However, it is reasonable to suggest that *Hermès* and *Dior* highlights only one of the aspects of the Court's interpretive jurisdiction as regards provisions of international agreements concluded under the MSs' powers.[187] Indeed, the ECJ has subsequently extended its interpretive jurisdiction to material provisions of TRIPs in terms of which the Community has already legislated.[188] Despite the fact that the Court did not expressly ruled in favour of extending the scope of its interpretive jurisdiction yet, its clearly evident reluctance to allocate competences within the context of mixed agreements would unavoidably necessitate such an extension to the provisions falling within the scope of shared competences, regardless of whether or not the Community had already utilised its competences at the internal level.[189] As regards practical implication of the aforementioned developments for the EC-RF PCA, an extended scope of the ECJ interpretive jurisdiction encompassing all the provisions falling within the scope of shared

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[182] *Id.*, in particular Rec. 36 of the judgment.
[183] *Id.*, in particular Rec. 37 of the judgment.
[184] *Id.*, in particular Rec. 38 of the judgment.
[185] *Id.*, in particular Rec. 35 of the judgment.
[186] Heliskoski, *supra* note 93, at 61.
[187] P. Koutrakos, EU International Relations Law, at 201 (2006). *See also*, Karayigit, *supra* note 148, at 453 (2006).
[188] Judgment of the Grant Chamber of 16 November 2004 in *Case C-245/02*, *Anheuser-Busch Inc. v, Budějovický Budvar, národní podnik* [2004] ECR I-10989, at paras. 40-46. *See also*, K. Lenaerts, *et. al.*, Procedural Law of the European Union 183 (2006).
[189] *See e.g.,* Andrea Ott, *Thirty Years of Case-law by the European Court of Jsutice on International Law: A Pragmatic Approach towards its Integration*, *in* V. Kronenberger (Ed.), The European Union and the International Legal Order: Discord or Harmony?, 95 at 108 (2001).

competences implies that virtually any PCA provision may constitute a subject for a preliminary ruling under Article 234 EC Treaty, irrespective of whether it was concluded under the Community or MSs' powers.

II. Reviewing Community Secondary Legislation: The Plea of Illegality

1. The Preliminary Reference on the Validity of the Community Acts

Prior to addressing the scope of its interpretive jurisdiction in the *Hermès* and *Dior* cases, the Court has faced with an issue on whether the validity of measures adopted by the institutions of the Community refers, within the meaning of Article 234 ECT, to their validity under international law.[190] In the *International Fruit Company* case, the ECJ has demonstrated that its "[j]urisdiction […] cannot be limited by the grounds on which the validity of […] measures may be contested," thus acknowledging its obligation to examine the validity of the Community secondary legislation on all grounds, including rules of international law.[191] Therefore, an action challenging the validity of the Community 'internal' legislation on the basis of its unconformity with the obligations assumed by the Community jointly with the MSs under EC-RF PCA may potentially constitute a subject for preliminary ruling under Article 234 ECT.[192] However, the Court has established two requirements that the provision of an international agreement relied on by an individual applicant must fulfil prior to invalidity can be invoked before the national court. The first requirement has been rather obvious, namely that a provision of an international agreement can only be relied on directly, if the Community is bound by the aforementioned agreement.[193] The second condition has been articulated as an 'ability' of the provision to confer "[r]ights on *citizens of the Community* which they can invoke before the courts."[194] In that regards, the Court has followed the opinion of Advocate General Mayras, who suggested that an act of Community law could be held invalid under the provisions of an

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[190] Judgment of 12 December 1972 in Joined *Cases 21* to *24/72*, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit (International Fruit Company)* [1972] ECR 1219, para. 2.

[191] *Id.*, in particular Recs. 5 & 6 of the judgment.

[192] *See also*, Judgment of 22 October 1987 in *Case 314/85*, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

[193] It must be emphasized that the first prerequisite should be considered in the light of the fact that EEC had not officially acceded to GATT (1947), but had subsequently replaced the MSs in commitments arising from GATT (1947). *See*, *Joined Cases 21* to *24/72*, *International Fruit Company*, *supra* note 190, para. 7. *See also*, Judgment of 19 November 1975 in *Case 39/75*, *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439, at para. 21. *See additionally*, E. U. Petersmann, *Application of GATT by the Court of Justice of the European Communities* 20 CMLR 397, at 398-399 (1983) and E. U. Petersmann, *Participation of the European Communities in the GATT – International Law and Community Law Aspects*, *in* D. O'Keeffe & H. Schermers (Eds.), Mixed Agreements, 167 at 167 *et seq*. (1983).

[194] Joined *Cases 21* to *24/72*, *International Fruit Company*, *supra* note 190, in particular Rec. 8 of the judgment.

international agreement only if applicants had been able to rely on rights derived from those provisions.[195] Advocate General Mayras has pointed out as a matter of fact that the doctrine of direct effect has to be applied in relations between international law and Community law, just as it is applied between Community law and national law. Although refraining from assimilating 'conferral of rights' with the 'direct effect', the ECJ has concluded along the lines of the Advocate General's opinion that Article XI GATT was not "[c]apable of conferring on citizens of the Community rights which they can invoke before the courts" in a claim challenging the validity of the Community secondary legislation.[196]

In the *Kupferberg* case, the Court has broken down the second tier of the *International Fruit Company* test into "two consistent parts without making any reference to individual rights, or even denying their relevance."[197] The ECJ has subsequently assessed the 'nature and structure' of the international agreement and 'clear, precise and unconditional' nature of the specific provision of the agreement as a precondition for its invocability by an individual applicant. Thus, the 'two-tier' test of *International Fruit Company* accumulated in *Kupferberg* has "firmly locked into place the idea that the working of international agreements in Community law is to be looked at as a matter of direct effect."[198] Consequently, the ECJ will only assess the validity of the Community secondary legislation, if the provision at issue is directly effective within the meaning of the Community case law on the direct effect of the international agreements. Thus, only directly effective provisions of the EC-RF PCA will be considered by the ECJ as a legitimate ground for the assessment of the validity of the Community secondary legislation in the light of its conformity with the obligations assumed by the Community jointly with the MSs under EC-RF PCA.

2. The Direct Action of Annulment under Article 230 EC Treaty

The *International Fruit Company* ruling has been subsequently extended by the ECJ to the direct action of annulment under Article 230 ECT. In the *Germany v. Council* case, the German government challenged the legality of the Council Regulation 404/93[199] on the grounds of its inconformity with GATT.[200] It has been suggested by the German government that "[c]ompliance with GATT rules is a condition of the lawfulness of Community acts, regardless of any question as to

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[195] *See*, Advocate General Mayras in *Joined Cases 21* to *24-72*, *International Fruit Company*, *supra* note 190.

[196] *Joined Cases 21* to *24/72*, *International Fruit Company*, *supra* note 190, in particular Rec. 27 of the judgment.

[197] M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, FIDE 2006: Report of Community Rapporteur, at 27 (2006).

[198] J. Klabbers, *International Law in Community Law: The Law and Politics of Direct Effect*, 21 Yearbook of European Law, 263 at 275 (2002).

[199] Council Regulation No 4004/93, OJ 1993 L 47/1.

[200] Judgment of 5 October 1994 in *Case C-280/93*, *Federal Republic of Germany v. Council of the European Union (Germany v. Counvil)* [1994] ECR I-04973.

the direct effect."[201] In its observations, the German government argued that the direct effect requirement was merely concerned with an action on validity brought by the individual applicants before the national court and therefore a Community internal legislation could not escape legal scrutiny under Article 230 ECT on the sole ground that an applicant relied on a provision lacking direct effect.[202] Consequently, the German government insisted on a conceptual distinction to be made between legality test and direct effect test. Contrary, the Council supported by the European Commission contended that since GATT provisions were not directly applicable, they 'neither' could be relied upon in the direct action of annulment brought by the MS under Article 230 ECT. The Council emphasised a specific nature of GATT "[c]haracterised less by an actual right for the parties to claim that the GATT rules should be obeyed than by the possibility of bringing about by negotiations between the contracting parties a complete balance between advantages and disadvantages."[203] The European Commission had subsequently pointed out that the ECJ interference would "[c]reate serious difficulties for the present attempts to solve within the framework of GATT the problem to which the organisation of the market in bananas […] have given rise."[204] Thus, Community institutions insisted on addressing an issue on invocability of the GATT provisions purely through the prism of direct effect.

Although without expressly admitting that lack of direct effect automatically implies that a specific provision of an international agreement cannot be relied upon under Article 230 ECT, Advocate General Gulmann has nevertheless emphasised that the Community courts have never undertaken review of legality on the basis of GATT provisions. He continued pointing out that the mere fact of an international agreement constituting an integral part of Community law does not necessarily entail that it forms part of the legal basis on which ECJ carries out its review of legality under Article 230 ECT.[205] The Advocate General has further preceded analysing the 'special features' of GATT with the subsequent deduction that "the Court may have recourse to GATT in its review of legality *only* if there are *special grounds* for subjecting the legal acts adopted by the institutions to such a review."[206] Finding no such 'special reasons' in the case at issue, Gulmann has subsequently concluded that the German government cannot rely on the GATT provisions in a direct action for annulment of the Regulation 404/93 under Article 230 ECT. Although constituting a rather weak reasoning for the denial of the judicial review of the Community law on the grounds of non-direct effectivity of the GATT provisions, the opinion of Advocate General Gulmann nevertheless

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[201] *Id.*, in particular Rec. 103 of the judgment.
[202] Advocate General Gulmann in *Case C-280/93*, *Germany v Council*, *supra* note 200, paras. 125 & 134.
[203] *Id.*, para. 126.
[204] *Id*.
[205] *Id.,* para. 137.
[206] *Id.*, para. 145 (emphasis added). *See also*, as regards specific grounds, Judgment of 22 June 1989 in *Case 70/87*, *Fédération de l'industrie de l'huilerie de la CEE v. Commission of the European Communities (Fediol)* [1989] ECR 1781 and Judgment of 7 May 1991 in *Case C-69/89*, *Nakajima All Precision Co. Ltd v. Council of the European Communities (Nakajima)* [1991] ECR I-02069.

provides at least some form of legal reasoning as regards coincidence between legality and direct effect tests.

In its brief judgement, the Court has exclusively analysed the case through the prism of direct effect without providing any reasons for assimilating or even substituting the direct effect test for the test of legality. The ECJ has merely restated the well-known 'special features' of the WTO agreement, which preclude an individual from relying on the GATT provisions in an action challenging the lawfulness of a Community act under Article 234 ECT. It has subsequently pointed out that the same considerations prevent "[t]he Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under […] Article [230 ECT]."[207] Undoubtedly, the motive leading ECJ to the aforementioned conclusion remains a fruitful ground for endless speculations. One can assume that the Court tried to avoid a dichotomy between preliminary ruling cases on validity under Article 234 ECT and direct action for annulment under 230 ECT.[208] Indeed, it would be hardly acceptable, if the outcome of the case depended on the type of the legal procedure employed by an applicant to reach the Community courts. However, in the *Germany v. Council* case, the aforementioned considerations could have in no way prevented the Court from favouring MSs as 'privileged class' of applicants, when the case comes to direct action relating to international agreements.[209] Despite vigorous attempts of Advocate General Saggio to convince the Court that MS's complaint "is in *no way inadmissible*,"[210] the ECJ had imperturbably reaffirmed the *Germany v. Council* doctrine in the *Portugal v. Council* case.[211]

However, in the recent case on conformity of EP and Council Directive 98/44 with the Convention on Biological Diversity (CBD) initialized by the Netherlands government under Article 230 ECT, the Court had finally separated direct effect from the judicial review. The ECJ has emphasised that it's the *Germany v. Council* doctrine "*cannot be applied to CBD*, which, unlike the WTO agreement, is not strictly based on reciprocity and mutually advantageous arrangements."[212] The Court continued that

> Even if […] the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement.[213]

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[207] *Case C-280/93*, *Germany v. Council*, *supra* note 200, in particular Rec. 109 of the judgment.

[208] M. Waelbroeck, *Effects of GATT within the Legal Order of the EEC*, 8 JWTL 614, at 622 (1974).

[209] Klabbers, *supra* note 198, at 266.

[210] Advocate General Saggio in *Case C-149/96*, *Portuguese Republic v. Council of the European Union* [1999] ECR I-8395, at para. 52.

[211] *Id*.

[212] Judgment of 9 October 2001 in *Case C-377/98*, *Kingdom of the Netherlands v. European Parliament and Council of the European Union (the Netherlands v. European Parliament and Council)* [2001] ECR I-7079, para. 53.

[213] *Id.*, in particular Rec. 54 of the judgment.

Thus, the ECJ has finally articulated in the positive terms a clear separation between the 'nature and structure' of an agreement as a criterion for judicial review and the protection of individual rights.[214] The Court has clarified that

> [t]his plea should be understood as being directed, not so much at a direct breach by the Community of its international obligations, […] [but] at an obligation imposed on the Member States by the Directive to breach their own obligations under international law, while the Directive itself claims not to affect those obligations.[215]

The ECJ has subsequently assessed the compatibility of the contested Directive 98/44 with the TRIPs finding no indications leading to the conclusion that the obligations imposed by Directive 98/44 require the Netherlands government to violate its obligations under international law.[216] It appears that the Court is purely intended at the end of the day to favour MSs as a 'privileged class' of applicants and therefore the effect of this case on the individual applicants should not be overestimated. In accordance with the current Community case law, an individual applicant can only rely on the directly effective provisions of the international agreements, when challenging the validity/legality of the Community internal legislation.[217]

E. The Direct Effect of Mixed International Agreements Within the Community Legal Order

I. Analysing Doctrine of External Direct Effect: The Process of Evolution

1. The Direct Effect of GATT 1947

For the first time, the Court has addressed an issue on the direct effect of an international agreement in its preliminary ruling on the aforementioned *International Fruit Company* case brought before the ECJ by the Dutch national court under Article 234 ECT.[218] In its judgment, the Court ruled along the lines of Advocate General Mayras opinion suggesting that the decision on the effect of an international agreement within the Community legal order required an in-depth analysis of the provision in the light of the context and general scheme of the agreement, having regard to the overall objective of the measure, and

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[214] Cremona, *supra* note 197, at 27.

[215] *Case C-377/98*, *the Netherlands v. European Parliament and Council*, in particular Recs. 55 of the judgment.

[216] *Id.*, in particular Recs. 57-68 of the judgment.

[217] *See e.g.*, Judgment of the Court of First Instance (Fourth Chamber) of 22 January 1997 in *Case T-115/94*, *Opel Austria GmbH v. Council of the European Union* [1997] ECR II-00039.

[218] *See e.g.*, on the *International Fruit Company* judgment, comments by S. A. Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community*, 67 AJIL 504, at 504 *et seq*. (1973).

circumstances in which the contracting parties had decided to apply the treaty.[219] Thus, the Court commenced its analysis with an examination of the spirit, the general scheme and the terms of GATT 1947.[220] The ECJ has pointed out that "[t]he principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements'" enshrined in GATT implied "[t]he 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."[221] It found that 'these factors' were "[s]ufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts."[222] Despite ruling out direct effect of Article XI GATT 1947, the Court nevertheless clearly acknowledged that a provision of a mixed international agreement is generally capable of producing direct effect within the Community legal order, if the requirements of the 'two-tier' test are fulfilled.[223] The ECJ has subsequently reaffirmed its entrenched position in the evolving *corpus* of Community case law on external direct effect of GATT 1947 provisions.[224] Thus, in *Schlüter*, the Court provided that

> The validity of acts of the institutions […] cannot be tested against a rule of international law unless that rule is binding on the Community and capable of creating rights of which interested parties may avail themselves in a court of law.[225]

It has subsequently reiterated that the 'broad flexibility' of GATT 1947 prevents the Court from assessing the validity of Council Regulation 974/71 in the light of its compatibility with Article II GATT. In the *SIOT* case, the ECJ faced with a challenge of the revenue and port charges imposed by the Italian government

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[219] Advocate General Mayras in *Joined Cases 21 to 24-72*, *International Fruit Company*, *supra* note 190.

[220] *Id*., in particular Rec. 20 of the judgment.

[221] *Id.*, in particular Recs. 21, 25 & 26 of the judgment. *See also*, Marrakech Agreement, *supra* note 160, Ann. 1A. Multilateral Agreements of Trade in Goods, General Agreement on Tariffs and Trade 1994, *in particular*, Art. XXII on consultations, Art. XXIII on dispute settlement and Art. XIX on safeguard clauses.

[222] *Joined Cases 21* to *24/72*, *International Fruit Company*, *supra* note 190, in particular Rec. 27 of the judgment.

[223] Hartley, *supra* note 139, at 386.

[224] *See*, on the deviation from the *International Fruit Company* approach, comments by G. Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 CMLR 35, at 46-47 (1983). *See also*, Judgment of 7 February 1973 in *Case 40-72*, *I. Schroeder KG v. the Federal Republic of Germany* [1973] ECR 125; *Case 38-75*, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen supra* note 193; and Judgment of 5 May 1981 in *Case 112/80*, *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095. *Cf.* E. U. Petersmann, *Application of GATT*, *supra* note 193, at 404-415.

[225] Judgment of 24 October 1973 in *Case 9/73*, *Carl Schlüter v. Hauptzollamt Lörrach* [1973] ECR 1135, para. 27. *See also,* Judgment of 16 March 1983 in *Joined Cases 267/81, 268/81* and *269/81*, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] ECR 801, para. 23.

on crude oil in transit.[226] The claimant argued that the imposition of the aforementioned charges contradict Article v. GATT on freedom of transit, since these charges affect transit goods, while being unloaded and forwarded in his own installations by the operator independently without incurring administrative expanses or rendering of services by the port authorities. However, the Court has laconically emphasised that "since […] [Article v. GATT] cannot have direct effect in the framework of Community law […] individuals may not rely upon it in order to challenge the imposition of a […] charge."[227] Thus, the Court has continuously ruled out direct effect of GATT 1947 provisions exclusively on the grounds of broad flexibility of the terms of the agreement as a whole, without even considering the wording of the specific GATT provisions.

2. The Direct Effect of the Yaoundé Convention

Four years after the *International Fruit Company* case, the Italian court referred to the ECJ an issue on whether Article 2(1) of the Yaoundé Convention had 'immediate' effect conferring on "[t]hose subject to Community law the right to rely on it in order to challenge the imposition of a national duty."[228] In its observations, the European Commission argued that Article 2(1) of the Yaoundé Convention contained an express and unconditional reference to the specific ECT provisions "in terms so unrestricted, clear and precise as to have direct effect in the relations between the Member States and individuals."[229] The Commission has controversially suggested that the inclusion of the ECT provisions into Article 2(1) of the Yaoundé Convention vests the article with the same authority as the provisions to which it refers. On the contrary, Advocate General Trabucchi insisted on the *International Fruit Company* approach discouraging automatic application to the international law of the direct effect doctrine developed with regards to relationship between the Community law and national law.[230] In its analysis of Article 2(1) of the Yaoundé Convention, the Court followed Trabucchi observations by turning first to the spirit, the general scheme and the wording of the Convention. It pointed out that the main objective of the "specific economic and political connexions" between the Community and dependent territories was "[t]o further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development."[231] Thus, "[t]he Convention was *not concluded in order to ensure equality* in the obligations which the Community assumes with regard to

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[226] Judgment of 16 March 1983 in *Case 266/81 Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle finanze, Ministero della marina mercantile, Circoscrizione doganale di Trieste and Ente autonomo del porto di Trieste (SIOT)* [1983] ECR 731. *See also*, Judgment of 16 March 1983 in *Joined Cases 290/81 and 291/81*, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle finanze dello Stato* [1983] ECR 847.

[227] *Case 266/81*, *(SIOT)*, in particular Rec. 28 of the judgment (emphasis added).

[228] Judgment of 5 February 1976 in *Case 87/75*, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze (Conceria Daniele Bresciani)* [1976] ECR 129, para. 16.

[229] Advocate General Trabucchi in *id*.

[230] *Id*., at 148.

[231] *Id.*, in particular Rec. 17 of the judgment.

the associated states, but in order *to promote their development*."[232] Indeed, the 'imbalance' of obligations was deemed "[i]nherent in the special nature of the Convention" and therefore could not "[p]revent recognition by the Community that some of its provisions have a direct effect."[233] The ECJ has subsequently proceeded analysing the content of Article 2(1) of the Yaoundé Convention. It has emphasised that "[t]he abolition of charges having equivalent effect must, on the part of the Community, proceed automatically", since consultations regarding the conditions of application of the article shall take place 'only' at the request of the associated state.[234] Moreover, in the view of the Court an express reference in Article 2(1) of the Yaounde Convention to Article 13 EEC implied that "[C]ommunity undertook precisely the same obligation towards the associated states to abolish charges having equivalent effect as, […] the Member States assumed to each other." The Court subsequently concluded that an obligation assumed under Article 2(1) of the Yaoundé Convention is "[s]pecific and not subject to any implied or express reservation" and therefore confers "[o]n those subject to Community law the right to rely on it before the courts."[235] Undoubtedly, a 'very' specific nature and objectives of the Convention played a decisive role in the outcome of the *Bresciani* case and therefore could hardly be considered a precedent nailing down the rules on the external direct effect of the international agreements.[236] Moreover, *Bresciani* remained the only ECJ judgement granting direct effect to the provision of an international agreement within the Community legal order for quite a long time, as variety of claims brought before the ECJ in its aftermath were turned down on grounds other than direct effect of the agreements concerned, thus leaving external direct effect doctrine outside the scope of the actual discussion.[237] Indeed, the question on whether the *Bresciani* case reflected

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[232] *Id.*, in particular Rec. 22 of the judgment (emphasis added). *See also*, Judgment of the Sixth Chamber of 12 December 1995 in *Case C-469/93*, *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA* [1995] ECR I-04533, paras. 30-35 and J. H. Bello & M. M. I Mora, *Italian Ministry of Finance v. Chiquita Italia*, 91 AJIL 152, at 154-155 (1997).

[233] *Case 87/75*, *Conceria Daniele Bresciani*, *supra* note 228, in particular Rec. 23 of the judgment.

[234] *Id.*, in particular Rec. 24 of the judgment.

[235] *Id.*, in particular Rec. 25 of the judgment.

[236] *See*, 1957 Treaty establishing the European Economic Community (EEC) (1957), art. 131 (Art. 182 ECT) provides as follows,

> The Member States agree to associate with the Community the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom […]. The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

[237] *See,* E. L. M. Volker, *The Direct Effect of International Agreements in the Community's Legal Order*, LIEL 131, at 138-139 (1983). *See, in particular*, *Case 65/77*, *Jean Razanatsimba*, *supra* note 143; Judgment of 30 November 1977 in *Case 52/77*, *Leonce Cayrol v. Giovanni Rivoira & Figli* [1977] ECR 2261; Judgment of the Second Chamber of 11 October 1979 in *Case 225/78*, *Procureur de la République de Besançon v. Bouhelier and others* [1979] ECR 03151; Judgment of 24 April 1980 in *Case 65/79*, *Procureur de la République v. René Chatain* [1980] ECR 1345; *Case 270/80*, *Polydor Limited*. *See also*, as regards *Polydor Limited,* comments by H. G. Schermers, *The Direct Application of Treaties with Third States: Note Concerning the Polydor and Pabst Cases*, 19 CMLR

a general rule on the external direct effect or merely emphasised a specific nature of the international agreements concluded under Article 182 ECT demanded further clarification by the Court.

3. The Direct Effect of Association Agreements and Free Trade Agreements

However, a new waive of preliminary references from the national courts of the MSs created a further opportunity for the ECJ to clarify its meagre case law on the direct effect of international agreements. The Court however kept the ball rolling by unexpectedly adopting a rather free-minded approach towards its own previous case law on the external direct effect. In the *Pabst* case, the German court inquired whether Article 53 of the Association Agreement with Greece conferred a right on individuals to claim the same fiscal treatment as accorded to the domestic spirits.[238] Contrary to the *International Fruit Company* test, the ECJ has immediately proceeded with the analysis of Article 53, surprisingly neglecting discussion of the so-called 'specific' features of the agreement, such as institutional structure and dispute settlement mechanism envisaged under the Association Agreement.[239] The Court has first emphasised that Article 53 forms "[p]art 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."[240] In the next paragraph, it acknowledged that the wording of Article 53 "[c]ontains clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures."[241] In the light of these observations, the Court briefly concluded that an importer of spirits from other MSs can rely upon Article 53(1) of the Association Agreement with Greece before the national court against the application of national measures of tax relief for spirits.[242] The *Pabst* judgment has considerably coincided with *Bresciani*, thus leading to the assumption that the "agreements directly tied to the EC Treaty were capable of providing rules of direct effect, while less directly connected agreements were not."[243]

The Court however expressly overturned the aforementioned supposition in its next judgment on the direct effect of Article 21(1) of the Free Trade Agreement with Portugal. In the *Kupferberg* case, a German importer of port from Portugal brought an action before the German court for fiscal matters challenging the validity of the imposed 'spirits surcharge' as contradicting Article 21(1) FTA

556, at 563 & 567-568 (1982). *See also*, M. Leigh, *European Economic Community Case Note*, 76 AJIL 857, at 862 (1982).

238 Judgment of the First Chamber of 29 April 1982 in *Case 17/81*, *Pabst & Richarz KG v. Hauptzollamt Oldenburg (Pabst)* [1982] ECR 1331.

239 *Cf.* on this particular point, *Joined Cases 21 to 24/72*, *International Fruit Company*, *supra* note 190. *See also*, Advocate General Rozès in *Case 17/81*, *Pabst*, *supra* note 238.

240 *Id.*, in particular Rec. 26 of the judgment.

241 *Id.*, in particular Rec. 27 of the judgment.

242 *Id.*, in particular Rec. 28 of the judgment.

243 R. A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW.J.Int'l L.&B 556, at 587 (1996/1997).

with Portugal. The German court had subsequently referred an issue on the direct effect of Article 21(1) FTA to the ECJ for a preliminary ruling. In its observations, the German government vigorously continued insisting on the view that "[t]he generally recognised 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."[244] Thus, it, in particular, argued that

> [*t*]*he distribution of powers in regards to the external relations* of the Community, *the principle of reciprocity* governing the application of Free Trade Agreements, *the institutional framework* established by such agreements in order to settle differences between the contracting parties and *safeguard clauses* allowing the parties to derogate from the agreements" prejudiced direct effect of the FTA provisions.[245]

The Court widely disagreed with the observations of the German government and opinion of Advocate General Rozés, who also argued against direct effectivity of the FTA provisions by referring to the core of the *International Fruit Company* ruling.[246]

First of all, the ECJ has emphasised the Community nature of the FTA, which implies that the effect of its provisions "[m]ay not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States."[247] The Court continued correctly pointing out that a full uniformity in interpretation and application of this agreement could hardly be secured without Community law unilaterally governing its effect throughout the Community, including the national level.[248] However, the ECJ acquires interpretive jurisdiction only when the Community institutions and third country have not addressed themselves an "[e]ffect the provisions of the agreement are to have in the internal legal order of the contracting parties."[249] Therefore, it is entirely within the discretion of the Community institutions to insert appropriate clauses into the agreement, if its judicial enforcement is considered as inappropriate or counterproductive.[250] Indeed, when such a discretion has not been exercised by the Community institutions, the Court ruling on the effect of the international agreement can in no way threaten the institutional balance between the Community and the MSs.

The ECJ has subsequently addressed in details the remaining arguments brought up by the MSs against the direct effect of the FTA provisions. The MSs has argued along the lines of the *Polydor* case that the ECJ should ruled out the direct effect of the FTA provisions in the light of the judgments delivered by the Austrian and Swiss supreme courts denying direct effect of the free-trade

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244 *Case 104/81*, *Kupferberg*, *supra* note 140, in particular Rec. 15 of the judgment.
245 *Id.*, in particular Rec. 16 of the judgment (emphasis added).
246 Advocate General Rozès in *id.*
247 *Id.*, in particular Rec. 14 of the judgment.
248 Bebr, *supra* note 224, at 60-61. *See also*, Eeckhout, *supra* note 86, at 284-285.
249 *Case 104/81, Kupferberg*, *supra* note 140, in particular Rec. 17 of the judgment.
250 H. J. Bourgeois, *European Community: Effects of International Agreements in European Community Law: Are the Dice Cast?*, 82 Mich. L. Rev 1250, at 1265 (1984).

agreements with the Community.[251] The MSs considered the aforementioned legal practices as a breach of the 'judicial reciprocity' entitling the Court to refrain from granting direct effect to the FTA provisions within the Community legal order. In the ECJ view however

> [t]he fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas *the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity* in the implementation of the agreement.[252]

Although finding no breach of reciprocity in a refusal of a third country judiciary to accord direct effect to the FTA provisions, the ECJ has nevertheless left the door open for the 'reciprocity argument', when, for instance, the other contracting party fails to ensure a *boda fide* performance of the obligations assumed under the international agreement.[253]

The Court has subsequently continued with the examination of the FTA structure, namely 'institutional framework' established by the agreement and 'safeguard clauses' enabling the contracting parties to derogate from the specific FTA provisions. The ECJ provided that

> The mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement.[254]

Indeed, if a specific provision of the agreement does not require prior intervention on the part of the joint committee, its direct effectivity will by no means "adversely affect the powers that the agreement confers on that committee."[255] The ECJ proceeded employing the same logic as regards safeguard clauses by providing that their mere existence "[i]s not sufficient in itself to affect the direct applicability which may [*sic* be attached] to certain stipulations in the agreement."[256] The Court has subsequently concluded its overall analysis of the FTA by affirming that "[n]either the nature nor the structure of the agreement concluded with Portugal may prevent a trader from relying on the provisions of the said agreement before a court."[257]

Due to the fact that the legal nature and general scheme of the agreement alone can hardly ensure direct effect of FTA provisions, the ECJ has then focused on the wording of Article 21(1) FTA. The Court has commenced its analysis with the assessment of the provision in the light of the object and purpose of the

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[251] Leigh, *supra* note 237, at 861. *See e.g.*, Austrian Supreme Court Judgement of 10 July 1979 in *Austra-Mechana v. Gramola Winter & Co* (1979) 29 Gewerblicher Rechtsschutz und Urheberrecht, at 185 (1980) and Swiss Supreme Court Judgement of 25 January 1979 in *Sunlight AG v. Bosshard Partner Intertrading*, 3 CMLR 664, at 664 (1980).

[252] *Case 104/81, Kupferberg*, *supra* note 140, in particular Rec. 18 of the judgment (emphasis added).

[253] Bourgeois, *supra* note 250, at 1265-1266.

[254] *Case 104/81, Kupferberg*, *supra* note 140, in particular Rec. 20 of the judgment.

[255] *Id.*

[256] *Id.*, in particular Rec. 21 of the judgment.

[257] *Id.*, in particular Rec. 22 of the judgment.

agreement.[258] The FTA with Portugal aimed at establishing "[a] system of free trade in which rules restricting commerce are eliminated in respect of virtually all trade in products originating in the territory of the parties."[259] However, as it has been correctly pointed out by the Court, trade liberalisation between the contracting parties achieved by elimination of customs duties, charges of equivalent effect and quantitative restrictions could nevertheless be negated by the fiscal practices of the contracting parties.[260] Therefore, a prohibition of direct or indirect tax discrimination enshrined in Article 21(1) FTA constituted "an indispensable complement to the traditional means of liberalising trade."[261] In the next paragraph of the judgment, the Court has 'rather abruptly' switched ingenuously to the analysis of the content of Article 21(1) FTA to conclude that it "[i]mposes on the contracting parties an unconditional rule against discrimination in matters of taxation, which is dependent only on a finding that the products affected by a particular system of taxation are of like nature."[262] The Court then happily summed up its analysis by stating that 'as such' Article 21(1) FTA "[i]s directly applicable and capable of conferring upon individual traders rights which the courts must protect."[263]

The *Kupferberg* judgment has somehow clarified certain issues that previously constituted the main reasons for criticism of the Community case law for uncertainty and unpredictability, but at the same time *Kupferberg* has also managed to hinder its uniformity.[264] First, the ECJ has crystallized the external direct effect test by breaking down the second tier of the *International Fruit Company* test into two respective limbs, namely assessment of the nature and structure of the agreement and evaluation of the character of the specific provision.[265] However, in its analysis of the FTA with Portugal, the Court has instantly demonstrated a far more liberal approach in assessment of the nature and structure of the FTA, than that adopted by the ECJ in regards to GATT 1947.[266] An open-minded approach to the assessment of the nature and structure of the international agreements implied a slightly diminishing weight attached by the Court to the first limb of the *Kupferberg* test, which might constitute the main

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258 *Id.*, in particular Rec. 23 of the judgment.
259 *Id.*, in particular Rec. 24 of the judgment.
260 *Id.*, in particular Rec. 25 of the judgment.
261 Bebr, *supra* note 224, at 62.
262 *Case 104/81, Kupferberg*, *supra* note 140, in particular Rec. 26 of the judgment.
263 *Id.*, in particular Rec. 27 of the judgment.
264 Brand, *supra* note 243, at 588-589.
265 Cremona, *supra* note 197, at 27.
266 *See e.g.*, further Community case law on the direct effect of the FTA provisions, Judgment of the Sixth Chamber of 17 July 1997 in *Joined Cases C-114/95 and C-115/95*, *Texaco A/S v. Middelfart Havn, Århus Havn, Struer Havn, Ålborg Havn, Fredericia Havn, Nørre Sundby Havn, Hobro Havn, Randers Havn, Åbenrå Havn, Esbjerg Havn, Skagen Havn and Thyborøn Havn and Olieselskabet Danmark amba v. Trafikministeriet, Fredericia Kommune, Køge Havn, Odense Havnevæsen, Holstebro-Struer Havn, Vejle Havn, Åbenrå Havn, Ålborg Havnevæsen, Århus Havnevæsen, Frederikshavn Havn, Esbjerg Havn* [1997] ECR I-04263; Judgment of 16 July 1992 in *Case C-163/90*, *Administration des Douanes et Droits Indirects v. Léopold Legros and others* [1992] ECR I-04625 and Judgment of the Third Chamber of 16 April 1991 in *Case C-347/89*, *Freistaat Bayern v. Eurim-Pharm GmbH*. [1991] ECR I-01747.

obstacle on the way of recognising direct effect of the international agreements with a rather sketchy cooperative link envisaged between the contracting parties. Moreover, the Court has confirmed that the direct effect of a specific provision depends on whether its wording is sufficiently clear, precise and unconditional in the light of the objectives of the agreement under consideration. The Court however evaded clarifying in positive terms whether it referred to the well-known *Van Gen en Loos* criteria of direct effect or applied a distinct set of requirements, when assessing the clarity, precision and unconditionality of the specific provision of an international agreement.[267] Nevertheless, the *Kupferberg* case undoubtedly remains a groundbreaking judgment leading to a considerable reassessment of the external direct effect doctrine, which has previously been suppressed in all terms by the legacy of the *International Fruit Company* ruling.

4. The *Demirel* Formula of External Direct Effect

The subsequent cases on the external direct effect primarily revolved around the character of the specific provisions, thus shedding more light on the second limb of the *Kupferberg* test. In the *Demirel* case, the ECJ has confronted with an issue on whether Article 12 of the EEC-Turkey Association Agreement and Article 36 of the Additional Protocol constitute directly effective rules of the Community law.[268] The Court commenced its analysis with summarising *Kupferberg* into the *Demirel* formula, which declares that

> a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regards 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.[269]

The Court has consequently applied the *Demirel* formula to the EEC-Turkey Association Agreement and its protocol. It has first described the main purpose of the agreement as the one aiming at strengthening Turkish economy with an aid from the Community, facilitating mutual alignment on the transitory state and entailing closer coordination of economic policies on the final stage of the establishment of the custom union.[270] However, in the Court's view, the agreement has merely set the aims of the association and laid down the guidelines for "[t]he attainment of those aims without itself establishing the detailed rules."[271] This particular indent of the judgment has caused serious doubts on whether the EEC-

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[267] Bourgeois, *supra* note 250, at 1267. *See also*, Bebr, *supra* note 224, at 63. *Cf*. Eeckhout, *supra* note 86, at 287. *See also,* in general on direct effect requirement, comments by P. Pescatore, *The Doctrine of 'Direct Effect': An Infant Disease of Community Law*, 8 ELR 155, at 171 *et seq*. (1983); I. Cheyne, *International Agreements and the European Community Legal Order*, 19 ELR 581, at 581 *et seq*. (1994) and D. Edward, *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations*, *in* A. G. Dott. (Ed.), Essays in Honour of Guiseppe Federico Mancini. Vol. II, at 425 *et seq*. (1998).

[268] *Case 12/86*, *Demirel*, *supra* note 69, para. 13.

[269] *Id.*, in particular Rec. 14 of the judgment.

[270] *Id.*, in particular Rec. 15 of the judgment.

[271] *Id.*, in particular Rec. 16 of the judgment.

Turkey Association Agreement is at all capable of meeting the first requirement of the *Kupferberg* test. However, the forthcoming Court's decisions granting direct effect to certain provisions of the EEC-Turkey Association Agreement have completely shattered these fears.[272] Thus, in *Sevince*,[273] the ECJ has accorded without any hesitations direct effect to Articles 2(1)(b) and 7 of Decision No. 2/76 and/or Articles 6(1) and 13 of Decision No. 1/80 adopted by the Council established under the EEC-Turkey Association Agreement.[274] Moreover, the mere fact that the ECJ has continued its analysis with a full-scale assessment of the specific provisions indicates that the refusal to granting direct effect to Article 12 EEC-Turkey Association Agreement and Article 36 of the Additional Protocol was solely and exclusively grounded in the character of these provisions.

The ECJ has correctly pointed out that the provisions relied upon by the individual claimant essentially serve to set out a programme, rather than establish sufficiently precise and unconditional rules directly governing movement of workers. In the Court's view, a conditional nature of these provisions can neither be mitigated by being read in conjunction with Article 7, which encourages in very general terms the contracting parties "[t]o take all appropriate measures […] to ensure fulfilment of the obligations arising from the agreement."[275] Consequently, the ECJ concluded that neither Article 12 EEC-Turkey Association Agreement, nor Article 36 of its protocol are capable of having direct effect within the Community legal order. Although without an express reference to the established Community case law on the internal direct effect, the ECJ seemingly applied classic direct effect analysis utilising the same requirements for the assessment

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[272] It must be emphasised that the mere fact that the ECJ has subsequently continued with the full-scale analysis of the provisions indicates that the refusal to accord direct effect to Art. 12 EEC-Turkey Association Agreement and Art. 36 of its protocol was solely and exclusively grounded in their conditional nature of these provisions.

[273] Judgment of 20 September 1990 in *Case C-192/89*, *S. Z. Sevince v. Staatssecretaris van Justitie* (*Sevince)* [1990] ECR I-03461.

[274] *See also*, other cases on EEC-Turkey Association Council decisions, Judgment of 14 March 2000 in *Joined Cases C-102/98* and *C-211/98*, *Ibrahim Kocak v. Landesversicherungsanstalt Oberfranken und Mittelfranken and Ramazan Örs v. Bundesknappschaft* [2000] ECR I-01287; Judgment of the Sixth Chamber of 10 February 2000 in *Case C-340/97*, *Ömer Nazli, Caglar Nazli and Melike Nazli v. Stadt Nürnberg* [2000] ECR I-00957; Judgment of the Sixth Chamber of 26 November 1998 in *Case C-1/97*, *Mehmet Birden v. Stadtgemeinde Bremen* [1998] ECR I-07747; Judgment of the Sixth Chamber of 30 September 1997 in *Case C-98/96*, *Kasim Ertanir v. Land Hessen* [1997] ECR I-05179; Judgment of the Sixth Chamber of 30 September 1997 in *Case C-36/96*, *Faik Günaydin, Hatice Günaydin, Günes Günaydin and Seda Günaydin v. Freistaat Bayern* [1997] ECR I-05143, Judgment of the Sixth Chamber of 5 June 1997 in *Case C-285/95*, *Suat Kol v. Land Berlin* [1997] ECR I-03069; Judgment of the Sixth Chamber of 29 May 1997 in *Case C-386/95*, *Süleyman Eker v. Land Baden-Württemberg* [1997] ECR I-02697; Judgment of the Sixth Chamber of 23 January 1997 in *Case C-171/95*, *Recep Tetik v. Land Berlin* [1997] ECR I-00329: Judgment of 6 June 1995 in *Case C-434/93*, *Ahmet Bozkurt v. Staatssecretaris van Justitie* [1995] ECR I-01475; Judgment of the Sixth Chamber of 5 October 1994 in *Case C-355/93*, *Hayriye Eroglu v. Land Baden-Württemberg* [1994] ECR I-05113; and Judgment of 16 December 1992 in *Case C-237/91*, *Kazim Kus v. Landeshauptstadt Wiesbaden* [1992] ECR I-06781.

[275] *Case 12/86*, *Demirel*, *supra* note 69, in particular Rec. 24 of the judgment.

of the content of the provisions.[276] This presumption has later found its proof in *ex parte Savas* followed by the variety of other judgments on the direct effect of the international agreements, where the Court has finally revealed its approach by expressly referring to the cornerstone cases of the internal direct effect doctrine.[277] After being clarified on the substance, the second limb of the *Demirel* formula became a rather stable one due to its comparatively well-established conceptual framework, while the first limb related to the nature and structure of the international agreements continued undergoing further modifications in accordance with the new turns in the ECJ vision of the external direct effect doctrine.

5. The *Sevince* Scheme of the External Direct Effect

Thus, the *Sevince* judgment has indicated a curious alteration in the analysis of the international agreements applied by the Court in pursuit of determining effect of their provisions within the Community legal order. In its judgment, the ECJ has surprisingly commenced its analysis with the content of the specific provisions, rather than with the nature and structure of the agreement, as it has been doing before. Thus, the Court has indicated that Article 2(1)(b) of Decision No. 2/76 and third indent of Article 6(1) of Decision No. 1/80 "[u]phold, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years' of legal employment in a Member State, to enjoy free access to paid employment of his choice."[278] Similarly, Article 7 of Decision No. 2/76 and Article 13 of Decision No. 1/80 contain "[a]n unequivocal 'standstill' clause regarding the introduction of new restrictions on access to the employment of workers legally resident and employed in the territory of the contracting parties."[279] It is only after ruling on the character of the aforementioned provisions, the Court continued with the analysis of the purpose and nature of the decisions adopted by the EEC-Turkey Association Council.

In Court's view, the purpose and nature of the Association Council Decisions further confirmed finding that the provisions at issue in the main proceedings are capable of direct application.[280] Decisions Nos. 2/76 and 1/80 were adopted by the Association Council in order to implement Article 12 of the EEC-Turkey Association Agreement and Article 36 of the Additional Protocol, which set out a programme for the attainment of free movement of workers.[281] The ECJ has subsequently acknowledged that the mere fact that

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[276] *See e.g.*, Eeckhout, *supra* note 86, at 314 and Lavranos, *supra* note 66, at 35. *See also*, Pescatore, *supra* note 267, at 174-177.

[277] Judgment of the Sixth Chamber of 11 May 2000 in *Case C-37/98*, *The Queen v. Secretary of State for the Home Department, ex parte Abdulnasir Savas* [2000] ECR I-02927, para. 47.

[278] *Case C-192/89*, *Sevince*, *supra* note 273, in particular Rec. 17 of the judgment.

[279] *Id.*, in particular Rec. 18 of the judgment.

[280] *Id.*, in particular Rec. 19 of the judgment.

[281] *Id.*, in particular Recs. 20-21 of the judgment.

> [t]he abovementioned provisions of the Agreement and the Additional Protocol essentially set out a programme does not prevent the decisions of the Council of Association which give effect in specific respects to the programme envisaged in the Agreement from having direct effect.[282]

The Court further provided that the direct effect of the provisions of the Association Council Decisions could neither be influenced by Article 2(2) of Decision No 2/76 and Article 6(3) of Decision No 1/80 empowering the national authorities to establish the procedures for applying the rights conferred on Turkish workers, nor by Article 12 of Decision 2/76 and Article 29 of Decision 1/80 requiring the contracting parties to take any measures required for the purposes of implementing the provisions of the decisions.[283] The ECJ continued its elaborations along the lines of the *Kupferberg* case that the mere existence of the safeguard "[c]lauses was not liable to affect the direct applicability inherent in the provisions from which they allowed derogations."[284] Thus, it concluded that the nature and structure of the Association Council Decisions do not prejudice direct effectivity of Articles 2(1)(b) and 7 of Decision No 2/76 and Articles 6(1) and 13 of Decision 1/80.[285]

Therefore, in the *Sevince* judgment, the Court has modified *Demirel* formula by turning to the assessment of the character of the provisions in the light of the agreement, prior to considering the purpose and nature of the agreement itself. The ECJ has finally nailed down into a formal rule, what previously could only been implied from the way it approached assessment of the nature and structure of the international agreements. The switch between the limbs of the *Demirel* formula implies that the ECJ has accepted the direct effect of the provisions of the international agreements as a general rule, thus emphasising an exceptional nature of those international agreements, which structure and nature could prevent its provisions from being directly effective.

6. The Direct Effect of Cooperation Agreements

In the *Kziber* case, the Court has utilized the *Sevince* scheme analyzing Article 41(1) of the EEC-Morocco co-operation agreement, which granted non-discriminatory treatment to workers of Moroccan nationality and members of their families in the field of social security.[286] The Court has accordingly commenced its analysis with the elaboration on the character of the provision leaving the assessment of the nature and structure of the EEC-Morocco co-operation agreement itself on then.[287] It has ruled that Article 41(1) contains a clear, precise and unconditional prohibition of discrimination in the field of social security on the grounds of nationality. It has subsequently emphasised that the mere fact that Article 41(1) specified that the prohibition of discrimination was subject to certain limits

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[282] *Id.*, in particular Rec. 21 of the judgment.
[283] *Id.*, in particular Rec. 22-23 of the judgment.
[284] *Id.*, in particular Rec. 25 of the judgment.
[285] *Id.*, in particular Rec. 26 of the judgment.
[286] Judgment of 31 January 1991 in *Case C-18/90, Office national de l'emploi v. Bahia Kziber. (Kziber)* [1991] ECR I-00199.
[287] *Id.*, in particular Rec. 15 of the judgment.

in the specific social security issues could not be interpreted as depriving the provision of its unconditional nature.[288] The ECJ has further acknowledged that a power granted by Article 42 EEC-Moroccan Co-operation Agreement to the Co-operation Council for the implementation of the principles set out in Article 41 could not be interpreted as calling into question the direct effect of Article 41(1) which was not subject, in its implementation or effects, to the adoption of any subsequent measures. Indeed, Article 41 EEC-Morocco Co-operation Agreement laid down an obligation capable of governing the legal situation of individuals in the field of social security. Although acknowledging a limited scope of the agreement establishing a mere co-operation between the parties without aiming at Morocco's association with or future membership in the EU, the ECJ has nevertheless considered that the purpose and nature of the EEC-Morocco Co-operation Agreement could not prevent certain of its provisions from being directly effective.[289] It has subsequently concluded that nothing in the purpose or nature of the agreement contradicted "[t]he conclusion that the prohibition of discrimination […] was capable of applying directly to the position of Moroccan workers or of members of their families living with them in the Member States of the Community."[290] Accordingly, in the *Kziber* case, the ECJ has for the first time recognised the direct effect of the agreement constituting the weakest type of bilateral agreements between the Community and third countries.[291]

The ECJ has reaffirmed *Kziber* approach in the subsequent line of cases on direct effect of co-operation agreements.[292] Thus, in the *Yousfi* case,[293] the German Government has expressly requested the Court to reconsider its case law on the direct effect of Article 41(1) of EEC-Morocco Co-operation Agreement in the light of the fact that the contracting parties were not intended to confer direct effect on Article 41(1). Furthermore, the MSs argued that the Court's decision granting direct effect "[w]ould have a negative effect on the position of the Member States in the conclusion of similar agreements, including the new agreement with Morocco."[294] However, Advocate General Tesauro ignored the aforementioned MSs' contentions by indicating that the MSs rely in their observations on the same arguments against the direct effect of Article 41(1), which has already been extensively addressed in the *Kziber* case.[295] In its judgment, the ECJ has first recalled *Kziber*, where it held that

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[288] *Id.*, in particular Rec. 22 of the judgment.
[289] *Id.*, in particular Rec. 21 of the judgment.
[290] *Id*., in particular Rec. 23 of the judgment.
[291] Eeckhout, *supra* note 86, at 289.
[292] *See also*, Judgment of 2 March 1999 in *Case C-416/96*, *Nour Eddline El-Yassini v. Secretary of State for Home Department* [1999] ECR I-01209, paras. 25-31 and Judgment of the Second Chamber of 15 January 1998 in *Case C-113/97*, *Henia Babahenini v. Belgian State* [1998] ECR I-00183, paras. 17-18.
[293] Judgment of 20 April 1994 in *Case C-58/93*, *Zoubir Yousfi v. Belgian State* [1994] ECR I-01353.
[294] Advocate General Tesauro, in *id*., para. 7.
[295] *Id*., para. 5.

> [A]rticle 41(1) of the Cooperation Agreement which lays down in clear, precise and unconditional terms a prohibition of discrimination, based on nationality, against workers of Moroccan nationality and the members of their families living with them in the field of social security, contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[296]

The Court has subsequently briefly described the object of the agreements as the one aiming at promotion of "[t]he overall cooperation between the contracting parties, in particular in the field of labour," thus emphasising that "[t]he principle of non-discrimination enshrined in Article 41(1) is capable of governing the legal situation of individuals."[297] Therefore, the purpose of the agreement reaffirmed that the wording of Article 41(1) is clear, precious and unconditional to have direct effect within the Community legal order. The above inquiry into the application of the external direct effect doctrine indicated that the ECJ has continuously favoured direct effect of a wide variety of international agreements concluded by the Community alone or jointly with the MSs, including the weakest types of bilateral agreements, such as co-operation agreements.[298]

II. Analysing Direct Effect of Article 23(1) EC-RF PCA: The *Simutenkov* Case

1. The Details of the Preliminary Reference in the *Simutenkov* Case

In the *Simutenkov* case, the ECJ has for the first and only time for now confronted with an issue on the direct effect of the EC-RF PCA.[299] Mr. Simutenkov, who had been holding a residence card and work permit in the Kingdom of Spain, performed as a professional footballer under an the employment contract with Deportivo Tenerife. As a Russian national, Mr. Simutenkov held the Royal Spanish Football Federation (RFEF) licence for players from outside the Community and the European Economic Area (EEA). Due to the restrictions on the participation of the non-Community players in the official professional competition at the national level, Mr. Simutenkov had applied, on the basis of Article 23(1) EC-RF PCA,[300] to the RFEF for his licence to be converted into a Community player's

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[296] *Id*., in particular Rec. 16 of the judgment.
[297] *Id*.
[298] Eeckhout, *supra* note 86, at 289.
[299] Judgment of the Grand Chamber of 12 April 2005 in *Case C-265/03*, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol (Igor Simutenkov)* [2005] ECR I-02579.
[300] *See*, Art. 23(1) EC-RF PCA, *supra* note 30. Art. 23(1) EC-RF PCA provides as follows:

> Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.

licence.[301] However, the RFEF rejected his application pursuant to Article 173 the RFEF General Regulations, which provided that

> [i]n order to register as a professional and obtain a professional licence, a footballer must meet the general requirement of holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area.[302]

Mr. Simutenkov has subsequently brought an action against the RFEF before the Social Court, "[s]eeking protection of his fundamental right not to be discriminated against on the grounds of his Russian nationality."[303] In its judgment, the Social Court acknowledged the fact of discriminatory treatment and recognized Mr. Simutenkov's right to be treated in the same way as a Community national in all matters relating to his working conditions. However, this judgement was subsequently overturned on the procedural grounds.[304] According to the Supreme Court decision, it was Central Court for Contentious Administrative Proceedings, rather than Social Court, who had jurisdiction to rule of the appeal against the RFEF rejection. The Central Court for Contentious Administrative Proceedings has subsequently dismissed the Simutenkov's action. Mr. Simutenkov appealed against the aforementioned judgement to the National High Court, which has finally referred the issue on the direct effect of Article 23(1) EC-RF PCA to the ECJ for a preliminary ruling.[305]

2. The Opinion of AG Stix-Hackl in the *Simutenkov* Case

Advocate General Stix-Hackl based her analysis of Article 23(1) EC-RF PCA on the *Sevince* formula previously reinforced in the Community cases on the direct effect of co-operation agreements. Thus, the Advocate General commenced her assessment with the wording of Article 23(1) EC-RF PCA. A linguistic divergences apparent from the comparative assessment of the various language versions of the agreement roused the Advocate General to proceed "[o]n the basis of the original text, hence the version of the Agreement which served as the source text for the translations into the other languages."[306] EC-RF PCA had been negotiated in English and therefore the Advocate General favoured the English

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[301] Advocate General Stix-Hackl, *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 6.

[302] The General Regulations of the Real Federación Española de Fútbol. Art. 173 provides as follows:

> Without prejudice to the exceptions laid down herein, in order to register as a professional and obtain a professional licence, a footballer must meet the general requirement of holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area.

[303] Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 7.

[304] *Id.*, para. 8.

[305] *See*, on criticism of the national proceedings in the *Simutenkov* case L. N. González Alonso *Relations extérieures de l'Union européenne et des États membres: compétence, accords mixtes, responsabilité internationale et effets du droit international*, Rapporteur Espagne. FIDE 2006, at 14-15.

[306] Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 19.

version of the Agreement over the others as a source of a primary reference. The English version of Article 23(1) EC-RF PCA "[c]learly imposes an obligation,"[307] as it provides that contracting parties

> [*s*]*hall ensure* that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.[308]

However, Advocate General Stix-Hackl acknowledged that the aforementioned linguistic divergences nevertheless required additional consideration of the intention of the contracting parties as regards obligations assumed under Article 23(1) EC-RF PCA. According to the Advocate General, the documents submitted by the Commission indicated that "[t]he parties wanted to lay down a clear obligation going *beyond* an obligation *merely to use endeavours*."[309] She has continued pointing out that the restrictions listed in the beginning of the provision, which subject Article 23(1) to the laws, conditions and procedures applicable in each Member State

> [c]annot be interpreted in such a way as to allow Member States to make the application of the principle of non-discrimination set out in that provision subject to conditions or discretionary measures inasmuch as such an interpretation would render the provision meaningless and deprive it of any particular effect.[310]

Consequently, Stix-Hackl concluded that the English version of Article 23(1) EC-RF PCA read in conjunction with the intention of the contracting parties "[i]ndicate[s] that a clear obligation is imposed on the Community and the Member States and thus that provision has direct effect."[311]

The Advocate General has subsequently proceeded along the lines of the *Sevince* scheme with the assessment of the nature and purpose of the EC-RF PCA. She has acknowledged that the PCA lags behind the Europe agreements in the subsequent content, thus merely providing for a prospect of a free-trade area.[312] Moreover, the EC-RF PCA neither seeks an association, nor foresees future accession of the Russian Federation to the EU. Nevertheless, the Advocate General has correctly pointed out that an intensity of a cooperative link with the Community is not decisive for the direct effect of the international agreement.[313] The settled Community case law on cooperation agreements provides that

> [i]t is sufficient with regard to the object of an agreement that the Contracting Parties promote overall cooperation […] for a provision laid down in such an agreement to be capable of governing directly the legal position of individuals.[314]

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307 *Id.*
308 Art. 23(1) EC-RF PCA, *supra* note 30 (emphasis added).
309 Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, paras. 22-24 (emphasis added).
310 *Id*., para. 26.
311 *Id*., para. 27.
312 *Id*., para. 33.
313 *Id*., para. 35.
314 *Id*., para. 38.

Moreover, Article 1 EC-RF PCA unequivocally fosters intensive cooperation between the contracting parties, as it stands for promoting "[t]rade and investment and harmonious economic relations between the Parties based on the principles of market economy," for providing "[a] basis for economic, social, financial and cultural cooperation founded on the principles of mutual advantage, mutual responsibility and mutual support" and for creating "[a]n appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe."[315] Stix-Hackl has subsequently concluded that "[t]he essence and purpose or object and context of the Agreement indicate that the provision at issue in the present proceedings has direct effect."[316] She further acknowledged that neither Article 27 PCA, nor Article 48 PCA prevented Article 23(1) PCA from having direct effect. Stix-Hackl has rightly emphasised that "the very wording of Article 27, which refers merely to the form of legal measure constituted by a recommendation indicates that Article 23(1) is not subjected in its implementation to the adoption of a subsequent legal measure.[317] As regards Article 48 PCA, she referred to the Community case law on Europe agreements, where the ECJ expressly stated that articles similar in wording to Article 48 PCA could not prevent direct effect of the specific provisions of the aforementioned agreements. Thus, the Advoate General has deduced from all the abovementioned observations that an obligation enshrined in Article 23(1) PCA, as regards working conditions, remuneration or dismissal is direct effective within the Community legal order.[318]

3. The Judgement of the ECJ in the *Simutenkov* Case

Although being less detailed in its analysis, the ECJ has followed the line of reasoning proposed by the Advocate General as regards direct effect of Article 23 (1) PCA. The Court has The Court has acknowledged that the wording of Article 23 (1) PCA

> [l]ays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on grounds of nationality, against Russian workers, vis-à-vis their own nationals, so far as their conditions of employment, remuneration and dismissal are concerned.[319]

Accordingly, Article 23 (1) PCA imposes a precise obligation as to the result and therefore can be relied on by an individual before "[a] national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end."[320] The ECJ has also agreed with the Advocate General, that neither words 'subject to laws, conditions and procedures of each MSs' featuring the beginning of Article 23 (1) PCA, nor entire content of Article 48 PCA can be construed as

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315 *See*, Art. 1 EC-RF PCA, *supra* note 30.
316 Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 44.
317 *Id*., para. 47.
318 *Id*., para. 51.
319 *Id*., in particular 22 of the judgment.
320 *Id*., in particular 23 of the judgment.

> [a]llowing the Member States to subject application of the principle of non-discrimination […] to discretionary limitations, which would have the effect of rendering that provision meaningless and thus depriving it of any practical effect.[321]

A direct effectivity of Article 23 (1) could neither be limited by Article 27 PCA, which merely confers on the Cooperation Council a power to adopt recommendation facilitating implementation without subjecting Article 23 (1) to the adoption of any subsequent measure.[322] The ECJ has further acknowledged that the finding of Article 23 (1) PCA as being directly effective can neither be gainsaid by the general nature and purpose of the EC-RF PCA itself. The Court briefly concluded along the lines of its previously settled case law on the cooperation agreements that clear, precious and unconditional provisions of an agreement establishing cooperation between the parties are capable of governing directly the legal position of individual.[323] Thus, the mere fact that EC-RF PCA is limited to establishing a partnership cannot in itself prevent PCA provisions from being directly relied on by an individual applicant in a court of law.[324] Consequently, the ECJ concluded that Article 23(1) PCA was capable of having direct effect within the Community legal order.[325]

4. The Scope of the Protection Envisaged under Article 23 (1) PCA

The ECJ has subsequently continued determining the scope of the prohibition assumed by the Community and the MSs under Article 23 (1) PCA. the Advocate General has examined the purport of Article 23 (1) on the basis of the rules on freedom of movement enshrined in Article 39 EC to verify whether it encompasses the form of discrimination under the main proceedings. Stix-Hackl has first referred to the Community case law on direct effect of Article 38 of the Europe Agreement with Slovakia, which she found comparable with Article 23 (1) PCA. The *Kolpal* case provides that Article 38 is applicable to "[a] rule drawn up by a sports federation […] which determines the conditions under which professional sportsmen engage in gainful employment,"[326] thus transferring the *Bosman*

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[321] *Id*., in particular 24 of the judgment.
[322] *Id*., in particular 25 of the judgment.
[323] *Id*., in particular 28 of the judgment.
[324] *Id*., in particular 29 of the judgment.
[325] *See*, on criticism of the extension of the direct effect to the EC-RF PCA provision on non-discrimination, comments by González Alonso, *supra* note 305, at 15-16. *See also*, Juzgado de lo Social No. 15 de Madrid in *Valeri Karpin / Liga Nacional de Fútbol Profesional* (2000) 478. The Spanish national court ruled in favour of Mr. Valeri Karpin invalidating restrictions on non-European players in Spanish top division without reference to the ECJ. *See also*, A. E. Kellermann, *Membership of the European Internal Market without being an EU Member State. A Comparison of EU-Norway, EU-Swirzerland and EU-Russian Relations, with Special Focus on the Experiences with Approximation of Legislation. What will be the Best Way Forward for the Russian Federation?*, Russian-European Trends No. 3, at 26 (2005).
[326] Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 55. *See also*, Judgment of the Fifth Chamber of 8 May 2003 in *Case C-438/00*, *Deutscher Handballbund eV v. Marcos Kolpak* [2003] ECR I-04135.

doctrine into the sphere of international agreements.[327] Although admitting that provisions governing access to the employment market fall outside the scope of Article 23 (1), the Advocate General rejected the RFEF argument that licences govern access to the employment market, rather than employment conditions.[328] Accordingly, she stipulated that

> [a] sporting rule such as that at issue in the main proceedings, [which] has a direct impact on the participation in matches of a Russian professional footballer who is already legally employed in accordance with the national provisions of the host Member State […] relates to working conditions within the meaning of Article 23 (1) of the Agreement.[329]

The Advocate General has further acknowledged that Article 23 (1) PCA grants employees with Russian nationality, who are legally employed in the territory of a Member States, a right to equal treatment as regards employment conditions having the same scope as the right accorded in similar terms by Article 39 (2) EC to Member State nationals.[330] Therefore, Stix-Hackl has finally concluded that Article 23 (1) PCA precludes

> [a]pplication of a rule such as that at issue in the main proceedings to Mr. Simutenkov since the rule gives rise to a situation in which he […] has merely a limited opportunity, in comparison with players who are nationals of Member States or of States in the EEA, to participate in certain competitions […] which constitute […] the essential purpose of his activity as a professional footballer.[331]

The ECJ has agreed with the observations submitted by the Advocate General, thus transposing *Kolpak* interpretation of Article 38 (1) EA with Slovak Republic to Article 23(1) PCA. According to the *Kolpak* case, a rule which limits the number of professional players, nationals of the non-member country, who might be fielded in national competitions *did relate to working conditions* within the meaning of Article 38(1) EA with Slovakia inasmuch as it directly affected participation in league and cup matches of a Slovak professional player who was already lawfully employed in the host Member State.[332] Although accepting a minor difference in wording between Article 38(1) EA with Slovak Republic and Article 23(1) PCA, the Court agreed with the Advocate General that this minor difference in drafting "[i]s not a bar to the transposition, to Article 23 (1) PCA of interpretation" upheld by the Court in the *Kolpak* case.[333] The ECJ has further acknowledged that neither the context, nor the purpose of the PCA indicates that the contracting parties intend "[t]o give to the prohibition of discrimination

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[327] K. A. Schuilenburg, *The ECJ Simutenkov Case: Is Same Level not Offside after All*, 3 Policy Papers on Transnational Economic Law, at 3 (2005). *See also*, Judgment of 15 December 1995 in *Case C-415/93*, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman* [1995] ECR I-04921.

[328] Advocate General Stix-Hackl in *Case C-265/03*, *Simutenkov*, *supra* note 299, para. 58.

[329] *Id*., para. 60.

[330] *Id*., para. 64.

[331] *Id*., para. 67.

[332] *Id*., in particular Rec. 32 of the judgment.

[333] *Id*., in particular Rec. 34 of the judgment.

based on nationality […] any meaning other than that which follows from the ordinary sense of those words."[334] The Court summarized its observations into the following

> [A]rticle 23 (1) […] establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality, such as that in issue in the main proceedings.[335]

Thus, the ECJ has finally concluded that Article 23 (1) PCA precluded

> the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provides that clubs may field in competitions organised at national level only a limited number of players from countries which are not parties to the EEA Agreement.[336]

Thus, in the *Simutenkov* case, the ECJ went beyond pure acknowledgement that the non-discrimination obligation as regards working conditions enshrined in Article 23 (1) PCA could be directly effective.[337] It has applied the principle of non-discrimination along the lines of *Bosman* and *Kolpak* to the rules of sports federation, thus favouring horizontal direct effect of the PCA provisions.[338] Moreover, despite the *Simutenkov* case being concerned with the issue of direct discrimination based on nationality, the wording of Article 23 (1) PCA arguably extends its application to the cases of indirect discrimination.[339] Nevertheless, the *Simutenkov* effect should not be overestimated, as Article 23 (1) PCA fell short of protecting the Russian nationals from discriminatory measures related to the entry requirements, lawful residence conditions and work permit rules, which remained within the exclusive legal domain of the MSs.[340]

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[334] *Id*., in particular Rec. 36 of the judgment.
[335] *Id.*
[336] *Id*., in particular Rec. 41 of the judgment.
[337] *See*, on the arguable assumption that the PCA provisions could not have direct effect within the Community legal order, R. A. Petrov, *Rights of Third Country/Newly Independent States' Nationals to Pursue Economic Activity in the EU*, 4 EFAR 235, at 246 (1999) and Maresceau & Montaguti, *supra* note 22, at 1341-1343. *See also*, comment on the direct effect of Art. 23 PCA, M. Cremona, *Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union*, LIEI 87, at 112 (1996).
[338] *See e.g.*, Cremona, *supra* note 197, at 29 and Hillion, *supra* note 101, at 44. It has been suggested that the principles put forward in the *Simutenkov* case may be extended to other PCAs. *See e.g*., F. Hendrickx, *The Simutenkov Case: Russian Players are Equal to European Union Players*, ISLJ 13, at 16 (2005). However, this remains highly arguable due to the fact that the EC-RF PCA constitutes the most advanced form of the PCAs signed between the Community and Newly Independent States. *See e.g.,* on the hierarchy of PCAs, comments by Berdiyev, *supra* note 29, at 463.
[339] *Cf*. Schuilenburg, *supra* note 327, at 5..
[340] *Id.*, at 8.

F. The Potential Direct Effect of the Partnership and Cooperation Agreement Between the European Communities and the Russian Federation

I. Incorporating GATT 1947 Provisions: The Hybrid Legal Order

Due to the fact that the negotiations on the accession of the RF to the WTO are still dragging on,[341] trade in goods between the European Community and Russia remains predominantly governed by the PCA provisions.[342] The EC-RF PCA was among the first EU trade agreements incorporating by reference an extensive number of GATT provisions of 1947.[343] Although GATT 1947 lags behind a more advantageous form of cooperation envisaged under GATT 1994, its partial incorporation into the PCA nevertheless allows Russia to benefit from the overarching principles of trade liberalisation, while it remains outside the scope of the WTO regime.[344] It has already been pointed out that the ECJ has clearly indicated in its case law saga addressing direct effect of GATT 1947 that the spirit and the general scheme of GATT preclude its provisions from having direct effect.[345] Moreover, in the *Van Parys* case, the Court has denied direct effect of Article 4 of the EEC-Andean Pact Agreement, which provides for the most-favoured-nation treatment between the contracting parties "[*i*]*n accordance*

[341] It must be emphasised that the negotiation on the accession of the Russian Federation to the WTO has reached its final stage. *See*, *Accessions: Russian Federation*, World Trade Organisation. Available at http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm. Accessed on 25 March 2007.

[342] *See*, 1998 Agreement between the European Community and the Russian Federation on Trade in Textile Products OJ 1998 L 169/2-27. Arts. 20 and 21 PCA exempt trade in textile products and products covered by the Treaty establishing the European Coal and Steel Community from the scope of the PCA. *See also*, 1998 Agreement between the European Community and the Government of the Russian Federation amending the Agreement between the European Coal and Steel Community and the Government of the Russian Federation on trade in certain steel products of 9 July 2002 OJ 2004 L 009/22. It must be emphasized that trade in coal and steel products is predominantly governed by the PCA provisions with the only exception of Art. 15 PCA. The aforementioned Coal and Steel Agreement has fixed the new quantities for exports of Russian steel products to the EU in the light of the recent 2004 EU enlargement (expired in 2006). It must be emphasized that the European Union and the Russian Federation have launched negotiations as regards the agreement on trade in nuclear materials and fisheries agreement. Art. 22 provides that trade in nuclear materials is governed by the relevant provisions of 1990 Agreement between the EU, the EAEC and the USSR on Trade and Commercial and Economic Cooperation, *supra* note 12.

[343] *See*, Joint Declaration in Relation to Title III and Article 94 EC-RF PCA.

[344] *See*, J. Lebullenger, *Un Accord de partenariat confronté aux règles du GATT et de l'OMC*, *in* J. Raux & V. Korovkine (Eds.), Le partenariat entre l'Union européenne et la Fédération de Russie, at 199-217 (1998).

[345] *Joined Cases 21* to *24/72*, *International Fruit Company*, *supra* note 190; *Case 9/73*, *Carl Schlüter v. Hauptzollamt Lörrach*, *supra* note 225; *Joined Cases 267/81, 268/81 and 269/81*, *Amministrazione delle Finanze dello Stato v. SPI and SAMI*, *supra* note 225; *Case 266/81*, *SIOT*, *supra* note 226 and *Joined Cases 290/81 and 291/81*, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle finanze dello Stato*, *supra* note 226.

with the General Agreement on Tariff and Trade (GATT)."[346] In his opinion, Advocate General Tizzano pointed out that Article 4 of EEC-Andean Pact Agreement was introduced in order to enable most-favoured-nation treatment to be applied to the states, which at that time were not yet members of GATT. Therefore, Article 4 merely extended "[t]he ambit of the GATT system *ratione personae* but did not alter the scope or nature of the obligations arising from that system."[347] Thus, the parties to the EEC-Andean Pact Agreement had no intention of undertaking commitments going beyond the obligations laid down in GATT.[348] Advocate General Tizzano has subsequently concluded that Article 4 of the EEC-Andean Pact Agreement is not capable of constituting a separate criterion for the assessment of validity of Community rules, as it purely reaffirm the intent of the parties to conduct trade with each other in accordance with the principles of GATT 1994.[349]

In its judgment, the ECJ has followed the Advocate General by highlighting a link between the potential effect of Article 4 of the EEC-Andean Pact Agreement and effect of GATT/WTO provisions within the Community legal order. It has subsequently concluded that Article 4 of the EEC-Andean Pact Agreement lacks direct effect for the reason that GATT/WTO itself is not capable of producing direct effect at the first place.[350] Despite all the aforementioned Community case law, it is nevertheless reasonable to suggest that at least some of the PCA provisions incorporating GATT articles are capable of being directly relied upon by an individual applicant challenging the validity of a legislative act adopted either on Community, or national level.

Contrary to a general reference envisaged under Article 4 of the EEC-Andean Pact Agreement, the EC-RF PCA provisions selectively incorporates specific GATT 1947 articles by an express reference. The PCA provisions referring to GATT 1947 are integrated into the wording of the PCA articles and supplemented by the Joint Declarations containing clarifications on interpretation and exemptions on application. The *rationale* behind this incorporation is an establishment of a hybrid legal framework harmoniously interconnecting specific GATT articles with other PCA rules, rather than, as it was in the *Van Parys* case, a mere extending the GATT regime to a non-contracting party of GATT/WTO. Indeed, the GATT articles incorporated into the PCA constitute an integral part of this agreement and therefore should be assessed in the light of the nature and structure of the PCA, rather than GATT 1947.[351] In the *Simutenkov* case, the Court has already

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[346] 1998 Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela OJ 1998 L 127/11.

[347] Advocate General Tizzano in *Case C-377/02*, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-01465, para. 110.

[348] *Id.*, at para. 111.

[349] *Id.*, at para. 112.

[350] *Id.*, para. 58.

[351] *See also*, A. Antoniadis, *The European Union and WTO Law: A Nexus of Reactive, Coactive, and Proactive Approaches*, 6 WTR 45, at 80-81 (2007). It must be emphasised that Antoniadis has also argued that due to the fact that "both the Community and associated states intended to transpose

acknowledged that neither nature, nor structure of the EC-RF PCA precludes its provisions from having direct effect. Moreover, in accordance with Article 1 PCA, the EC-RF PCA aims at promotion of trade and investment, development of "[h]armonious economic relations between the Parties," establishment of "[a]n appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe" and creation of '[t]he necessary conditions for the future establishment of a free trade area between the Community and Russia."[352] Undoubtedly, none of the aforementioned objectives could be efficiently achieved without giving an adequate effect to the PCA provisions on trade in goods. Thus, the direct effect of the PCA provisions incorporating by reference GATT articles depends exclusively on whether the wording of these provisions is sufficiently clear, precise and unconditional within the meaning of Community case law on the external direct effect. Consequently, in pursuit of determining whether PCA provisions are directly effective, the wording of all relevant PCA provisions, including those referring to GATT 1947, should be first assessed 'in isolation' and subsequently 'in conjunction' with other provisions of the agreement.

specific WTO rules in their legal order," the extension of "the *Nakajima* doctrine to cover these cases too should not be ruled out." Indeed, in the *Chiquita* case, the CFI has agreed with the applicant that "the *Nakajima* case law is not, a priori, limited to the area of anti-dumping." The Court continued stating that "it is capable of being applied in other areas governed by the provisions of the WTO Agreements where those agreements and the Community provisions whose legality is in question are comparable in nature." *See*, Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 3 February 2005 in *Case T-19/01*, *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities* [2005] ECR II-00315. However, the *rationale* of the *Fediol* and *Nakajima* exceptions is concerned with the transposition of the international law by means of Community secondary legislation (principle of implementation). Therefore, it remains highly questionable whether the *Nakajima* exception conceptually allows extension to the cases of transposition of the international agreement by means of another international agreement. *See*, *Case C-69/89*, *Nakajima*, *supra* note 206 and *Case 70/87*, *Fediol*, *supra* note 206. *See also*, A. E. Appleton, *Fédération de L'industrie de L'huilerie de la CEE (Fediol) v. Commission des Communautes Europeennes Case No. 70/87*, 84 AJIL 258, at 258 *et seq*. (1990). *See*, further on the recent Community case law as regards direct effect of WTO and its annexes, comments by N. Lavranos, *The Chiquita and Van Parys Judgments: An Exception to the Rule of Law*, 32 LIEI 449, at 449 *et seq*. (2005) and A. Antoniadis, *The Chiquita and Van Parys Judgments: Rules, Exceptions and the Law*, 32 LIEI 461, at 461 *et seq*. (2005). *See also*, on the direct effect of GATT/WTO, general comments by G. Zonnekeyn, *The Direct Effect of GATT in Community Law: From International Fruit Company to the Banana Cases*, 2 ITLR 63, at 63 *et seq*. (1996) and P. J. Kuijper & M. Bronckers, *WTO Law in the European Court of Justice*, 42 CMLR 1313, at 1313 *et seq*. (2005).

[352] *See, in particular*, 2nd, 8th and 9th indents of Art. 1 EC-RF PCA, *supra* note 30.

II. Discovering the Potential Direct Effect of the PCA Provisions: The Unseen Opportunities

1. The PCA Provisions on Trade in Goods

Article 10(1) PCA incorporates Article I(1) GATT 1947,[353] which grants MFN treatment with respect to customs duties and charges of any kind imposed on or in relation to the importation or exportation, in regards to the methods of levying and other rules and formalities related to such duties and charges, as well as in relation to international transfer of payments for imports and exports. Thus,

> [a]ny advantage, favour, privilege or immunity granted by any contracting party to *any product* originating in or destined for any other country *shall be accorded immediately* and *unconditionally* to the like product originating in or destined for the territories of all other contracting parties.[354]

Accordingly, Article 10(1) PCA by means of Article I(1) GATT 1947 imposes an unconditional 'obligation of result' on the Community to ensure not less favourable treatment to the Russian products comparing with that accorded to any other third country as regards trade in goods.[355] The application of the MFN treatment rule is subjected to a number of specific exemptions enshrined in Article 10(2) PCA. A mere existence of the safeguard clause does not prejudice direct effect of Article 10(1) PCA though.[356] Thus, the wording of Article 10(1) PCA imposes a sufficiently clear, precise and unconditional obligation capable of producing direct effect within the Community legal order.[357]

The wording of Article 11(1) PCA almost entirely coincides with Article III(2) GATT, which accords national treatment to 'like' products of one contracting

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[353] It must be emphasised that the draft PCA did not contain reference to Art. I(1) GATT 1947. The incorporation of the GATT 1947 provisions into the PCA implies that the relevant GATT practices should be directly taken into account in the interpretation of the PCA provisions. *See also*, Art. 94 EC-RF PCA, *supra* note 30.

[354] *See*, Art. I(1) GATT 1947 (emphasis added). It must be emphasised that the EC-RF PCA neither eliminates all duties and charges *per se*, nor precludes changes in the tariff rates, but merely provides for the protection against discriminating Russian products imported into EU or Community products exported to Russia. *See*, Art. 16 PCA on consultations in the Cooperation Committee as regards changes in tariff protection in no way prejudice direct applicability of Art. 10(1) PCA.

[355] In the *Port* case, the applicant arguing in favour of direct effect of Art. I (1) GATT 1994 provided that the wording of Art. I (1) GATT and Art. XIII of GATT 1994 is 'clear, precise and unconditional'. *See*, Judgment of the Court of First Instance (Fifth Chamber) of 12 July 2001 in *Case T-2/99*, *T. Port GmbH & Co. KG v. Council of the European Union* [2001] ECR II-02093, para. 42. *See also*, Judgment of the Court of First Instance (Fifth Chamber) of 12 July 2001 in *Case T-3/99*, *Banatrading GmbH v. Council of the European Union* [2001] ECR II-02123, para. 34.

[356] *See*, on exemptions from the most-favoured-nation treatment rule, Art. 10(2) EC-RF PCA, *supra* note 30. *See also*, on the conditions of import of products to the territory of Russia Joint Declaration in Relation to Article 10 EC-RF PCA.

[357] It must be emphasised that the Russian Federal Arbitration Court for Volgo-Vjatskij Region has found on cassation Art. 10 (1) EC-RF PCA, *supra* note 30 on most-favoured-nation treatment directly applicable in a case brought against Custom office of the Russian Federation. Judgment of the Russian Federal Arbitration Court for Volgo-Vjatskij Region of 19th January 2005 No. A17-151A/5-2004.

party imported into the territory of another contracting party in regards to internal taxation or other charges of any kind.[358] Moreover, Article 11(2) PCA along the lines of Article III(4) GATT precludes discrimination against 'like' imported products "[i]n respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[359] Although similarly subjecting national treatment rule to the exemptions articulated in Article III GATT, Article 11(3) does not prejudice an 'unconditional nature' of the obligation imposed on the contracting parties under the first and second paragraphs of Article 11 PCA.[360] Apparently, Article 11 PCA precludes in clear, precise and unconditional way direct or indirect discrimination of 'like' products of Russian origin imported into the territory of the Community.

Article 12(1) PCA aims at ensuring freedom of transit of goods originated in the customs territory or designated for the customs territory of the contracting parties.[361] Article 12(2) PCA incorporates by an express reference, among others, second and third paragraphs of Article v. GATT 1947. The second paragraph ensures freedom of transit "through the territory of each contracting parties […] for traffic in transit to or from the territory of other contracting parties."[362] The third indent of Article v. GATT 1947 states that such traffic

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[358] Art. 11(1) EC-RF PCA, *supra* note 30 provides as follows:

> The product of the territory of one Party imported into the territory of the other Party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess to those applied, directly or indirectly, to like domestic products.

[359] Art. 11(2) EC-RF PCA, *supra* note 30 provides as follows:

> these products shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

[360] Art. III (8)(a) GATT 1947 provides that laws, regulations or requirements governing *the procurement by governmental agencies* of products purchased for governmental purposes should be excluded from the scope of national treatment rule. Art. III (8) (b) GATT 1947 emphasises that the aforementioned rules shall not prevent *the payment of subsidies exclusively to domestic producers*, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Art. and subsidies affected through governmental purchases of domestic products. *See also*, Art. III (9) GATT 1947 on the internal maximum price control measures and Art. III (10) 1947 on establishing or maintaining internal quantitative regulations relating to exposed cinematograph films. It must be emphasised that the EEC-USSR TCA did not contain provision similar to Art. 11 PCA on national treatment in regards to internal taxation and/or regulatory measures.

[361] The second indent of Art. 12(1) PCA provides as follows: "each Party shall provide for freedom of transit through its territory of goods originating in the customs territory or designated for the customs territory of the other Party." First indent of Art. 12 PCA expressly recognises that the principle of freedom of transit is an essential condition of attaining the objectives of the PCA. The aforementioned express statement on freedom of transit is supplemented by an overall presumption that the nature of the PCA can not prevent PCA provisions on trade in goods from having direct effect within the Community legal order. *See* Art. 12 PCA. *See also*, Joint Declaration in Relation to Article 12 EC-RF PCA, which limits the scope of Art. 12 to freedom of transit of goods.

[362] *See*, Art. v. (3) GATT 1947.

> [s]hall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.[363]

In its brief examination of the wording of the second and third paragraphs of Article v. GATT in the *SIOT* case, the ECJ apparently implied that the relevant provisions of Article v. GATT imposes a clear, precise and unconditional obligation on the contracting parties as regards freedom of transit.[364] Therefore, Article 12(2) PCA unconditionally rules out by means of an express reference to Article v. GATT 1947 all custom duties, transit duties and other charges in respect of goods in transit from Russia or designated to Russia, with the only exception of charges for transportation or those commensurate with administrative expenses.[365]

Article 15(1) PCA prohibits in clear, precise and unconditional manner quantitative restrictions on goods of Russian origin imported into the Community.[366] However, the general rule on prohibition of quantitative restrictions is subject to a safeguard clause under Article 17 PCA. Article 17(1) PCA allows contracting parties to take 'appropriate measures'

> Where *any products* is being imported into the territory of one of the Parties in *such increased quantities* and under *such conditions* as *to cause or threaten to cause substantial injury to domestic producers* of like or directly competitive products.[367]

Moreover, Article 17(3) PCA provides that the contracting party "*shall be free to restrict imports* of the products concerned or *to adopt other appropriate measures* to the extent and for such time as is necessary to prevent or remedy the injury."[368] Besides import restrictions, the wording of Article 17(3) PCA permits the contracting party to apply 'appropriate measures', thus providing a general

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[363] *Id.*

[364] It must be emphasised that in the *SIOT* case, the ECJ provided as follows:

> according to Art. v. (3) […] *the imposition* between the contracting parties of *all customs duties, transit duties or other charges* imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered, *is prohibited*.

The ECJ has ruled out direct effect of Art. v. GATT exclusively on the grounds of the *International Fruit Company* case (emphasis added). *See*, *Case 266/81*, *SIOT*, *supra* note 226, paras. 27-28.

[365] *See*, Art. 12(2) EC-RF PCA, *supra* note 30. Art. 12(2) PCA also incorporates fifth paragraph of Art. v. GATT 1947, which grants most-favoured-nation treatment to traffic in transit in regards to "all charges, regulations and formalities in connection with transit." Therefore, an individual applicant can also challenge discriminatory measures imposed on transit goods in violation of most-favoured-nation treatment rule.

[366] *See*, Art. 15(1) EC-RF PCA, *supra* note 30. It must be emphasised that Art. 15(1) PCA does not cover measures of equivalent effect to quantitative restrictions.

[367] *See*, Art. 17(1) EC-RF PCA, *supra* note 30 (emphasis added). The wording of Art. 17 (1) PCA coincides with Art. XIX (1) (a) GATT 1947. *See also*, the Joint Declaration in Relation to Article 17 EC-RF PCA, which provides that "the Community and Russia declare that the text of the safeguard clause does not grant GATT safeguard treatment" and therefore the contracting parties avoid obligations under the Uruguay Round Safeguards Agreement.

[368] *See*, Art. 17(3) EC-RF PCA, *supra* note 30 (emphasis added).

derogation from PCA provisions on trade in goods, not limited to its application by Article 15 PCA. Due to the fact that Article 17 PCA does not require the application of safeguard measures on a non-discriminatory basis, it may also prejudice direct applicability of the PCA provisions granting non-discriminatory treatment to goods of Russian origin. However, in the *Sevince* case, the ECJ has acknowledged that

> Otherwise than in the specific situations which may give rise to […] application [of the safeguard clauses], the existence of such clauses is not in itself liable to affect the direct applicability inherent in the provisions from which they allow derogation.[369]

Therefore, Article 17 PCA does not prejudice direct applicability of the PCA provisions on trade in goods.[370] Consequently, an individual applicant can rely on the aforementioned PCA provisions on trade in goods challenging the legality/validity of the Community and national measures on the grounds of their incompatibility with the obligations assumed by the Community and its MSs jointly under the PCA agreement.

2. The PCA Provisions on Labour Conditions

The EC-RF PCA contains two provisions on the migrant workers, which parallel provisions in the Europe Agreements, EEC-Turkey Association Agreement and the Maghreb Co-operation Agreements.[371] Article 23(1) PCA on non-discrimination in working conditions, remuneration and dismissal of the Russian nationals legally resident and employed in the MSs has been granted direct effect by the ECJ in the *Simutenkov* case.[372] However, the PCA provisions on labour conditions fail to ensure the spouses and/or children of the migrant worker access to the MSs' labour markets during the migrant worker's stay of employment. Moreover, the EC-RF PCA expressly precludes a continued right of residence for the migrant workers of the Russian nationality. Article 50 PCA provides that without prejudice to the rights of the 'key personnel' and 'temporary movement of natural persons' representing Russian companies[373] no provisions shall be interpreted as giving the right to nationals of Russia *to enter*, or *stay in* the territory of Community in any capacity whatsoever.[374] Its wording prevents the application by analogy to Russian nationals of the Community case law on a continued right of residence

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[369] *Case C-192/89*, *Sevince*, *supra* note 273, in particular Rec. 25 of the judgment. The Court has adopted an opposite approach as regards interpretation of Art. XIX GATT. *See e.g.*, on GATT safeguard clauses, comments by J. O. Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, 9 EJIL 626, at 633-636 (1998).

[370] It must be emphasised that neither Art. 18 PCA on anti-dumping and countervailing measures, nor Art. 19 PCA on restrictions on imports, exports or goods in transit applied on non-discriminatory basis could influence direct applicability of the PCA provisions on trade in goods.

[371] S. Peers, *From Cold War to Lukewarm Embrace: The European Union's Agreements with the CIS States*, 44 ICLQ 829, at 835 (1995).

[372] *Case C-265/03*, *Igor Simutenkov*, *supra* note 299, in particular Rec. 29 of the judgment.

[373] *See*, Arts. 32 and 37 EC-RF PCA, *supra* note 30. *See also*, Joint Declaration in relation to Articles 26, 32 and 37 of the EC-RF PCA.

[374] *See*, Art. 50 EC-RF PCA, *supra* note 30.

of the third country nationals flowing from the principle of non-discrimination.[375] Article 24 PCA on social security issues merely establishes a general programme for the conclusion of the necessary agreements ensuring co-ordination of social security systems for workers of Russian nationality and 'where applicable' for the members of their family, in particular, as regards issues related to the calculation and transfer of pensions, as well as reception of family allowances.[376] Undoubtedly, Article 24 PCA lacks direct effect and therefore Russian nationals are precluded from relying on the Community case law on social security issues developed by the ECJ in regards to the Maghreb Co-operation agreements.[377]

3. The PCA Provisions on Establishment and Operation of Undertakings

a) The PCA Provisions on Undertakings

The EC-RF PCA establishes a differentiated approach in regards to treatment of establishment of Russian companies and operation of their subsidiaries and branches within the Community. Thus, Article 28(1) PCA provides that the Community and its MSs "shall grant […] *treatment no less favourable* than that accorded to any third country, with regards to conditions affecting the *establishment of companies* in their territories."[378] Article 33 PCA recognises the importance of granting national treatment with regards to the establishment and foresees the possibility of movement towards this end on a mutually satisfactory basis in the light of the recommendations of the Cooperation Council established under the EC-RF PCA.[379] As regards operation of Russian companies, Article 28(4) grants "[t]o *branches* of Russian […] companies […] a *treatment no less favourable* than that accorded to branches of companies of any third country, *in respect of their operation*."[380] Although subjecting the establishment of Russian companies and operation of their branches to 'the legislation and regulations' applicable in the Community, PCA *via* Joint Declaration on Article 28 PCA precludes Community and its MSs from creating further "[r]eservations resulting in a less favourable treatment than that accorded to companies […] or branches

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[375] *See*, on Art. 40 of the EEC-Morocco Co-operation Agreement, *Case C-416/96*, *Nour Eddline El-Yassini v. Secretary of State for Home Department*, *supra* note 292, para. 67. *See also*, on Art. 64 of the Euro-Mediterranean Agreement, Judgment of the Court (Fifth Chamber) of 14 December 2006 in *Case C-97/05*, *Mohamed Gattoussi v. Stadt Rüsselsheim* (not yet published), para. 43. *See also*, on the Decision 1/80 of the EEC-Turkey Association Council *Case C-237/91*, *Kazim Kus v. Landeshauptstadt Wiesbaden, supra* note 274.

[376] *See* Art. 24 EC-RF PCA, *supra* note 30. *See also*, Joint Declaration in relation to Article 24 of the EC-RF PCA.

[377] *See*, on Arts. 40 and 41 of EEC-Morocco Co-operation Agreement, *Case C-18/90*, *Kziber*, *supra* note 286 and *Case C-58/93*, *Zoubir Yousfi v. Belgian State*, *supra* note 293.

[378] *See*, Art. 28(1) EC-RF PCA, *supra* note 30 (emphasis added). *See also*, Art. 35 EC-RF PCA, which excludes air, inland waterways transport and maritime transport from the scope of Art. 28 PCA. *See also*, Joint Declaration in Relation to Article 35 of EC-RF PCA.

[379] *See*, Art. 33 EC-RF PCA, *supra* note 30. It must be emphasised that lack of a standstill provision does not prejudice direct effect of Art. 28(1) EC-RF PCA.

[380] *See*, Art. 28(4) EC-RF PCA, *supra* note 30 (emphasis added).

of any third country respectively."[381] Moreover, the phase 'in conformity with the legislation and regulation applicable in each Party' should be read along the lines of *Simutenkov* case, where the ECJ acknowledged that words 'subject to the laws, conditions and procedures' could not influence the direct effect of Article 23(1) PCA. Article 28(2) endows Community subsidiaries of Russian companies with "[a] *treatment no less favourable* than that granted to other *Community companies or to Community companies which are subsidiaries of any third country companies* whichever is better, *in respect of their operation*."[382] It nevertheless also subjects application of national treatment and MFN treatment to the 'legislation and regulations' of the contracting parties. However, an interpretation of the wording of Article 28(2) PCA provided in the Joint Declaration on Article 28 indicates that

> [e]ach Party may regulate the operation of companies on its territory, provided that this *legislation and regulations do not create* for the operations of companies of the other Party *any new reservations resulting in a less favourable treatment* than that accorded to their own companies or to subsidiaries of companies of any third country whichever is the better.[383]

As it has already been emphasised, the mere fact that the application of Article 28(2) PCA is subjected to the 'legislation and regulations applicable in each Party' could not prejudice unconditional nature of the obligation imposed by Article 28(2) PCA. Thus, Article 28 PCA constitutes a clear, precise and unconditional provision capable of producing direct effect within the Community legal order.[384]

Article 29 PCA provides additional provisions governing establishment and operation in banking and insurance sectors. Article 29(2) allows the parties to take "[m]easures for prudent reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service suppliers, or to ensure the integrity and stability of the financial system."[385] However, such measures could not be used "[a]s *a means of avoiding*

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[381] *See*, Joint Declaration in Relation to Article 28 of EC-RF PCA.

[382] *See*, Art. 28(2) (emphasis added). Subject to reservations listed in Ann. 3 EC-RF PCA, *supra* note 30.

[383] *See*, Joint Declaration in Relation to Article 28 of EC-RF PCA (emphasis added).

[384] It must be emphasised that lack of standstill provision on establishment does not prejudice direct effect of Art. 28 PCA. Art. 34 PCA provides that

> the Parties shall *use their best endeavours* to avoid taking any measures or actions which render the conditions for the establishment and operation of each other's companies more restrictive than the situation existing on the day preceding the date of signature of the Agreement.

See, Art. 34 EC-RF PCA, *supra* note 30 (emphasis added). Indeed, Art. 34 PCA does not impose an unconditional obligation on the contracting parties capable of direct effect within the Community. However, it does not ruled out direct effect of Art. 28 PCA on non-discrimination against Russian companies in terms of their establishment and operation of their subsidiaries and branches.

[385] *See*, Art. 29(1) EC-RF PCA, *supra* note 30.

the Party's obligations under the Agreement."[386] Furthermore, Article 29(3) provides that contracting parties

> [*s*]*hall not adopt any new regulations or measures* which would *introduce or worsen discrimination* as compared to the situation existing on the date of the signature of the Agreement *as regards conditions affecting the establishment* of the other Party's companies in their respective territories in comparison to their own companies.[387]

Article 29(3) constitutes an unequivocal 'standstill clause', which clarity, precision and unconditionality leaves no grounds for doubts as regards its direct effectivity within the Community legal order. Thus, an individual applicant can rely on Article 29(3) PCA challenging Community or national legislation introducing discriminatory measures and/or aggravating discrimination as regards conditions of establishment of Russian companies operating in banking and insurance sectors against national companies.[388]

b) The PCA Provision on the Key Personnel

The right of establishment articulated in the EC-RF PCA significantly differs in its scope and method of application from the right of establishment foreseen in the EAs. The EC-RF PCA excludes self-employed persons from the ambit of establishment, thus precluding the application by analogy of the recently developed Community case law on the direct effect of EAs' provisions concerning self-employed persons.[389] The EC-RF PCA only provides a right for the Russian companies established in the Community to employ in accordance with the legislation in force in the host country of establishment Russian nationals as key personnel. Despite the fact that the application of Article 37 PCA is subject to the legislation in force in the host country of establishment,[390] its wording is nevertheless sufficiently clear, precise and unconditional to produce vertical direct effect within the Community legal order.[391] Therefore, the Russian nationals falling within the category of the key personnel can rely on Article 32(1) PCA before

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[386] *Id*. (emphasis added).

[387] *See*, *id*., Art. 29(3) (emphasis added).

[388] *See*, for the interpretation of a worsen discrimination, Art. 29(3) EC-RF PCA, *supra* note 30. Subject to reservations by Russia listed in Ann. 7 *Financial Services*. *See also*, Joint Declaration in Relation to Article 29(3) EC-RF PCA.

[389] *See also*, on the direct effect of the Europe Agreements, Judgment of the Grant Chamber of 16 November 2004 in *Case C-327/02*, *Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055; Judgment of the Fifth Chamber of 8 May 2003 in *Case C-438/00*, *Deutscher Handballbund eV v. Marcos Kolpak* [2003] ECR I-04135; Judgment of 27 September 2001 in *Case C-257/99*, *The Queen v. Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik* [2001] ECR I-06557; Judgment of 27 September 2001 in *Case C-235/99*, *The Queen v. Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova* [2001] ECR I-06427; Judgment of 27 September 2001 in *Case C-63/99*, *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* [2001] ECR I-06369; and Judgment of 20 November 2001 in *Case C-268/99*, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-08615.

[390] *See*, for the definition of the key personnel, Art. 32 EC-RF PCA, *supra* note 30. *See also*, Joint Declaration in relation to Articles 26, 32 and 37 of the EC-RF PCA.

[391] Petrov, *supra* note 337, at 243.

the national courts of the MSs' to ensure their rights of entry and residence.[392] Furthermore, the Russian nationals being legally employed and resident in the MS of the companies' establishment as a 'key personnel' can subsequently rely on Article 23(1) PCA against the Community or national measures discriminating them in terms of working conditions, remuneration and dismissal.

4. The PCA Provisions on Cross-Border Supply of Services

The EC-RF PCA is the only PCA in force containing substantive obligations on cross-border supply of services.[393] Article 36 PCA grants "[t]reatment *no less favourable* than that *accorded to any third country* with regard to *the conditions affecting the cross border supply of services*, by […] *Russian companies* into the territory of […] Community."[394] The wording of the provision imposes a clear and precise obligation on the Community not to discriminate against Russian cross border service providers *vis-à-vis* third country providers. The unconditionality of the obligation enshrined in Article 36 PCA should be assessed in the light of Article 47 PCA, which empowers the Cooperation Council to make recommendations for the further liberalisation of trade in services.[395] In the *Simutenkov* case, the ECJ has clearly indicated that Article 27 PCA empowering the Cooperation Council to make recommendations as regards implementation of Article 23 (1) PCA on non-discrimination in labour conditions does not prejudice direct effect of Article 23 (1) PCA. Therefore, Article 47 PCA providing for non-binding recommendations of the Cooperation Council aiming at 'further' liberalisation of trade in services fails short of subjecting Article 36 PCA to any further measures required for its implementation. Accordingly, Article 36 PCA constitutes a clear, precise and unconditional provision capable of producing direct effect within the Community legal order.[396] However, Article 36 PCA limits the MFN treatment to companies,

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[392] Hillion, *supra* note 101, at 47. However, the right of entry and residence is strictly limited to the period of employment as a key personnel. *See also*, Joint Declaration in relation to Articles 26, 32 and 37 of the EC-RF PCA.

[393] It must be emphasised that the draft of the EC-RF PCA contained merely a 'best endeavour' clause, similar to those enshrined in other PCAs and EAs. The substitution of the 'best endeavour' with 'shall grant' demonstrates an intention of the parties to undertake a precise 'obligation of result'. The EC-Belarus PCA containing provision on cross-border supply of services similar to that enshrined in EC-RF PCA has not yet been ratified due to political reasons.

[394] *See*, Art. 36 EC-RF PCA, *supra* note 30 (emphasis added). *See also*, Ann. 5: Cross-Border Supply of Services: List of Services for which the Parties shall Grant Most-Favoured-Nation (MFN) Treatment. *See also*, Community Declaration in Relation to Article 36 EC-RF PCA, which excludes from the ambit of Art. 36 PCA "the movement of the service supplier into the territory of the country where the service is destined, nor the movement of the recipient of the service into the territory of the country from which the service comes." *See also*, Declaration by Russia in Relation to Article 36 EC-RF PCA.

[395] *See*, Art. 47 EC-RF PCA, *supra* note 30 (emphasis added).

[396] It must be emphasised that Peers has questioned the direct effect of the PCA provisions on cross-border supply of services in the light of the fact that PCA does not incorporate a standstill provision on services. Peers suggested that "without a standstill clause, the articles in question are similar to the GATT articles and commitments upon which the Court of Justice has refused to confer direct effect." *See*, Peers, *supra* note 371, at 839-840 (1995). However, the ECJ has ruled

thus excluding from the scope of the article cross border supply of services by individuals. Nevertheless, Article 37 PCA permits the temporary movement of natural persons representing MFN services' providers

> [f]or the purpose of *negotiating for the sales of cross-border services* […] *entering into agreements to sell cross-border services* for that company, where those representatives will not be engaged in making direct sales to the general public or in supplying services themselves.[397]

Article 37 PCA states that it should be applied without prejudice to Article 48 PCA, which provides that "[n]othing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay […] of natural persons."[398] In the *Simutenkov* case, the Court has clearly indicated that Article 48 PCA can not be construed as "[a]llowing the Member States to subject application of the principle of non-discrimination […] to discretionary limitations, which would have the effect of rendering that provision meaningless and thus depriving it of any practical effect."[399] The aforementioned analysis of Article 37 PCA 'in insulation' and 'in conjunction' with other PCA provisions demonstrates that Article 37 PCA constitutes a sufficiently clear, precise and unconditional provision capable of producing direct effect within the Community legal order.[400]

5. The PCA Provisions on Movement of Capital

The PCA ensures freedom of "[*c*]*urrent payments* between residents of the Community and of Russia connected with the movement of goods, services or persons made in accordance with […] the present Agreement."[401] Article 52 (2) PCA provides for "[f]ree movement of capital between residents of the Community and of Russia in the form of *direct investment* made in companies formed in accordance with the laws of the host country and *investments*" related to the establishment of Russian companies within the Community, as well as

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out the direct effect of GATT articles exclusively on the basis of 'the nature and structure' of GATT without considering whether the wording of GATT provisions is sufficiently 'clear, precise and unconditional' to produce direct effect within the Community legal order. Thus, the mere fact of the PCA provisions being similar to the GATT provisions does not ruled out their direct effect. Undoubtedly, a standstill provision on services would provide a broader scope of protection enabling individual applicants to challenge the legality/validity of any Community measure on cross-border services, which introduce any new restrictions or worsen the situation as regards conditions of operation on the date of the entry into force of the EC-RF PCA. Nevertheless, its absence does not prejudice ability of the Russian cross-border service providers to rely upon Art. 36 PCA challenging Community measures discriminating Russian providers *vis-à-vis* third country cross-border service providers. It must be emphasised that the contracting parties agreed under Art. 38 (3) PCA to examine within the Cooperation Council a possibility of negotiating a standstill clause. However, the contracting parties have never exercised this opportunity.

397 *See*, Art. 37 EC-RF PCA, *supra* note 30(emphasis added).

398 *See*, Art. 48 EC-RF PCA, *supra* note 30. *See also*, Art. 50 EC-RF PCA and Joint Declaration in Relation to Articles 26, 32 and 37 EC-RF PCA.

399 *Case C-265/03*, *Simutenkov*, *supra* note 299, in particular Rec. 24 of the judgment.

400 Petrov, *supra* note 337, at 247.

401 *See*, Art. 52(1) EC-RF PCA, *supra* note 30 (emphasis added). *See also*, for the definition of current payments, Joint Declaration in Relation to Article 52 EC-RF PCA.

"[*t*]*he transfer abroad of this investments*, including any compensation payments arising from measures such as expropriation, nationalisation or measures of equivalent effect" and "*any profit* stemming therefrom."[402] These provisions of the PCA impose on the contracting parties in a clear, precise and unconditional way an 'obligation of result' that an individual applicant can rely on before the Community or national courts.[403] Moreover, Article 52(5) PCA encapsulates a classic standstill provision, which provides that

> [t]he Parties *shall not introduce any new restrictions* on the *movement of capital and current payments* connected therewith *between the resident* of the Community and Russia and *shall not make the existing arrangements more restrictive*.[404]

Thus, an individual applicant can rely upon Article 52(5) PCA against national legislative measures, if they do not comply with the negative obligation enshrined in the aforementioned provision of the agreement. Although falling short of ensuring full liberalisation of capital movements, the PCA provisions nevertheless provide an effective remedy for the protection of interests related to the investment flows and ensure status quo as regards restrictions of capital movements.

G. Conclusive Remarks

A recent unprecedented territorial expansion of the EU accompanied by the economic strength of the interconnected markets and geopolitical weight of the combined diplomatic efforts reinforced the position of EU as one of the most important actors on the international arena. Among those being crown with laurels for the success of the EU model, ECJ deserves its honours as no one else. Indeed, it breathed the life in the EU law of external relations by developing *corpus* of legal rules along the lines of its une certaine idée de l'Europe.

An intensive debate over the substance of the EU rules governing external relations expressed itself in a wave of preliminary references articulating three vital constitutional issues, namely allocation of external competences between the Community and the MSs, the scope of the Community court's interpretive jurisdiction and the doctrine of external direct effect. The Court favoured an open-ended list of external competences, thus discouraging their clear-cut allocation for the sake of maintaining flexible legal framework capable of constant adjustment to the new political and economic developments. It ensured uniformity in interpretation and application of international agreements by calling for a close cooperation between the Community and national courts. It appears that the national courts have positively responded on a call for unity,

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[402] *See*, Art. 52(2) EC-RF PCA, *supra* note 30 (emphasis added). *See*, for the definition of the direct investment, Joint Declaration in Relation to Article 52 EC-RF PCA. *See also*, on the investments made in Russia by Community residents, An Exchange of Letters in Relation to Art. 52 EC-RF PCA.

[403] A. E. Kellermann, *The Impact of EU Enlargement on the Russian Federation*, 4 RJEA 5, at 16 (2004).

[404] *See*, Art. 52(5) EC-RF PCA, *supra* note 30.

willingly referring cases related to interpretation of international agreements to the Community courts, irrespective of whether the provisions falling within the scope of shared competences have been concluded under the Community or MSs' powers.[405] The Court's doctrine of external direct effect has also undergone a substantial review in the recent decades. It is now evolutionized into the *Sevince* scheme, which implies recognition of the external direct effect as a general rule, thus emphasising an exceptional nature of those international agreements, which structure and nature prevents the Court from granting direct effect to their provision. The aforementioned developments of the EU law of external relations had a remarkable impact on the direct applicability of the EC-RF PCA within the Community legal order.

The ECJ has granted direct effect to Article 23(1) PCA on non-discrimination of Russian nationals in working conditions, remuneration and dismissal. The foregoing analysis of the PCA provisions on trade in goods, establishment and operation of undertakings, cross-border supply of services and movement of capital demonstrates that at least some of these provisions are similarly capable of producing direct effect within the Community legal order. Although being limited in its scope, the PCA nevertheless ensures protection against discrimination of Russian entrepreneurships *vis-à-vis* national or third country undertakings. Moreover, businesses acting on the field of EU-Russian cooperation find themselves in a much more advantageous position in terms of an opportunity to rely directly on the GATT provisions expressly incorporated into the EC-RF PCA. Unfortunately, *Simutenkov* remains the only case, where an individual applicant has relied on the PCA provision challenging the validity of the national legislation on the grounds of its inconformity with the obligations assumed by the Community jointly with the Member States under the EC-RF PCA. The reason arguably lies in hiding culture or mentality of the Russian clientele, which prefer to solve legal disputes arising within the framework of EU-Russia bilateral business relations through the medium of the Russian Ministry of Foreign Affairs and Presidential Administration. This paper aimed at demonstrating that the EC-RF PCA provides an opportunity to resolve such disputes in the court of law, rather than in the cabinets and offices of the public authorities. Indeed, the individual applicants have significantly underestimated the potential of the PCA in terms of its ability to serve as a directly effective law within the Community legal system. Whether the same approach as regards current PCA or upcoming post-PCA agreement will be maintained remains to be seen.

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[405] *See e.g.*, J. Mischo, Luxembourg National Report, FIDE, at 5 (2006); G. A. Zonnekeyn, Belgium National Report, FIDE, at 13 (2006); D. Cahill, Irish National Report, FIDE, at 11 (2006); C. G. Patsalides, Cyprus National Report, FIDE, at 15 (2006); A. Falk & K. Wistrand, Swedish National Report, FIDE, at 12 (2006); S. Rodin & I. G. Lang, Croatian National Report, FIDE, at 12 (2006); M. Kauppi & S. Vourensola, Finish National Report, FIDE, at 6 (2006); G. Hafner, Austrian National Report, FIDE, at 8 (2006); M. Niedzwiedz, Polish National Report, FIDE, at 24 (2006) *Cf.* N. Lavranos, Dutch National Report, FIDE, at 9 (2006).