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Free Trade Agreements after the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union

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Abstract: *Free Trade Agreements (FTAs) are increasingly employed by the European Union (EU) as a tool of its internal market and external relations policy. This article addresses the evolution of FTAs through the jurisprudential lens of the Court of Justice of the EU. To this end, and after clarifying key constitutional issues (competence, substance and hierarchy), it discusses the Court's case-law on the direct effect of certain measures, and addresses a selection of cross-functional questions regarding the interpretation of material law founded in the Court's case-law. As a matter of general tendency, the jurisprudence takes a rather liberal stance in recognising direct effects of FTAs concerning analogical interpretation of economic freedom. By contrast, a more restrictive approach appears to have been applied to the interpretation of provisions having an impact on the possibility of third states' citizens to reside in the EU.*

I Introduction

The Treaty of Lisbon introduced a number of significant changes in the law governing the external relations of the EU.[1] The grounds for these changes lay however in the Treaty establishing a European Constitution.[2] As M. Krajewski argues, 'in particular, the Lisbon Treaty preserved the provisions of the Constitutional Treaty regarding the common commercial policy, rendering respective analyses of these provisions by and large valid'.[3] As other contributions in this issue have noted, administrative evolution

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[1] As most of the legal issues considered in this contribution were similar under the European Economic Community (EEC), European Community (EC) or EU Treaties, we have chosen to use only the present denomination—EU—even for situations occurring under previous Treaties. EEC or EC will be employed only when a difference needs to be stressed.

[2] See M. Cremona, 'The Draft Constitution: External Relations and External Action', (2003) 40 *Common Market Law Review* 1347 and C. Smits 'La politique commerciale commune', in M. Dony and E. Bribosia (eds), *Commentaires de la Constitution de l'Union européenne* (Editions de l'Université de Bruxelles, 2005), at 389.

[3] M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi and P. Eeckhout, (eds), *European Union Law after the Treaty of Lisbon*, (OUP, 2012), at 292.

has been accompanied by amendments to the decision-making process of the Council (unanimity/qualified majority) and enlarged powers of the European Parliament regarding the conclusion of trade agreements. Latest examples are very recent; in June 2012 the EU signed an ambitious and comprehensive trade agreement with Colombia and Peru. The European Commission estimates that 'the trade deal will relieve EU exporters of €270 million in duties annually; it will further open up markets on both sides as well as increase the stability and predictability of the trading environment'.[4] In October 2013, EU and Canada reached a political agreement on the key elements of a trade agreement (CETA). Moreover, in June 2013, the Council gave the Commission a green light to enter into formal bilateral trade negotiations with the United States.[5]

Free trade agreements (FTAs) are often used by the EU because it is an important economic tool of the internal market and essential for the EU's external relations policy.[6] This article will address the evolution of FTAs through the jurisprudential lens of the Court of Justice of the European Union (ECJ). It is a conscious choice insofar as it complements other approaches in this issue as well as the legal approach embraced here: legal pragmatism. The 'pragmatic' approach to the law[7] in accordance with the 'Brussels School of Jurisprudence'[8] contemplates the rule of law as a function of its application to a concrete situation where it takes shape and produces effects that can be controversial. For a legal pragmatist, the substance of an issue, norm or system is often measured less by the quality of its 'pedigree' than by the regulatory effects produced.[9] A legal pragmatist analyses these effects, focusing more on the concrete application of regulations than on their origin or enunciation in the abstract. This somewhat 'downstream' view of the law is marked by a shift in interest from the legislature to the judge in both civil and common law countries. The pragmatic approach is relevant to this study through the effects of the jurisprudence associated with FTAs.

Our intention is not to chronicle this jurisprudence, but rather to identify certain recurring questions before the Court in Luxembourg and to analyse the responses provided. Often, these questions are not only relevant to FTAs *stricto sensu* but also to other international agreements binding the EU. In essence, from the moment they are concluded and ratified by EU institutions, the FTAs do not constitute a distinct normative category in the EU legal order but rather a part of a larger general context of international agreements. Furthermore, the FTAs are not the only international

[4] http://ec.europa.eu/trade/countries-and-regions/regions/andean-community/

[5] For a description of the mandate given by the Council to the Commission see: MEMO/13/564

[6] For a comparative view on trade agreements and their purpose concluded by one of the EU's biggest trade partners–China–see F. Snyder, *The EU, the UTO and China: Legal Pluralism and International Trade Regulation* (Hart Publishing, 2010), 324–380.

[7] For an analysis of legal pragmatism in legal interpretation, see R. Summers, 'Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Summary and Critique of Our Dominant General Theory and Its Use', (1980–1981) 66 *Cornell Law Review*, at 862.; B. Tamanaha, 'Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction', (1996) 41 *American Journal of Jurisprudence* 315; B. Frydman, *Le sens des lois* (Bruylant, 2005), at 577.

[8] The 'Brussels School of Jurisprudence' ('Ecole de Bruxelles') earned international renown under the direction of Chaïm Perelman and Paul Foriers for having given new wind to judicial reflection regarding a reconciliation of positive law with argumentative theory. See B. Frydman, 'Perelman et les Juristes de l'Ecole de Bruxelles' in B. Frydman and M. Meyer (eds.), Chaïm Perelman (1912–2012) *De la Nouvelle Rhétorique à la Logique Juridique* (PUF, 2012), 229–246.

[9] B. Frydman, 'Comment penser le droit global?', in J.-Y. Chérot and B. Frydman (eds.), *La science du droit à l'ère de la globalisation* (Bruylant, 2012), at 26.

agreements of the EU dealing with trade issues. As trade is without any doubt one of the most important political instruments of the EU, trade provisions are often found as well in association,[10] cooperation,[11] partnership and cooperation,[12] 'Europe',[13] African, Caribbean and Pacific group of states (ACP)[14] and various bilateral agreements.[15] That is why it will be necessary to mention, although in a limited manner, some important jurisprudential precedents which relate to EU's international agreements in general.

To this end, we first identify the legal context in which FTAs evolved, and with respect to questions regarding their constitutional nature, jurisdiction, substantial limits and placement within the hierarchy of the EU legal order (II). We will then address the direct effect of specific measures (III), as well as a selection of cross-functional questions regarding the interpretation of material law founded in the Court of Justice case-law (IV).

II Constitutional Issues: Competence, Substance and Hierarchical Position

The *competence* of Member States to conclude a treaty is limited only by the restrictions of international law on state sovereignty. By contrast, the same competence of international organizations is limited by their specialization as defined in their constitutional charters. The EU is distinguished from typical international organizations by its jurisprudence, as opposed to particular competences in various domains. Furthermore, EU jurisprudence interprets Treaty terms regarding such competences rather broadly.[16] The Treaty of Lisbon substantially modified external relations in general and FTAs in particular by enlarging the field of application of the common commercial policy, which is an exclusive competence of the Union (Article 3 TFEU). Article 207 TFEU (former Article 133 TEC) now provides that 'the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements *relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade such as those applicable in the event of dumping or subsidies (. . .)'.[17] Furthermore, as the Treaty now includes aspects related to the trade of cultural, audiovisual, educational and health services as within the common commercial policy, difficulties in the formation and execution of mixed agreements should theoretically be eliminated.[18]

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[10] EEC-Greece association agreement from 1961; EEC–Turkey association agreement from 1963;
[11] EEC–Morocco cooperation agreement from 1976; EEC–Algeria cooperation Agreement from 1976.
[12] EC–Russia partnership and cooperation agreement from 1994.
[13] EC–Slovakia Association agreement from 1994.
[14] Yaoundé agreement from 1963.
[15] The EU–Switzerland bilateral agreements—see Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, from 1999.
[16] C. Blumann and L. Dubouis, *Droit matériel de l'Union européenne* (Litec, 2010).
[17] The italicised portion represents additions enacted by the Treaty of Lisbon.
[18] M. Dony, *Droit de l'Union européenne*, (Editions de l'Université de Bruxelles, 2012) and F. Priollaud and D. Siritzky, *Le Traité de Lisbonne—Textes et commentaires article par article des nouveaux Traités européens (TUE-TFUE)*, (La documentation Française, 2008). Unanimous vote by the Council is still a prerequisite to the conclusion of agreements in these areas. For details, see article 204 (4) TFEU.

Regarding the *substance*, an agreement must respect the provisions of primary law at the risk of an *a priori* check by a negative opinion from the Court preventing the conclusion of an international agreement, or an *a posteriori* check via an action for annulment before the ECJ of a Council decision resulting in suppression of the agreement from the EU legal order. In such instance, the Court would take a closer look at the agreement with the other countries involved, and to whom certain decision-making powers might be transferred. The Court has accepted this type of agreement subject to the condition that it does not produce the effect 'of surrendering the independence of [EU] action in its external relations or changing its internal constitution by the alteration of essential elements of the Community structure regarding the prerogatives of institutions, the decision-making procedure, and the position of Member States vis-à-vis one another'.[19] Under this condition, acts adopted by authorities created by international agreements are 'integrated into [. . .] [the EU] legal order'.[20]

The *hierarchical position* of EU international commitments with non-member States follows a relatively clear case-law. The Treaties effectively have primacy over all international agreements.[21] Jurisprudential application of this subordination exists through the Court's annulment of international agreement decisions.[22] Subject to the Treaties, Union institutions and Member States are bound by international commitments through the EU legal order, where they receive the full weight of authority.[23] Because they are binding on institutions, agreements with non-member countries and unilaterally implemented acts hold a superior position in the hierarchy than the secondary law.[24] The foregoing logically implies that the secondary law is interpreted in conformity with the measures of such agreements and that it may be repealed in case of non-conformity. As K. Lenaerts aptly concludes, within the legal order of the Union, 'international law is at the intermediate level—below the constitutional principles of the Union (sub-constitutional), but above derived law (super-legislative)'.[25]

[19] Opinion 1/76 (ECR 1977, 741); Opinion 1/91 (ECR 1991, I-6079); and Opinion 1/92 (ECR 1992, I-2821).

[20] Case C-192/89 *Sevince* [1990] ECR 3461, and Case C- 237/91, *Kus* [1992] ECR 6781.

[21] D. Simon, *Le système juridique communautaire*, (PUF, 2001); N. De Sadeleer and I. Hachez 'Hiérarchie et typologies des actes juridiques', in N. De Sadeleer, H. Dumont, and P. Jadoul (eds.), *Les innovations du Traité de Lisbonne—Incidences pour le praticien* (Bruylant, 2011), at 58.

[22] Case C-327/91 *France v. Commission* [1994] ECR I-3641; and Case C-122/95 *Germany v. Council* [1998] ECR I-973. N. De Sadeleer and I. Hachez *op cit* 50, 58. This subordination allows for the risk of eventual implication of international liability of the EU if such annulment leads to damages or reparations in the realm of international law. P. Eeckout, *External Relations of the European Union—Legal and Constitutional Foundations* (OUP, 2005) and M. Dony *op cit* 264.

[23] This is also true for unilateral acts of institutions created by EU international agreements. The jurisprudence clearly establishes that 'it is by direct implementation of the agreement that decisions of an Associate Council, like the agreement itself, become integrated into [EU] legal order'. See Case *Sevince*, cited above.

[24] Case C-40/72 *Schröder* [1973] ECR 125; Case C-61/74 *Michelina Santopietro v. Commission* [1975] ECR 483; and Case C-344-04 *IATA and ELFAA* [2006] ECR 403.

[25] K. Lenaerts, 'Droit international et monisme de l'ordre juridique de l'Union' (2010) 4 *Revue de la Faculté de droit de l'Université de Liège* 519.

III The Persistent Question of Direct Effect[26]

As soon as international agreements take effect,[27] or from the moment the EU assumes them under Treaty obligations[28]—and they become an integral part of the EU legal system[29]—the issue arises as to how individuals may invoke them in the EU judicial order.[30]

Given the primacy of such agreements over EU legislation, the Court has concluded that EU and Member State courts must ensure that EU and national legislation is interpreted as far as possible in conformity with the obligations contained therein.[31] However, this rule of conforming interpretation, which is equally applicable in the field of non- (or wrongly) transposed directives,[32] cannot be invoked in circumstances where an EU or Member State internal rule 'frontally clashes' with the international one, and where conformity would lead to a *contra legem* interpretation.[33] In such instance, the EU or Member State law may be challenged only if the international agreement provision concerned has 'direct effect'.[34]

Direct effect exists when the contracting parties so indicate in the terms of the agreement.[35] Although the EU institutions competent in negotiating and concluding agreements with non-member countries are free to discuss the intended effects of the measures with the contracting parties, it is extremely rare that the parties expressly address the issue of direct effect.[36] Given the lack of presumption of direct effect in international agreements binding the EU,[37] it is the Court that conducts a careful analysis based on the substance, intention and terms of the measures in question.

In *International Fruit Company*, and *Bresciani*,[38] the Court held that direct effect of international agreements binding the EU is subject to stricter scrutiny than direct effect of EU internal norms. Aside from being clear, precise and unconditional, the spirit and the general scheme of an agreement must demonstrate the ability to confer rights on EU citizens that may be invoked before the courts.[39]

As we will see, the wording of the direct effect test has been altered only slightly—and without any notable changes in substance—since the initial cases. According

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[26] D. Simon *op cit* 403, and P. Eeckout, *op cit* 284.

[27] Case 181/73, *Haegemann* [1974] ECR 449, para 5.

[28] Joined Cases 21 to 24/71, International Fruit Company [1972] ECR 1219, paras 10 to 18 and Case C-308/06, *Intertanko* [2008] ECR I-4057, para 48.

[29] Joined Cases *International Fruit Company*, cited above, para 6.

[30] *ibid.*, para 8.

[31] See Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para 52, and Case C-286/02 Bellio [2004] ECR I-3465, para 33.

[32] In applying national law, the interpreting national court is required to do so, in light of the wording and the purpose of the EU directive, and in order to achieve the result pursued by the directive in compliance with the third paragraph of Article 288 TFEU. See Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, para 113 and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, para 60.

[33] Opinion of Advocate General P. Mengozzi in Case C-335/05, *Řízení Letového Provozu* [2007] ECR I-4307, para 58; see as well K. Lenaerts, *op cit* 519.

[34] This term refers to characteristics of a legal norm that allow it to be invoked by individuals before the courts.

[35] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para 34.

[36] M. Dony, *op cit* 277, 278.

[37] D. Simon, *op cit* 403.

[38] Case 87/75, *Bresciani* [1976] ECR 129, para 16.

[39] Case *International Fruit Company*, cited above, point 20.

to the Court in *Demirel*,[40] a provision in an agreement concluded by the EU with non-member countries must be regarded as directly applicable when (with regard to the wording, purpose and nature of the agreement itself) the provision contains a clear and precise obligation that is not subject to the adoption of any subsequent measure.

Recently, in *Intertanko*[41] and *Air Transport Association of America*,[42] the Court confirmed its ability to examine the validity of EU legislation in light of an international treaty only where the nature and broad logic of the latter does not preclude it, and where the treaty's provisions appear to be unconditional and sufficiently clear and precise.

Let us now have a closer look at these conditions and their implications on direct effect of international agreements in the EU legal order. Relevant case-law defines two sets of conditions. The *first* one is in relation to the examined provision of the international agreement and relates to its normative intensity.[43] It is analogous to the direct effect conditions of EU internal norms[44] and represents a *positive* test. The rights that this provision confers must be clearly and precisely enunciated and they must be unconditional.

Concerning *clarity and precision*, a clarification of a detail is necessary. A careful reader of the Court's cases addressing direct effect might note that whereas some of the cases mention the clarity criterion, others do not. Such discrepancy should not be considered as implying a different test, but merely the fact that the case-law had not yet established a clear distinction between the criteria of precision and clarity. Semantically similar, they should be examined jointly. Regarding clarity and precision, jurisprudence requires the examined provision to explicitly enumerate the rights conferred to individuals, which rights are in question, which individuals may rely on them, and who exactly is obliged to grant/execute them.[45] This was the case in cooperation, partnership and association agreements containing clauses granting citizens of third countries (or citizens of future Member States) equal rights in specific areas within the EU.[46] However, agreements that created only programmes or vague objectives failed to satisfy these conditions.[47] Regarding *unconditionality*, the Court requires that the conferral of the rights or their effect is not dependent on the adoption of any EU or Member State act.[48]

In many cases regarding association agreements, the Court was required to decide whether clauses conferring on third States' citizens' rights such as the freedom of establishment, or equal treatment with respect to conditions of employment, remu-

[40] Case 12/86, *Demirel* [1987] ECR 3719, para 14.

[41] Case *Intertanko*, cited above, para 45.

[42] Case C-366/10, *Air Transport Association of America and Others* [2011] not yet reported, paras 54 and 55.

[43] Case 37/98, *Abdulnasir Savas* [2000] ECR I-2927, para 54.

[44] See Case 41/74, *Van Duyn* [1974] ECR 1337, para 6.

[45] See, by analogy, Joined Cases C-6/90 and C-9/90, *Frankovich and Bonifaci* [1991] ECR I-5357, paras 10 to 27.

[46] See Case C-18/90, *Kziber* [1991] ECR I-199 concerning the EEC–Morocco cooperation agreement; Case C-103/94, *Krid* [1995] ECR I-719 concerning the EEC–Algeria cooperation agreement; Case C-265/03, *Simutenkov* [2005] ECR I-2579, para 23 concerning the EC–Russia partnership and cooperation agreement; Case C-438/00, *Deutscher Handballbund* [2003] I-4135 concerning the EC–Slovakia association agreement and Case C-171/01, *Wählergruppe Gemeinsam* [2003] ECR I-4301, para 58 concerning the EEC–Turkey association agreement.

[47] See Case *Demirel*, cited above, para 23; Case *Savas*, cited above, para 42; and *Case Air Transport Association of America and Others*, cited above, para 77.

[48] See Case C-262/96 *Sürül* [1999] ECR I-2685, para 60.

neration and dismissal could be considered unconditional, while other clauses of the same agreement provided that Member State authorities remained competent to apply their own national laws and regulations regarding entry, stay and establishment, within the parameters of the agreement. Although, the freedom of establishment, for example, is not effective without the possibility for the concerned individuals to enter EU Member State territory, the Court has consistently put aside this obstacle to direct effect by stating that such clauses of association agreements do not concern the Member States' implementation of the provisions governing establishment and are not intended to make implementation or rights conferred subject to the adoption of further national measures.[49]

Another typical obstacle to unconditionality raised by Member States has been that the association agreements grant a certain liberty, ie non-discrimination with respect to conditions of employment, remuneration and dismissal, which takes effect '[s]ubject to the conditions and modalities applicable in each Member State'. However, the Court has rejected this argument, stating that such a provision may not be interpreted so as to allow Member States to subject the principle of non-discrimination set forth in the agreement to conditions or discretionary limitations. Such an interpretation would render the provision meaningless and deprive it of any practical effect.[50]

Last, but not least, FTAs, as well as other types of EU international agreements commonly provide for the creation of a 'council' with powers to adopt decisions executing or implementing rights or objectives set forth in the agreement. On its face, this procedure might certainly represent a hindrance to the unconditionality requirement.[51] However, the Court's jurisprudence has been relatively liberal on this point. Regarding cooperation agreements with countries of the Maghreb[52] and the partnership and cooperation agreement with Russia,[53] the Court held that the provisions that ensure the implementation of the non-discrimination principles in the field of social security may not be construed as calling into question the direct applicability of a provision that is not subject, in its implementation or effects, to the adoption of any subsequent measure. In fact, the role assigned to the 'councils' consists in *facilitating* compliance with the prohibition of discrimination and, if necessary, adopting the measures required for the implementation of particular principles, ie of aggregation. The councils' role may not be regarded as rendering conditional the immediate application of the principle of non-discrimination.

The *second set of conditions* in the direct effect test—*the nature and the broad logic of the international treaty or agreement*—reflects the specificity of international agreements in the EU legal order compared to EU's internal norms, which may be directly applicable if the three previous conditions are met. Here, the Court verifies whether, beyond a potentially clear, precise and unconditional provision, the characteristics of

[49] See Case C-63/99 *Gloszczuk* [2001] ECR I-6369, para 37; Case C-235/99 *Kondova* [2001] ECR I-6427; Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557; and Case C-268/99 *Jany and Others* [2001] ECR I-8615, para 35.

[50] Case C-162/00, *Pokrzeptowicz-Meyer* [2002] I-1049, para 24; and *Case Simutenkov*, cited above, para 24.

[51] This was one of the reasons why in *Demirel* (cited above, para 24) the Court of Justice refused the direct effect of Article 12 of the EEC–Turkey Agreement and of Article 36 of the Protocol, read in conjunction with Article 7 of the Agreement, which contained a standstill clause on the introduction of further restrictions on family reunification.

[52] Case *Kziber*, cited above, para 19.

[53] Case *Simutenkov*, cited above, para 25. For a similar solution concerning a mixed committee in the EEC–Portugal FTA see Case 104/81, *Kupferberg* [1982] ECR 3641, paras 19 and 20.

the agreement under consideration are not hostile to its direct application before the EU or Member State courts. In particular, the Court considers whether the agreement examined in its legal, and even political, context[54] is able to confer rights that individuals can invoke themselves. These conditions create a sort of *negative test*.

Although General Agreement on Tariffs and Trade/World Trade Organisation (GATT/WTO) agreements do not fall within the scope of this article, they deserve to be alluded to given that they are the most notorious examples where these conditions were not satisfied;[55] similar objections to direct effect might arise in FTAs. GATT/WTO agreements[56] are based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements, and they are characterised by great flexibility of their provisions, in particular those allowing for the possibility of derogation, measures to combat exceptional difficulties and the settlement of conflicts between contracting parties. Given these features of GATT/WTO agreements, an individual may not normally base his claim on an eventual violation of their provisions by the EU or a Member State because various settlement options might still exist. Irrespective of the clear, precise and unconditional rules these agreements may contain, their legal and political context renders them generally unsuitable for direct invocation before the EU or Member State courts.

The Court's jurisprudence has acknowledged, however, that where the EU has intended to implement a particular obligation assumed in the context of the GATT/WTO, or where the EU measure refers expressly to the precise provisions of the GATT/WTO agreements, the Court retains the authority to review the legality of such measure in light of the GATT/WTO rules.[57] These are the so-called 'Fediol & Nakajima' conditions.[58] Nevertheless, it is not yet clear whether even in the case of compliance with the Fediol & Nakajima conditions it is still required that the conditions of clarity, precision and unconditionality be satisfied, or whether these last conditions can be effectively bypassed.[59]

In the realm of FTAs, and other trade related agreements, the nature and broad logic condition has met various challenges. The first challenge considered whether the

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[54] Case C-377/02, *Van Parys* [2005] ECR I-1465, para 48.

[55] On WTO law and direct effect, see F. Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart Publishing, 2010) at 153–208, sp165–177.

[56] Concerning GATT, see, *inter alia*, Joined Cases *International Fruit Company*, cited above, para 21, 25 and 26; Case 9/73, *Schlueter* [1973] ECR 1135, para 29; Case 266/81, *SIOT* [1983] ECR 731, para 28; Joined Cases 267/81, 268/81 and 269/81, *SPI and SAMI* [1983] ECR 801, para 23; Case C-280/93, *Germany v. Council* [1994] ECR I-4973, para 106 and Case C-469/93, *Chiquita Italia* [1995] ECR I-4533. For the WTO see, *inter alia*, Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para 47; Case C-307/99, *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, para 24; Joined Cases C-27/00 and C-122/00, *Omega Air and Others* [2002] ECR I-2569, para 93; Case C-76/00 P, *Petrotub and Republica v. Council* [2003] ECR I-79, para 53 and Case C-93/02 P, *Biret International v. Council* [2003] ECR I-10497, para 52. Other examples where the nature and the broad logic of an international treaty or agreement were incompatible with their direct effect in the EU legal order may be found in Case *Intertanko*, cited above, para 64, concerning the United Nations Convention on the Law of the Sea, and in the Case *Air Transport Association of America*, cited above, para 78, with regard to the Kyoto Protocol.

[57] Concerning GATT see Case 70/87 *Fediol v. Commission* [1989] ECR 1781, para 19 to 22, and Case C-69/89 Nakajima *v.* Council [1991] ECR I-2069, para 31; and concerning the WTO agreements, see Case *Portugal v. Council*, cited above, para 49, and Case *Biret International v. Council*, cited above, para 53.

[58] On these exceptions, see F. Snyder, *op cit*, note 54.

[59] Case T-512/09, *Rusal Armenal v. Council*, [2013] not yet reported – appeal before the Court of Justice. C-21/14P – still pending.

inequality of rights and obligations in favour of non-EU countries was in itself contrary to direct effect. Recognising that some of these agreements were specifically designed to contribute to the development of these countries, the Court (after *Bresciani*) did not consider this to be an obstacle.[60]

Next, the Court asserted that direct effect could exist in a provision of an international agreement establishing special procedures for settling disputes between contracting parties. Finally, the Court emphasised that it is not necessary for an international agreement to provide a contracting party with a possibility of accession to the EU in order to be directly applicable.[61]

With the notable exception of GATT/WTO agreements and international treaties such as the United Nations Convention on the Law of the Sea and the Kyoto Protocol, which by their nature do not establish provisions that may be directly invoked by individuals, it is possible to conclude that the Court's jurisprudence has been relatively liberal in recognising direct effect of FTAs, and other trade related agreements.[62] However, in order for individuals to claim rights, the invoked provisions must still receive favourable interpretation. In the next section, we therefore examine the scope of such provisions according to the ECJ case-law, and we devote particular attention to international agreements that confer rights or liberties already provided for under EU law.

IV Analogical Interpretation of Analogical Rights?

The idea of applying the Court's jurisprudence to provisions of international agreements binding the EU that provide for the same or analogous rights or liberties as EU law is not new. In *Bresciani*, the Court held that, expressly referring to Article 2(1) of the 2nd ACP Convention regarding the Treaty provision abolishing charges of equivalent effect, the EU undertook the same obligations towards Associated States as Member States assumed towards each other in the Treaty.[63] This ruling might imply that if an international agreement binding the EU refers to a Treaty provision, the interpretation of the Treaty provision extends to the agreement.

However, such automaticity has not been confirmed in subsequent case-law. Since *Polydor*, the Court has adopted a case-by-case approach.[64] A similarity, or even identity, of provisions in an international agreement and an EU norm does not necessarily lead to analogous interpretation, as there is an obligatory analysis of the provisions in light of both the *object* and *purpose* of the Agreement and its *wording*.[65] The Court noted that although the European Economic Community (EEC)–Portugal agreement aimed at an unconditional elimination of certain restrictions to the free movement of goods between the contracting parties, the agreement did not share the

[60] See Case *Bresciani*, cited above, paras 20 and 21; Case *Kziber*, cited above, para 21; Case *Chiquita Italia*, cited above, paras 30 to 34; Case *Gloszczuk*, cited above, para 36; Case *Kondova*, cited above, para 37; Case *Barkoci and Malik*, cited above, para 37.

[61] See Case *Kziber*, cited above, para 21; Case C-162/96, *Racke* [1998] ECR I-3655, paras 34 to 36, and Case *Simutenkov*, cited above, para 28.

[62] F. G. Jacobs, 'Direct Effect and Interpretation of International Agreements in the Recent Case-Law of the European Court of Justice', in A. Dashwood and M. Marescau (eds), *Law and Practice of EU External Relations* (Cambridge University Press, 2008), at 13.

[63] Case *Bresciani*, cited above, para 25.

[64] Case 270/80 *Polydor* [1982] ECR 329, para 15.

[65] *ibid.*, paras 8 and 16.

same purpose as the Treaty, in as much as the latter seeks to create a single market reproducing as closely as possible the conditions of a domestic market. Consequently, such a difference of objectives between the agreement and the Treaty did not allow for analogical interpretation.[66]

The conditions laid down in *Polydor* were subsequently specified and reiterated in *Metalsa*. The Court referred to Article 31 of the 1969 Vienna Convention on the law of treaties,[67] which stipulates that a treaty is to be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. The point was to stress that stretching the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the EU with a non-member country depends, *inter alia*, on the aim of each provision in its particular context, and on a comparison between the objectives and context of the agreement and those of the Treaty.[68]

It would be difficult to defend the idea that the case-law developed on these grounds followed an internal logic applicable to all circumstances. Rather, it appears that the jurisprudence has formed along several parallel patterns that correspond to issues typically raised as a function of the type of the agreement concerned. In the spirit of the Brussels School of Jurisprudence, we shall illustrate this opinion with concrete examples.

A 'Essence-of-an-FTA' Case-Law

Cases belonging to this group concern mostly trade but also cooperation and association agreements. The Commission or applicants in national proceedings generally petitioned the Court regarding basic provisions in the free movement of goods to be extended to identical or analogous provisions of the agreements. The ECJ did not consider these rules as a logical and coherent block—where one rule was ineffective without the others—but rather, made distinctions among them.

Regarding customs duties on imports and charges having an equivalent effect, the Court observed that, according to Article XXIV para 8(b) of GATT, a free-trade area shall be understood to mean a 'group of two or more customs territories in which the duties and other restrictive regulations of commerce [. . .] are eliminated on substantially all the trade between the constituent territories in products originating in such territories'. As such, elimination of customs duties in the context of eliminating obstacles to trade is of prime importance, along with the elimination of charges having equivalent effect. The Court has therefore concluded that an FTA would lose much of its effectiveness if the term 'charge having equivalent effect' contained in the FTA agreement were interpreted with a more limited scope than the same term appearing in the Treaty.[69]

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[66] *ibid.*, paras 18 to 21.

[67] It is worth noting that the EU is not—and cannot be—a contracting party to this Convention, as it is intended to apply only to relations between States. By contrast, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations from 1986 could have applied to the EU had it taken effect. However, the Court of Justice still refers to the 1969 Vienna Convention in as much as it represents international customary law.

[68] Case C-312/91, *Metalsa* [1993] ECR I-3751, paras 11 and 12.

[69] Case C-163/90, *Legros and Others* [1992] ECR I-4625, paras 25 and 26. Confirmed in Joined Cases C-114/95 and C-115/95, *Texaco and Others* [1997] ECR I-4263, para 27; and generalised in Case

A different solution has been adopted with respect to provisions in international agreements that prohibit quantitative restrictions and measures having equivalent effect, as well as discriminatory internal taxation. The Court has repeatedly held that the interpretation of Treaty provisions establishing these interdictions was inspired by the common market objective, which is altogether absent from FTAs.[70] This objective was nonetheless recognised in *Pabst & Richarz*[71] with respect to the Association Agreement with Greece, as the agreement was intended to prepare Greece for accession to the common market. This specific objective therefore justified an analogous interpretation of the rules banning discriminatory internal taxation.

B 'Turkish Worker' Case-Law

The Court has been relatively open to the analogical interpretation of rights provided for in both the Treaty and the Ankara Agreement. According to settled case-law,[72] the principles enshrined in the Treaty provisions relating to the freedom of movement for workers extends, as far as possible, to Turkish nationals who enjoy rights under the EEC–Turkey Association. As the Court has held, such interpretation by analogy covers not only the Treaty provisions themselves but also the secondary legislation adopted in order to implement them.[73] Analogical interpretation has been applied to the terms 'worker', 'family member' and 'worker being duly registered as belonging to the labour force'.[74] Where the analogous interpretation applied to provisions conferring rights to Turkish workers, the Court equally applied the interpretation to provisions that might give rise to exceptions.[75]

However, the analogical interpretation ended where Turkish workers claimed rights specifically conferred to EU citizens. The exclusively economic purpose of the Ankara Agreement did not allow these rights to be extended to non-EU, ie Turkish citizens, even if they were considered workers in the sense of both the Treaty and the Agreement.[76]

C 'Europe Agreements' Case-Law

Although the Court gave association agreement provisions banning discrimination on grounds of nationality both in working/remuneration/dismissal conditions of legally

C-125/94, *Aprile* [1995] ECR I-2919, paras 38 and 39, and Case C-173/05, *Commission v. Italy* [2007] ECR p. I-4917, para 33, where the Court of Justice held that 'where it is provided for in bilateral or multilateral agreements concluded by the [EU] with one or more non-member countries with a view to eliminating obstacles to trade, the prohibition of charges having equivalent effect to customs duties has the same scope as in intra-[EU] trade'.

[70] Case *Polydo*r, cited above, paras 18 to 21; Case *Kupferberg*, cited above, para 30; Case *Metalsa*, cited above, para 19; Joined Cases *Texaco and Others*, cited above, para 28; and Case C-102/09, *Camar* [2010] ECR I-4045, paras 34 and 35.

[71] Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paras 25 to 27.

[72] See, *inter alia*, Case C-340/97, *Nazli* [2000] ECR I-957, paras 55, 56 and 63; Case C-136/03, *Dörr and Ünal* [2005] ECR I-4759, paras 62 and 63; and Case C-303/08, *Bozkurt* [2010] ECR –13445, para 55.

[73] See, regarding Directive 64/221, *inter alia*, Case *Dörr and Ünal*, cited above.

[74] See, *inter alia*, respectively Case C-14/09, *Genc* [2010] ECR I-931, para 19; Case C-451/11, *Dülger* [2012], not yet reported; and Case C-337/07, *Altun* [2008] ECR I-10323.

[75] Case *Nazli*, cited above, para 56.

[76] Case C-371/08, *Ziebell* [2011] not yet reported, paras 60 to 74. See also V. Polat, 'Le glissement de la politique jurisprudentielle de la Cour de justice à l'égard des travailleurs turcs', (2012), August/September *Revue Europe* 7.

employed workers[77] and in the right of establishment the same interpretation as corresponding provisions in the Treaty,[78] it did not extend the same consequences *vis-à-vis* residence permits as those under the Treaty. The Court noted that, unlike the Treaty, the Europe agreements did not create an internal market, and Member States were to retain jurisdiction in regulating the entry, stay and establishment within their territories.[79]

An interesting aspect of this jurisprudence is that if the competence of Member States to apply their own national laws and regulations regarding entry, stay and establishment does not present an obstacle to direct application of the relevant provisions of association agreements in the EU legal order, this same competence may be a valid reason for not applying by analogy the pertinent case-law. Even more remarkable, in *Gloszczuk*, *Kondova*, *Barkoci and Malik*, the Court refused the extension of its *Royer* case-law because the association agreement was 'simply' designed to create an appropriate framework for the candidate States' gradual integration into the Community, whereas the purpose of the Treaty was to create an internal market. However, it seems this same objective served in *Pokrzepowicz-Meyer*[80] and *Pabst and Richarz* to defend the decision to conduct an analogical interpretation of the relevant provisions.

D 'Cooperation and Partnership Agreement' Case-Law

The cooperation and partnership agreements concluded with the Maghreb countries, Russia and several other Eastern European, Caucasus and Central Asia States[81] contain clauses banning discrimination against these countries' citizens on grounds of nationality with respect to working, remuneration and dismissal conditions. Since *Kziber*, the Court has held these provisions amenable to analogical interpretation with corresponding provisions in EU law. Accordingly, not only the concepts of 'social security', 'worker' and 'family member'[82] but also those of 'public policy', 'public security' or 'public health'[83] were interpreted according to their meaning in EU law. The fact that, unlike the Turkish and Europe association agreements, these agreements were not intended to create a path towards possible accession to the EU did not affect their interpretation in light of EU law.[84]

Limits on analogous interpretation were also noted with respect to the right to stay. For example, Mr. El-Yassini, a Moroccan national whose residence permit expired earlier than his working permit, attempted to rely on the 'Turkish worker' case-law, whereby working rights implied recognition of residence rights, and the validity of

[77] The Court of Justice refused an extension of the non-discrimination rule regarding access to regulated professions. Case C-101/10, *Pavlov and Famira* [2011] not yet reported, para 27.

[78] Case *Gloszczuk*, cited above, para 47; Case *Kondova*, cited above, para 50; Case *Barkoci and Malik*, cited above, para 50; Case *Jany and Others*, cited above, para 27; Case C-465/01, *Commission v. Austria* [2004] ECR p. I-8291, para 44; and Case C-327/02, Panayotova and Others [2004] ECR I-11055, para 19.

[79] See, for interpretation of the Treaty, Case 48/75, *Royer* [1976] ECR 497, paras 31 and 32. Concerning the Europe Agreements, see Case *Gloszczuk*, cited above, para 52; Case *Kondova*, cited above, para 55; Case *Barkoci and Malik*, cited above, para 55; and Case *Jany and Others*, cited above, para 28.

[80] Case *Pokrzepowicz-Meyer*, cited above, para 42 and Case *Gloszczuk*, cited above, para 50.

[81] For details on these last agreements see http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm.

[82] Case *Kziber*, cited above, paras 24, 25, 27 and 28.

[83] Case C-416/96, *El-Yassini* [1999] ECR I-1209, para 45.

[84] Case *Simutenkov*, cited above, paras 35 and 36.

these rights was independent from the initial reason for their conferral.[85] This entails in substance that because the Moroccan cooperation agreement does not aim at a possible future accession of that country, and that it does not prepare it for a free movement of workers, unlike the Ankara Agreement, the case-law analogy has not been granted.[86]

E 'Swiss and EEA' Case-Law

The *summa divisio* of these cases resides in the Swiss refusal to join the European Economic Area (EEA) agreement, while the other European Free Trade Association (EFTA) Member States went along with it. As the Court emphasised in *Grimme*,[87] Switzerland did not subscribe to the project of an economically integrated entity with a single market based on common rules. As such, Switzerland did not join the internal market of the EU, the aim of which was the removal of all obstacles so as to create an area of total freedom of movement analogous to that in a national market, which includes *inter alia* the freedom to provide services and the freedom of establishment. Switzerland instead chose the route of bilateral arrangements between the EU and its Member States in 16 specific areas, which completed the FTA from 1972 and a 1989 insurance agreement.[88]

As these agreements lack the internal market objective, their provisions are interpreted strictly and do not carry any implications beyond the explicit wording and broad logic of the agreement.[89] Consequently, application of the Court's jurisprudence may only be possible within the scope of the rights defined in the Swiss agreements.[90]

By contrast, the interpretation of the EEA agreement closely follows that of the corresponding provisions or concepts in EU internal norms.[91] Due to their degree of integration into the internal market of the EU, the EFTA Member States that have joined the EEA enjoy a more advantageous situation than third-party countries that have concluded FTAs or bilateral agreements with the EU. The jurisprudence tends to indicate that the Court has recognised that, in principle, only those exceptions that may be applied to EU Member States may be applied to EFTA Member States that have joined the EEA.[92] In particular, neither the EU nor its Member States may apply Article 64 TFEU to these countries, which provides for an exception to the free movement of capital with non-Member States.[93]

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[85] Case *El-Yassini*, cited above, para 35.

[86] *ibid.*, paras 57 to 59.

[87] Case C-351/08, *Grimme* [2009] ECR I-10777, paras 27 and 28.

[88] For more details on these agreements, see http://www.europa.admin.ch/themen/00500/index.html?lang=en, or http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/

[89] Case *Grimme*, cited above, paras 30 to 38; Case C-541/08, *Fokus Invest* [2010] ECR I-1025, para 37; and Case C-70/09, *Hengartner and Gasser* [2010] ECR I-7233, paras 40 and 41.

[90] Case C-13/08, *Stamm and Hauser* [2008] ECR I-11087, paras 47 to 49; Case C-506/10, *Graf and Engel* [2011] not yet reported, paras 22 to 26.

[91] See, in general, Case C-452/01, *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, para 29; see, for free movement of workers, Case C-465/01, *Commission v. Austria* [2004] p. I-8291, para 30; see, for freedom of establishment, Case C-104/06, *Commission v. Sweden* [2007] ECR I-671, para 32; see, for free movement of capital, Case C-521/07, *Commission v. Netherlands* [2009] ECR I-4873, para 33; and Case C-72/09, *Établissements Rimbaud* [2010] ECR I-10659, para 22; Case C-83/13, *Fonnship A/S v. Svenska Transportarbetareförbundet* and others, not yet reported, paras 32 to 38 and 41.

[92] See, for free movement of capital, Case C-476/10, *projektart and Others*, para 39.

[93] *ibid.*, para 38 and cited case-law.

The case-law extension is rejected only in exceptional circumstances where, due to different applicable norms, EEA Member States, Switzerland and EU Member States are not in a comparable situation. The Court has held that, under certain circumstances, a difference in fiscal treatment may be admissible between companies established in EU Member States and companies established in overseas territories or third-party states (including EEA Member States) if there is no mutual administrative assistance convention akin to Directive 77/799 among EU Member States. Given the judgment in *Ziebell*, the difference in legal context would probably also justify a refusal of EU citizen-specific rights to citizens of the EFTA member states that have joined the EEA.

The foregoing examples tend to indicate that no general formula exists dictating whether the Court's case-law concerning concepts within EU internal norms may be extended by analogy to similar, or even identical, provisions of international agreements concluded by the EU. In fact, a certain elasticity of the *Metalsa* conditions can be observed. As a matter of general tendency, in cases where the scope, historical and legal context of an agreement is sufficiently amenable, the jurisprudence takes a rather liberal stance concerning analogical interpretation of economic freedoms. By contrast, a more restrictive approach appears to have been applied to the interpretation of provisions having an impact on the possibility of third States' citizens to reside in the EU.

V Conclusion

As stated in the introduction, this jurisprudential analysis contemplates several key recurring issues in the context of FTAs. Three concluding points can be made. First, a certain degree of flexibility, or even elasticity, appears in the Court's jurisprudence, with a preference towards evolution in the course of affairs instead of confinement to dogmatic rigidity. The analysis of cases demonstrates that the Court pays particular attention to context in the domain of FTAs. This emphasis on context—by definition changing—allows the Court to effect changes to its jurisprudence in a relatively easy manner.

Second, aside from the interpretation of provisions regarding the possibility of non-EU citizens to reside in the EU, jurisprudential analysis suggests a fairly liberal Court. Not only in its recognition of the direct effect of cooperation, partnership and association agreements but also in its rather analogous interpretations of economic freedoms, the Court has taken a broad and comprehensive approach so as to facilitate implementation of FTAs within the European legal system.

Third, and more generally, the common commercial policy regime has been simplified. This has been done by its inclusion within the exclusive competence of the Union. It has also been attained by broadening its scope (to include, for example, foreign direct investment). What is more, there is now increased legitimacy through the substantially reinforced role of the European Parliament in the conclusion of agreements.

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