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Legal constraints on EU Member States as primary law makers : a case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession

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PART I

Legal Constraints flowing from EEC-Turkey Association Law

INTRODUCTION

The first part of this thesis tries to lay down the constraints that would flow from the EEC-Turkey Association Law on Member States when negotiating Turkey's accession. Before going into the particularities of the Ankara Agreement and the legal regime created around it, Chapter 2 focuses on the legal basis, aims, scope, as well as past practice of establishing association agreements with third European countries. The EU has signed association agreements with many countries around the world. The reason for restricting our analysis to agreements signed with European countries is the geographical constraint under Article 49 TEU stipulating that only "European" States may apply to become members of the Union. In other words, what is of interest for our purposes are association agreements that have the potential to be used as stepping-stones for EU membership. Chapter 2 examines association agreements of different kind with a view to placing the Ankara Agreement in context, and demonstrating that it is a genuine pre-accession agreement.

Chapter 3 examines the Ankara Agreement in detail, as it constitutes the main legal framework within which EU-Turkey relations take place. As such, it not only shapes and constrains existing relations, but also forms the (legal) basis of future relations and constitutes an important building block towards the negotiation of a possible future Accession Agreement, hence, the need for its in-depth analysis. After introducing the general structure and objectives of the Agreement, the focus shifts on the provisions on free movement of persons, that is free movement workers, service providers and establishment, since the objectives set and the legal rules established around those provisions could arguably constrain Member States and preclude them from introducing a PSC in Turkey's future Accession Treaty.

To demonstrate the level of development of the Ankara *acquis*,[132] the instruments introduced as a first step for the implementation of free movement of persons, that is the Additional Protocol of 1973, as well as Decisions of the Association Council are briefly introduced. Ironically, today, what is more

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132 The terms Ankara *acquis* and Ankara Association Law are used interchangeably throughout this thesis to refer to all legal rules flowing from the Ankara Agreement, its Additional Protocols, Association Council Decisions as well as the case law of the Court of Justice interpreting those instruments.

interesting and instrumental for the further development of free movement are not any instruments taken to complete the final stage of association as envisaged by the Ankara Agreement or its Additional Protocol, but the case law of the Court of Justice which interprets the provisions of the instruments just mentioned.

It should be noted that the case law of the Court delivered during the first decades of the Association dealt mainly with the rights of Turkish workers who were already established in a Member State and the rights of members of their families. It is only in the last fifteen years that the Court has been delivering judgments which have direct implications for free movement of workers, freedom to provide services and freedom of establishment *between* Turkey and Member States of the EU. Chapter 3 focuses on these more recent cases, which deal with the long forgotten standstill clauses. Those clauses were introduced in the instruments that were supposed to lay down the groundwork for the future establishment of the freedoms, by prohibiting the introduction of any new restrictions as a firs step. Since no second or third steps were taken, those clauses were either forgotten or not taken seriously. The cases that provide for the establishment of some freedom of movement in certain fields nowadays is a result of the Court's rulings identifying some of the Member States' measures obstructing free movement as new restrictions prohibited by the standstill clauses.

The examination of the case law on the standstill clauses reveals not only the extent to which free movement of persons is liberalised at the moment, but also provides clues for the possibility of its further liberalisation prior to Turkey's entry into the Union. The case law has also exposed the limits of those clauses, i.e. areas in which liberalisation of free movement is not possible by judicial fiat, such as the free movement of service recipients. In short, Chapter 3 shows that even with the existing limitations, the Ankara Association Law contains one of the most advanced free movement regimes between the EU and a third State, second only to the EEA. The more developed the free movement of persons regime gets under the Association, the more credible (both political and legal) constraint it would constitute on Member States when negotiating Turkey's accession.

2 Association as a stepping-stone to membership

2.1 Introduction

Association has proved to be a versatile instrument for the EEC/EC/EU external relations. Not only have associations with different countries had different aims and content,[133] but also association as a form of relationship with specific countries proved flexible enough to evolve over time in line with the changing needs and desires of its contracting parties.[134] This flexibility was made possible by the vague wording of Article 217 TFEU (*ex* Article 238 of the EEC Treaty, and *ex* Article 310 EC), which constitutes the legal basis of those agreements. Thus, for a better understanding of what an association entails, an analysis of the wording of Article 217 TFEU and the Court's interpretation of it will be provided first. To complement the latter analysis, principles governing the use of association agreements will be deduced from past practice as well as relevant documents. Last but not least, a brief account of the evolutionary trajectory of association will be provided so as to be able to place the Ankara Agreement on it.

2.2 Defining 'association'

To begin with the wording of Article 238(1) of the EEC Treaty (now, Article 217 TFEU), it provided that the Community (now the Union) "may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures". The second paragraph of the same provision laid down the procedure according to which such agreements were to be concluded,[135] i.e. that they were to "be concluded by the Council, acting

133 D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (England: Sheffield Academic Press, 1999). 17.

134 While initially not drafted with membership prospects in mind, the early association agreements with the CEECs were later reoriented towards the attainment of that prospect. See, ibid., 18-19. See also, K. Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," *Common Market Law Review* 37(2000): 1175-90.

135 The procedure for the conclusion of association agreements is now laid down in Article 218 TFEU.

unanimously after consulting the Assembly [European Parliament]."[136] Lastly, Article 238(3) provided that "[w]here such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236 [now Article 48 TEU]".

The brief definition of association as a relationship that involves "reciprocal rights and obligations, common action and special procedures", does not say much. Arguably, the drafters of the Treaty wanted to provide the Community with as much flexibility as possible in defining the aim, scope and content of each association agreement. This is confirmed by the statement of the first president of the Commission of the EEC Walter Hallstein, according to whom "association can be anything between full membership minus 1% and a trade and cooperation agreement plus 1%".[137] The fact that an association constitutes a relationship that goes beyond a mere trade agreement can also be inferred from the Court's *Demirel* ruling, in which it established that an association agreement creates "*special, privileged links* with a non-member country which must, at least to a certain extent, take part in the Community system".[138]

To look more closely at the different components defining association, the first is "reciprocal rights and obligations", which according to the Court, should not be interpreted as "reciprocity" or "equality" in the obligations assumed by the parties.[139] In an association, depending on the level of development of the associate country, rights and obligations may be taken on over time and on an asymmetrical basis, as illustrated by the Ankara Agreement that is discussed in more detail below. However, the parties do not have a completely free hand in this regard. They are, or at least the EC/EU is, constrained by their commitments with regard to international trade. The EC/EU's participation in the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization (WTO) since 1995, means that it can only grant unilateral trade preferences to an associate country under the Article XXIV (5) GATT exemption, that is if the association leads to the "formation of a customs union

136 The role of the European Parliament in the conclusion of association agreements was upgraded with the Single European Act, after the entry into force of which the procedure required "the assent of the European Parliament which shall act by an absolute majority of its component members". See, M. Maresceau, *Bilateral Agreements Concluded by the European Community* (Martinus Nijhoff Publishers, 2006). 315.

137 See, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.

138 Emphasis added. *Case 12/86 Demirel*, [1987] ECR 3719, para. 9.

139 Maresceau, *Bilateral Agreements Concluded by the European Community*: 316. See also, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 24; and S. Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," in *The General Law of E.C. External Relations*, ed. A. Dashwood and C. Hillion (Sweet & Maxwell, 2000), 169.

or a free trade area".[140] Since the agreement between the founding six was that an association should go beyond a mere free trade area,[141] in practice, this was not a problem.

The second component of the definition of association is "common action". Although it has been interpreted by the Court to mean to "take part in the Community system",[142] as Maresceau argues, the expression in the Treaty "has perhaps a less ambitious significance than the Court seems to suggest",[143] since associated countries have never taken part in the Communities' decision-making system.[144] Hence, "common action" seems to refer to the implementation of the objectives of the association through the common institutions created in the framework of the association, such as association councils and/or association committees. Moreover, it is not difficult to deduce that the objectives of the association and any common action will need to be in line with, that is parallel to, those of the Treaty. According to this principle of parallelism established in the *AETR* case:

The Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty. This authority arises not only from an express conferment by the Treaty, but may equally flow from measures adopted, within the framework of provisions, by the Community institutions.[145]

The Court elaborated on this principle in *Kramer*, by stating that the authority of the EC to enter into international commitments may arise "not only from express conferment by the Treaty, but may equally flow *implicitly* from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions, by the Community institutions".[146] The implication of this principle for association agreements was that common action could cover only areas where the EC had "an explicit or implicit internal competence to act".[147] However, association agreements entailing matters beyond the EC's treaty-making powers were signed in the past,[148] and today agreements that include cooperation in the field of CFSP can be signed as well. The method employed to overcome the competence constraint in signing an

140 Moreover, any customs union had to cover "substantially all the trade between the constituent territories of the union" (Article XXIV (8)(a)(i) GATT) and had to contain "a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time" (Article XXIV (5)(c) GATT). See, the Text of the 1947 General Agreement on Tariffs and Trade. Available online at: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

141 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 30.

142 *Case 12/86 Demirel*, para. 9.

143 Maresceau, *Bilateral Agreements Concluded by the European Community*: 317.

144 Ibid.; and Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

145 *Case 22/70 Commission v Council (AETR)*, [1971] ECR 263, para. 1 of the summary.

146 Emphasis added. *Joined Cases 3, 4 and 6/76, Kramer and Others*, [1976] ECR 1279, paras. 19-20.

147 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 25.

148 Ibid., 27.

association agreement has been to have both the EC/EU and its Member States individually sign and approve the envisaged association agreement, which would then be classified as a "mixed agreement".[149] According to Phinnemore, the use of this method has broadened the scope of association "well beyond that already available under the flexible provisions of Article 238 (310) [Art. 217 TFEU]".[150]

As to the last component of association laid down in Article 217 TFEU, that is "special procedures", it refers to the establishment of an institutional framework to ensure the proper functioning of the association. This institutional framework created separately under each association agreement, which usually consists of an association council, an association committee and a joint parliamentary committee,[151] provides the forum in which, decisions and "common action" are taken, so as to materialize the objectives of the association.[152]

2.3 Principles of practice and association as a flexible and evolving tool

Efforts to establish the EEC's approach on association were put forth as soon as it was created. What follows is a brief account of the Member States' changing views on the nature and aims of association over time, as well as an endeavour to identify some of the principles of practice that have not changed since their inception.

The founding six Member States of the EEC considered the idea to create a European free trade area with other OEEC (Organisation for European Economic Co-operation) countries, which was referred to as the European Economic Association at the time. To that effect an Interim Committee was established already back in 1957 in order to coordinate the position of the six on what such association should entail. It was agreed that an association should go beyond a free trade area to include the coordination or harmonization of

149 Schermers defined mixed agreements as follows: "A mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence". H. G. Schermers, "A Typology of Mixed Agreements," in *Mixed Agreements*, ed. D. O'Keeffe and H. G. Schermers (Kluwer, 1983), 25-26. For a comprehensive and up-to date account of challenges posed by mixed agreements, see C. Hillion and P. Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010).

150 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 28.

151 An association council is composed of representatives of the Council and of the government of the associate state; an association committee is composed of Commission officials and senior civil servants of the associate state; and a joint parliamentary committee contains parliamentarians from both the European Parliament as well as the national parliament of the associate state. See, ibid., 26-27.

152 Ibid.; Maresceau, *Bilateral Agreements Concluded by the European Community*: 317.

commercial policy, the conditions of production, as well as provision of adequate safeguards.[153] This list was extended in the 'Ockrent Report' of October 1958 to include the coordination of trade policies, rules on competition, the harmonization of social conditions and rapprochement of legislation, the convergence of economic, and free movement of workers,[154] which led to the collapse of the talks with countries of the OEEC, as the list was considered to be too ambitious. The Report emphasised the following principle, which was to govern negotiations and their conclusion. It provided that "[the European Economic Association] Agreement must not in any way prejudice either the content or the implementation of the Treaty of Rome".[155] In other words, the implementation and safeguarding of the Treaty of Rome had priority. The fear the associations could slow down or compromise the EEC's own development led to the exclusion of associates from participation from the EEC institutions.

As Phinnemore succinctly summarizes, the basic principles that emerged during the first few years regarding the use and content of association agreements were as follows: "first, no association should impede integration within the EEC; secondly, association should not involve simply a free trade area, but entail policy coordination if not harmonization; and thirdly, involvement of the associate in the EEC's internal decision-making processes was not on offer".[156] These principles can be deduced not only from the early reports of the European Parliament, but also from the content and structure of the first two Association Agreements with Greece (1961) and Turkey (1963).[157] Member States' views on association in the 1960s and 1970s did not go beyond these principles. Neither the Member States nor other community institutions managed to formulate a consistent policy in this period.

One of the important differences of opinion was on the issue whether association should be made available exclusively to those states aspiring to become members in the future or whether it should also be employed as a permanent, long-term alternative to membership. The divergence of opinion is visible in the early reports of the European Parliament. While the Birkelbach

153 L. N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford and London: Stanford University Press & OUP, 1963). 141-42.

154 What is referred to, as the "Ockrent Report" in the literature is a Memorandum of the Council of Ministers of the EEC, of 17 October 1958, forwarded to the Intergovernmental Committee of the OEEC for the establishment of a free-trade area in Europe. Available online at: http://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/c517d312-8554-4e08-9c75-ce5a347fd619/Resources#d697fac3-ec53-4c75-b7dc-eaf90db58e8c_en&overlay

155 Ibid.

156 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

157 Agreement establishing an Association between the European Economic Community and Greece (Athens Agreement), OJ 26/294, 18.2.1963; and Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement), OJ 113/1, 24.12.1973.

Report (1961) outlined the association possibilities with the EEC,[158] it emphasized that "the norm for European states should be EEC membership and not association".[159] However, two years later a second report by the European Parliament, the Blaisse Report (1963) was published. While acknowledging the view held by some that "an "association" agreement can be concluded only with countries which later intend to become full members of the Community",[160] in its following page the Report states that association is also possible "for countries which, though unable or disinclined to join the Community, are nevertheless prepared to play their part in the integration process by harmonising their economy with that of the Community to a really appreciable extent".[161] In other words, countries, which did not wish to join the EEC, could also become associates, provided they were ready to commit to a certain degree of integration.

Despite the existence of supporters of both views, the prevailing, yet unofficial view in 1960s, was that association had to be limited to less developed countries, such as Greece and Turkey, which could use the relationship to develop their economies and become members in the future. That can be deduced even from the first two concluding paragraphs of the Blaisse Report. While acknowledging there is no reason why the applications of the neutral countries (Austria, Sweden and Switzerland) should not be considered, it stated that:

> 'The Treaty of Rome provides for the association of non-member countries, although *what its authors had in mind was perhaps more a temporary association of countries still not sufficiently developed economically to become full members*. Thus the association with Greece is undoubtedly the purest form of application of Article 238.'[162]

The principles mentioned above became formal principles in 1987 when the Commission laid down its position on the future of EC-EFTA relations.[163] These principles, which were referred to as the Interlaken Principles, envisaged

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158 The first possibility was that of an association based on a customs union leading to possible future membership; the second possibility was an association based on a free trade area; and lastly, a relationship based on a special economic cooperation agreement. See, M. Willi Birkelbach (Rapporteur), "Rapport fait au nom de la commission politique de l'Assemblée parlementaire européenne sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté" (Birkelbach Report), 19 December 1961, pp. 25-28. Available online at: http://www.cvce.eu/content/publication/2005/6/1/2d53201e-09db-43ee-9f80-552812d39c03/publishable_fr.pdf

159 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

160 P. A. Blaisse, "Report prepared on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No 134, 26 January 1963, p. 31.

161 Ibid, p. 32.

162 Emphasis added. Ibid, pp. 35-36.

163 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 38-39.

"priority for internal integration, preservation of the Community's autonomous powers of decisions and the need to achieve balanced results (a fair balance between benefits and obligations)".[164] A second set of principles came out from the Commission proposals for Europe Agreements (EAs) with the Central and East European Countries (CEECs). The conclusion of such agreements was to take place on the condition that prospective associates gave "practical evidence of their commitment to the rule of law, respect for human rights, the establishment of multi-party systems, free and fair elections and economic liberalization with a view to introducing market economies".[165] The commitment to democracy and the latter principles, (which later in 1993 were proclaimed officially as the "Copenhagen criteria"), have always been one of the unwritten prerequisites for establishing an association, however, this was made explicit only in 1990.[166]

The Commission's proposals on the EAs undoubtedly reaffirmed earlier principles. However, according to Phinnemore, they deviated in one important respect from the earlier requirement that an associate be a democracy. He argues that Spain was seen as ineligible for association in 1960s not only because it was not a democracy, but also because association at the time was seen as stepping-stone to membership. Whereas in the case of the CEECs, the EAs were "proposed as sui generis agreements and not as pre-accession agreements".[167] Even though future membership was not entirely ruled out, at least in the earlier EAs (those with Hungary, Poland, the Czech and Slovak Federal Republic), the link between association and membership was not explicitly acknowledged. It was only after the 1993 Copenhagen European Council that the EAs were reoriented as pre-accession tools.[168]

One of the most creative uses of "association" as a tool has been within the Stabilisation and Association Process (SAP) initiated in 1999,[169] with the

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164 Bulletin of the European Communities, Vol. 5 – 1987, p. 65.

165 European Commission, "Association Agreements with the Countries of Central and Eastern Europe: A General Outline", COM(90) 398 final, Brussels, 27 August 1990, p. 20.

166 C. Hillion, "The Copenhagen Criteria and their Progeny," in *EU Enlargement: A Legal Approach*, ed. C. Hillion (Oxford, Portland, Or.: Hart Publishing, 2004); Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 39.

167 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 39. See also, M. Maresceau, "A Typology of Mixed Bilateral Agreements," in *Mixed Agreements Revisited: The EU and its Member States in the World*, ed. Christophe Hillion and Panos Koutrakos (Oxford: Hart Publishing, 2010), 18.

168 See P.-C. Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to a Member State Status," in *East Central Europe and the European Union: From Europe Agreements to a Member State Status*, ed. P.-C. Müller-Graff (Baden-Baden: Nomos, 1997), 16; Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," 1173; Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

169 Communication from the Commission to the Council and the European Parliament, on "The Stabilisation and Association Process of countries of South-Eastern Europe (Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania", COM (1999) 235 final, Brussels, 26.05.1999.

purpose to stabilize and democratize the Western Balkans by offering "a perspective of EU membership"[170] once the Copenhagen criteria are fulfilled. Hence, conditionality is the cornerstone of SAP and its novelty was that it applied even in the absence of any contractual links between the EU and the countries of the region.[171] Blockmans calls this "a graduated process", as increasing levels of conditionality apply from the start of negotiations to the conclusion of the Stabilisation and Association Agreements (SAAs) and later until eventual accession.[172] As a result of this process SAAs were signed with Croatia (2001), Macedonia (2001), Albania (2006), Montenegro (2007), Bosnia and Herzegovina (2008), and Serbia (2008). Negotiations for a SAA with Kosovo started on the 28 October 2013.[173] In its preamble, each of the agreements confirms that the respective associate is "a *potential* candidate for EU membership",[174] thereby creating officially an additional status for states aspiring to join the EU.

In short, this overview illustrates the changing views and policies in the EU on what association should entail. There were always diverse views on the matter, as illustrated by the early Parliamentary reports mentioned above. While the prevailing view in that early period was of developing association as a relationship to assist less developed countries, such as Greece and Turkey, to build their economies so as to prepare them for full membership in the future, the EAs of the early 1990s were far less ambitious. However, no matter what the initial intention was, as far as association agreements signed with European countries were concerned, they could (and often would) be reoriented towards attaining membership as soon as consensus to that effect appeared. Not only the EAs, but also the 1995 enlargement to the EFTA countries is a good illustration of the fact that, more often than not associations with European countries serve as a road that sooner or later seems to lead to EU membership.

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170 See, Common Position concerning a Stability Pact for South-Eastern Europe 1999/345/CFSP, OJ L 133, 28.05.1999, pp. 1-2.

171 Another novelty was the paramount importance given to regional cooperation. While cooperation between the CEECs was encouraged, it was considered crucial for the stabilisation of the Western Balkans. Hence, it constituted an explicit condition that reappeared in the SAAs again and again. See, S. Blockmans, "Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)," in *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, ed. S. Blockmans and A. Lazowski (The Hague: T.M.C. Asser Press, 2006), 338.

172 S. Blockmans, "Consolidating the Enlargement Agenda for South Eastern Europe," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (The Hague: T.M.C. Asser Press, 2007), 67-68.

173 See European Commission, MEMO/13/938, 28.10.2013. Available online at: http://europa.eu/rapid/press-release_MEMO-13-938_en.htm

174 Emphasis added.

2.4 DIFFERENT MODELS OF ASSOCIATION

As briefly discussed above, the nature of association agreements signed over the decades between the EEC/EC/EU and third countries have changed. Before going into categorizing them on the basis of the trade regime they entail, it should be noted that "[t]he Community's [now the Union's] classification of agreements is governed by politics, not law".[175] That is especially the case with mixed agreements. Hence, scholars warn against approaching them from a purely legal perspective, as they occupy the "complex grey zone where law and politics meet".[176] That partially helps explain, why the Ankara Agreement, which is considered as "a genuine pre-accession agreement",[177] has not led to accession, while the Agreements with Malta and Cyprus, which were considered to be "nothing more than advanced trade agreements",[178] have done so.

While the place of an association agreement in the classification below does not automatically determine the fate of an associate state in terms of its eventual accession to the Union, it is still very important, as the scope, content, aim and degree of integration envisaged by each type of agreement is taken into account by the Court of Justice when interpreting those agreements. It will not be wrong to say that the deeper integration an agreement envisages, the more the Court is inclined to give it an interpretation in line with EU law. Thus, the first cluster of agreements, which envisaged the establishment of a Customs Union and the eventual accession of Greece and Turkey to the Community/Union, are among the agreements that have been given the widest interpretation by the Court.[179]

The following classification of association agreements has been borrowed from Phinnemore and has been updated.[180] It is chronological, as clusters of agreements signed in different periods reflect the Community's/Union's evolving association policy in those respective periods of time. The first cluster of agreements are the ambitious association agreements signed with Greece and Turkey in the 1960s, immediately followed by the more modest agreements signed with Malta and Cyprus in the 1970s. Thirdly, comes the EEA: the most

175 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 175.

176 Maresceau, "A Typology of Mixed Bilateral Agreements," 16.

177 M. Maresceau, "Turkey: A Candidate State Destined to Join the European Union," in *From Single Market to Economic Union: Essays in Memory of John A Usher*, ed. N. Nic Shuibhne and L. W. Gormley (Oxford: OUP, 2012), 318. See also, A. Rizzo, "L'Accord d'Ankara: Accord d'Association ou de Véritable "Pré-adhésion"?," in *Turquie et Union européenne: État des lieux*, ed. B. Bonnet (Buxelles: Bruylant, 2012), 105-32.

178 Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

179 As to the EEA Agreement, which does not envisage eventual accession, but deep integration into the internal market, it should be noted that it is the EFTA Court that rules on issues of interpretation.

180 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 45-49.

advanced association regime created between the Union and a group of third countries. Though officially it is a relationship that does not envisage membership, in practice, as illustrated by the 1995 enlargement, membership is not entirely ruled out. Last but not least, come the EAs of 1990s and SAAs of the 2000s signed with the CEECs and those of the Western-Balkans.

2.4.1 Associations based on a Customs Union

The first two association agreements were the so-called Athens Agreement signed with Greece (1961), and Ankara Agreement signed with Turkey (1963). These were ambitious association agreements that aimed at the gradual establishment of a Customs Union and the harmonization of the economic policies of these two countries with that of the EEC in the medium-term, and preparing them for full membership in the long-term.[181]

The emphasis in these agreements was on establishing a Customs Union because that was also the EEC's priority at the time. The very first sentence of Article 9 of the EEC Treaty, which is situated in Part Two: Foundations of the Community, under title I: Free Movement of Goods, stipulates that "[t]he Community shall be based on a customs union …". Both Agreements, even though the Ankara Agreement was less detailed,[182] can be called mini-Treaties of Rome, as they covered the EEC Treaty's entire subject matter.[183] Both agreements provided for future free movement of goods, workers, services, capital, freedom of establishment, and the extension of the rules on agriculture, transport, and competition. The comprehensiveness of those agreements, particularly their economic provisions providing for the harmonization of policies between the associates, according to Feld,[184] strongly suggest that they provide for "more than the creation of a mere customs union".[185]

The conclusion that a relationship based on a Customs Union was suitable for associates, which aspired to become members in the future, but were

181 W. Feld, "The Association Agreements of the European Communities: A Comparative Analysis " *International Organization* 19, no. 2 (1965): 230-34.

182 The Athens Agreement is more detailed and is composed of 77 provisions, whereas, the Ankara Agreement is composed of only 33 provisions. Thus, the latter agreement had to be complemented by an Additional Protocol providing for the details of its implementation in 1971. See, J. N. Kinnas, *The Politics of Association in Europe* (Frankfurt: Campus Verlag GmbH, 1979). 61.

183 See, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161.

184 He notes however, "that the provisions containing the elements of an economic union [in the Ankara Agreement] are not detailed regulations but only commitments for future action during the transition and final periods which will be spelled out in detail by the Supplementary Protocol". Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 233-34.

185 Ibid., 233.

economically not ready to do so at the relevant time, such as Greece and Turkey, can also be deduced from the report of the Political Commission of the Parliamentary Assembly, which provided as follows:

> 'Les avantages d'une association sous forme d'union douanière consistent notamment dans un rapprochement progressif du pays associé au marché commun, posant ainsi les jalons de son adhésion future. *C'est pourquoi cette forme se recommande tout particulièrement pour les pays désireux d'adhérer, mais qui ne remplissent pas les conditions économiques nécessaires à l'adhésion.* Si ces pays sont prêts à tirer les conséquences d'ordre politique qui résultent des liens étroits de l'association, à respecter les principes établis, à se soumettre au système de contrôle institutionnel de l'association, l'union douanière leur offrira de plus grands avantages que les autres formes d'association.'[186]

Even though both countries were considered as "developing" countries at the time, Greece was better off than Turkey. That is why the Ankara Agreement provided first, for an extra "preparatory stage", in which Turkey was to strengthen its economy with the aid from the Community. While a detailed schedule for establishing a Customs Union was spelled out clearly in the Athens Agreement,[187] the Ankara Agreement provided for the drafting of such a schedule in an Additional Protocol that was to be adopted once Turkey was deemed ready to enter the next "transitional stage" of the association,[188] which was to precede the "final stage" that was to be based on the Customs Union.[189] Last but not least, both Agreements contained provisions referring to the examination of the possibility of their accession to the Community once they were ready to accept the obligations their memberships would entail.[190]

2.4.2 Associations based on a potential Customs Union

In the following decade, "the apparent centrality of a customs union to an association was challenged",[191] mainly because of the problems experienced with Greece and Turkey.[192] Thus, the association agreements signed with Malta

186 Emphasis added. Birkelbach Report, note 158 above, para. 103, p. 26.

187 For details see, Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 230-34; and Kinnas, *The Politics of Association in Europe*: 56-61.

188 See, Articles 3 and 4 of the Ankara Agreement.

189 See Article 5 of the Ankara Agreement.

190 See Article 28 of the Ankara Agreement and Article 72 of the Athens Agreement.

191 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 46. See also, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161-62.

192 There were both economic and political problems. The economies of both countries did not develop as quickly as expected to match those of their western counterparts. Moreover, the 1960s were marked by military coups and political turmoil in both.

(1970) and Cyprus (1972) were "a very limited form of free trade agreement[s]"[193] that envisaged the possibility to establish a Customs Union.[194] These agreements were not pre-accession agreements. They were not even mixed agreements, as they did not envision cooperation in any other area than free movement of goods.[195]

Neither the substantively limited scope of these agreements, nor the absence of any reference to accession in them, constituted a problem or an obstacle for the Maltese and Cypriot membership applications. Once they joined the Union in 2004, these limited agreements were replaced by the Accession Treaty,[196] demonstrating clearly that when there is (political) will there is a way.

2.4.3 The EEA: The Internal Market Association

This section provides only a brief overview of the EEA Agreement. Even though it is the most advanced economic regime created as a basis of relations with developed countries, the fact remains that it emerged as an alternative to EU membership, and currently none of the states parties to it seems to have any active membership aspirations.[197]

Iceland, Liechtenstein, Norway and Switzerland are the only remaining parties to the EFTA Convention.[198] While all of these states participated in the negotiations of the EEA Agreement, as a result of a negative referendum in December 1992, Switzerland failed to actually join the EEA. Subsequently, it

193 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161. See also, Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

194 The preamble of both agreements provide that "eighteen months before the expiry of the first stage, negotiations may be opened with a view to determine the conditions under which a customs union between the Community and [Malta/Cyprus] could be established".

195 Maresceau, "A Typology of Mixed Bilateral Agreements," 19.

196 Ibid.

197 There were two negative referenda on the issue of EU membership in Norway (in 1972 and 1994). A third referendum is not very likely in the near future. As to Iceland, it lodged a membership application in 2009, which was followed by the opening of accession negotiations in 2010. However, those negotiations were short-lived as the government of Iceland dissolved its accession team, and put the negotiations on hold. See, http://eu.mfa.is/documents/

198 The EFTA Convention was signed in Stockholm in 1960, and was updated on 21 June 2001 by the Vaduz Convention. The Vaduz Convention incorporated important rules and principles established in the EEA Agreement as well as in the Bilateral Agreements between the EU and Switzerland. As a result, all EFTA states now enjoy the same privileged relationship among themselves as they do with the EU. The EFTA Council regularly updates the Convention so as to reflect the developments under the EEA Agreement and the Bilateral Agreements with Switzerland. For more details, see EFTA, Communiqué of Ministerial Meeting of the European Free Trade Association, Vaduz, 21 June 2001, PR-E 3/2001. See also, www.efta.int.

established its own complex web of more than hundred bilateral agreements with the EU, which now govern their relations.[199] Since only a few of these agreements are formally based on Article 217 TFEU (or its predecessor provision),[200] from a legal point of view it is difficult to maintain that those constitute an association regime, even though there are academics arguing to the contrary.[201]

The EEA Agreement constitutes the most advanced economic regime created as a basis of relations with developed countries. In terms of free movement of goods, it does not go as far as establishing a Customs Union,[202] yet, in terms of free movement of persons, services and capital it entails the adoption of the entire internal market *acquis* by the associates, i.e. Iceland, Liechtenstein and Norway (the so-called EEA/EFTA states).[203] The EFTA Court, which deals

199 For a detailed analysis, see C. Tobler and J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-) Rechts. Systematische Darstellung in Text und Tafeln*, 2 vols. (Zurich: Dike, 2013); T. Cottier et al., eds., *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Berne: Stämpfli, 2014).

200 See, Agreement between the EC and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed on 21.06.1999 in Luxembourg, OJ L 114, 30.04.2002, p. 6; Agreement between the EC and the Swiss Confederation on Air Transport, OJ L 114, 30.04.2002, p. 73; Agreement between the EC and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, OJ L 114, 30.04.2002, p. 91; Agreement between the EC and the Swiss Confederation on trade in agricultural products, OJ L 114, 30.04.2002, p. 132; Agreement between the EC and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ L 114, 30.04.2002, p. 369; Agreement between the EC and the Swiss Confederation on certain aspects of government procurement, OJ L 114, 30.04.2002, p. 430; Agreement on Scientific and Technological Cooperation between the EC and the Swiss Confederation, OJ L 114, 30.04.2002, p. 468; and Protocol to the Agreement between the EC and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their Accession to the European Union, signed on 26.10.2004 in Luxembourg, OJ L 89, 28.03.2006, p. 28. See also, G. Bauer and C. Tobler, "«Der Binnenmarkt ist (k)ein Schweizer Käse». Zum Assoziationsstatus der Türkei, der EWR/EFTA-Staaten und der Schweiz in ausgewählten EU-Politikbereichen, insbes. dem EU-Binnenmarkt," in *Schweizerisches Jahrbuch für Europarecht 2014/2015* (Berne: Stämpfli, 2015 (forthcoming)).

201 For an example, see R. Streinz, "Die Türkei als Partner – Formen der Zugehörigkeit zur EU," in *Jahrbuch Bitburger Gespräche 2005/II, Zur Frage einer Mitgliedschaft der Türkei in der Europäischen Union* (München: C.H. Beck 2006), 121.

202 The free movement of goods remains limited to a free trade area. See, P. J. Kuijper, "External Relations," in *Kapteyn & VerLoren van Themaat: The Law of the European Union and the European Communities*, ed. P. J. G. Kapteyn, et al. (Kluwer Law International, 2008), 1339.

203 Ibid., 1339-41. See also, A. Lazowski, "EEA Countries (Iceland, Liechtenstein and Norway)," in *The European Union and its Neighbours*, ed. S. Blockmans and A. Lazowski (The Hague: TMC Asser Press, 2006); EFTA-Court, *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart Publishing, 2014); C. Baudenbacher and in cooperation with the University of Liechtenstein, eds., *Handbook of EEA Law* (Heidelberg: Springer, 2015 (forthcoming)).

with EEA law for matters arising on the side of the EEA/EFTA states, qualifies the existing framework of relations as constituting "a fundamentally improved free trade area".[204]

While the existing system seems to function well, the first draft for an EEA Agreement is recalled by scholars as an example of a planned association that involved "too much integration".[205] The Court delivered a negative opinion on the first draft agreement as it considered it provided for a system of courts with competences that would damage the autonomy of the Community legal order; hence the agreement was found to be incompatible with "the very foundations of the Community",[206] and was accordingly revised.

2.4.4 Associations based on a Free Trade Area

In terms of the trade regime they create, the EAs together with the SAAs appear to be the least ambitious of the agreements covered so far. They envisage(d) the incremental establishment of a free trade area in industrial goods over a period of time that could extend up to ten years, determined in line with the level of development of each associate.[207] Including rules on competition and state aids was seen as a necessary corollary to introducing the rules on free movement of goods.[208]

Free movement of workers, services, capital, freedom of establishment, approximation of laws are referred to and included only "embryonically" in the EAs.[209] However, the substantive scope of cooperation was extended considerably after those agreements were reoriented towards full membership and were complemented by the introduction of the pre-accession strategy in 1994.[210] Even though there is no explicit mention of membership or accession

204 *Case E-2/97 Mag Instrument Inc v California Trading Company Norway, Ulsteen (Maglite decision)*, [1997] EFTA Court Report 127, para. 27.

205 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 170.

206 *Opinion 1/91 EEA*. Cf. *Opinion 1/92 EEA*, [1992] ECR I-2821.

207 The periods envisaged in the EAs and SAAs varied among themselves. While the norm was a ten-year period for the EAs, Estonia was deemed ready to pursue free trade immediately. Latvia and Slovenia negotiated a four-year transition period, and Lithuania a six-year period. The SAAs also envisage different periods. For instance, while the Agreement with Croatia envisaged a six-year year transition period, the one with FYROM envisaged a ten-year period. See, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 48; D. Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," *European Foreign Affairs Review* 8(2003): 89.

208 Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to a Member State Status," 17.

209 Ibid.

210 Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 94. See also, Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," 1175-90.

in the early EAs,[211] the Court of Justice explicitly acknowledged that objective in the interpretation of those agreements.[212]

Scholars agree that the structure and content of the SAAs were inspired by the EAs.[213] Thus, the emphasis here will be on the most important differences rather than similarities between the two types of agreements.[214] There are few important differences worth mentioning here. The first is the reference contained in the preambles of the SAAs to the associated countries as "potential candidates" for EU membership. While Phinnemore thinks that this reference "suggests that the SAAs enjoy a lesser status compared with the Europe Agreements",[215] Maresceau takes the contrary view and argues that by virtue of this reference, SAAs "at least conceptually, are more clearly pre-accession agreements than the Europe Agreements".[216] The author agrees with the latter view.[217] As mentioned above, the first EAs do not contain anything explicit

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211 The references that can be interpreted to that effect in the EAs are under the title "Political Dialogue". See, Article 2 of one of the earliest EAs (signed in 1991), which provides that political dialogue and cooperation "will facilitate Poland's full integration into the community of democratic nations and progressive rapprochement with the Community". See also, the latest EA (signed in 1996), Article 4 of which provides for "Slovenia's full integration into the Community of democratic nations and its progressive rapprochement with the European Union".

212 While acknowledging the aim of the EA as "the progressive integration of the Republic of Poland into the Community" in *Pokrzeptowicz-Meyer*, the Court extended its case law on workers to the EA provisions. However, the same statement with the further addition of "with a view to its [Poland's] possible accession" in *G³oszczuk*, was not enough for the extension of the case law on freedom of establishment to the corresponding provisions of the EA. In short, acknowledging the aim of the EAs as accession did not mean the extension of corresponding EU Treaty rules and case law to the provisions of the EAs. For the respective citations, see, *Case C-162/00 Pokrzeptowicz-Meyer*, [2002] ECR I-1049, para. 42; and *Case C-63/99 G³oszczuk*, [2001] ECR I-6369, para. 50. For an in-depth analysis of the Court's case law on the interpretation of provisions of various EAs concerning free movement of persons, see C. Hillion, "Cases C-63/99 Secretary of State for the Home Department ex parte Wies³aw G³oszczuk and Elzbieta G³oszczuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Ma³gorzata Jany e.a v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002.," *Common Market Law Review* 40, no. 2 (2003): 465-91.

213 See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 96; and Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

214 For an extensive and in-depth comparison see, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 77-103. See also, Maresceau, "A Typology of Mixed Bilateral Agreements," 18-19.

215 Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 84.

216 Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

217 Phinnemore might have reached that conclusion because he compares only the reference in the EA with Slovenia with those in the SAAs. As can be seen in more detail in note 211 above, the standard reference in the earlier EA agreements ("full integration into the

referring to accession or membership to the EU. The prospect of membership was introduced not by the first EAs, but by the Copenhagen European Council in 1993, following which special Accession Partnerships had to be developed to assist each country in its transition to democracy and establishing a functioning market economy in preparation for accession.

The second important difference between the SAAs and EAs is the emphasis placed on regional cooperation in the former. Regional cooperation was encouraged in the EAs as well, however, their focus was rather on economic and political reform. It is not surprising that there is a special title (Title III) devoted entirely to regional cooperation in the SAAs, as the underlying rationale of SAP is, first and foremost, to bring peace and "stability" to the Western Balkans.[218]

Last but not least, the SAAs impose a four or five-year waiting period before the respective Stabilisation and Association Councils are able to adopt measures regarding the implementation of the freedom of establishment for the self-employed.[219] There was no such waiting period in the EAs, only the application of the non-discrimination provision regarding the freedom of establishment was postponed until the end of the respective transitional period defined in each agreement,[220] or exceptionally in certain sectors, excluded all together.[221]

As argued above, there are more similarities than differences between the two types of agreements. Another important element borrowed from the experience of the accession process of the CEECs is the so-called "European Partnerships", modelled on the Accession Partnerships designed to complement

community of democratic nations") has become "full integration into the Community of democratic nations" in the EA with Slovenia. Obviously, capitalizing the word "community" has changed its meaning. In other words, if one judges only on the basis of the existence of an explicit reference to accession to the EU, being "a potential candidate for EU membership" seems more promising and concrete than "full integration into the community of democratic nations". However, on the whole, as Phinnemore's comparative analysis of the two types of agreements reveals, under many of the headings, the proposed scope of cooperation is bigger in the EAs. He also adds that the language employed in the two types of agreements proves the claim that the SAAs envisage a less intense form of association than the EAs. See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?."

218 Ibid., 84-85.

219 See for example, Article 50(4) of the SAA with Albania and Article 48(4) of the SAA with Macedonia, which impose a five-year waiting period after the entry into force of their respective agreements, while Article 49(4) of the SAA with Croatia and Article 53(4) of the SAA with Serbia impose a four-year waiting period. See also, S. Peers, "EU Migration Law and Association Agreements," in *Justice, Liberty, Security: New Challenges for EU External Relations*, ed. B. Martenczuk and S. Van Thiel (Brussels: Brussels University Press, 2008), 56.

220 For an example see, each indent of Article 44(1) of the EA with Poland.

221 For an example see, Article 44(6) of the EA with Poland, which reads as follows: "The provisions concerning establishment and operation of Community and Polish companies and nationals contained in paragraphs 1, 2 and 3 shall not apply to the areas or matters listed in Annex XIIe."

the EAs.[222] As to the change in the qualifying adjective of the partnership, the Croatian experience illustrated that once the necessary conditions for opening accession negotiations are fulfilled, it is not difficult to re-name and re-qualify the relationship.[223] Yet, as illustrated by the Turkish experience so far, neither the existence of Accession Partnership instruments,[224] nor the official opening of accession negotiations are a guarantee for a country's eventual accession to the EU.[225]

2.5 Conclusion

The purpose of this introductory part on various forms of association between the Community/Union and third European states was to illustrate that the latter relationship could take various forms and that it could evolve over time in line with the development of the Community/Union and the changing needs or wishes of the associates. However, as soon as the associates expressed their wish to join the club, and provided they were ready to do so, they were always welcome to join.

Association can be any kind of relationship, which goes beyond being a mere trade agreement but falls short of full membership.[226] As is illustrated in more detail in Part II, the rationale underlying the EU's latest enlargement policy, its creative design, use of various strategies and partnerships was to assist the associate states aspiring to join the EU in their preparation to become full members of the EU, so that they are able to take on fully their respective obligations flowing from the Treaties without disrupting the proper inner functioning of the Union.

Whether and to what extent the Union succeeded in preparing the candidates for their membership is another matter. However, as will also be demon-

222 Blockmans, "Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)," 346.

223 It should be noted that the re-naming took place following the opening of accession negotiations with Croatia on 3 October 2005. See, Council Decision 2006/145/EC on the principles, priorities and conditions contained in the *Accession Partnership* with Croatia, OJ L 55/30, 25.02.2006, and repealing Council Decision 2004/648/EC on the principles, priorities and conditions contained in the *European Partnership* with Croatia, OJ L 297/19, 22.09.2004. Emphasis added.

224 For the first Accession Partnership developed for Turkey see, Council Decision 2001/235/EC on the principles, priorities and intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85/13, 24.03.2001; for the latest one see, Council Decision 2008/157/EC on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 51/4, 26.02.2008.

225 Accession negotiations with Turkey were opened on 3 October 2005.

226 Feld, "The Association Agreements of the European Communities: A Comparative Analysis" 227.

strated in the following Part, the Community/Union kept on developing and fine-tuning its instruments to that effect based on its previous experiences. This was essential, not only because the EU is a moving target, which kept "deepening" by acquiring new powers and competences, but also because the challenge of integrating new Member States increased tremendously, as there were not many "developed" countries left wishing to join the Union. Hence, if the Union wished to sustain its enlargement policy, it had to develop the appropriate instruments that would assist membership aspirants in their transformation in the quest to join the Union. In this context, association proved to be an invaluable framework within which those instruments could be employed in line with the corresponding needs of each associate.

As demonstrated above, different associations were developed on the basis of different (trading) models; hence, each relationship developed to a different extent. If an associate wished to join the Union, it had to live up to the challenge of taking on fully the obligations that flew from its accession to the Community/Union at the relevant time, which seemed to grow exponentially with each subsequent enlargement. At that point, the legal regime created by the association, with the rights and obligations it entails for the Contracting Parties as well as their nationals, has always served as the basis, which had to be complemented with the necessary policies and measures that would transform the associate into a full Member State. The more developed the legal regime under the association, the less complementary work was needed at the time of accession. This is clearly exemplified by the short period of time it took for the EEA States Austria, Finland, and Sweden to join the Union in comparison to other former associates.[227]

The purpose of this introductory part on different association regimes was to put the Ankara Agreement in the context of other association agreements so as to reveal its true nature. It was established that it is indisputably a genuine pre-accession agreement. Since the aim of this thesis is to establish the constraints on Member States in drafting Turkey's Accession Agreement, it is essential to lay down the existing legal regime created by the Ankara Agreement in more detail, as it serves as the basis for Turkey's accession process. The amount of work to be done is determined by the level of cooperation and approximation reached by the association regime along various policy lines. This basis is the minimum, the starting point, which is to be topped up in the process of accession and preparation for membership with the missing pieces of the jigsaw puzzle that will complete the picture and raise Turkey

227 Austria, Finland and Sweden signed the EEA Agreement on 2 May 1992. The EEA Agreement entered into force on 1 January 1994. See, Information concerning the date of entry into force of the Agreement on the European Economic Area and of the Protocol adjusting the Agreement on the European Economic Area, OJ L 1/606, 3.1.1994. Half a year later, on 24 June 1994, they signed their Accession Treaties, which entered into force on 1 January 1995, OJ L 1, 1.1.1995.

to the status of a full Member State. It is argued further that this minimum or this already acquired basis of rights and obligations will serve as a constraint on Member States in the accession process. In other words, the existing association regime can be characterized as a stepping-stone or a basis that needs to be further complemented; it is not something to be further reduced. If the latter is at stake, then we are no longer talking about an accession process, but simply about changing the existing nature of the association.[228]

As Hallstein put it, membership minus %1 is an association.[229] Hence, even if Turkey's full integration in other policy areas is ensured, it is argued that given the importance of free movement of persons to the European integration project, crippled free movement rights for Turkish nationals will mean nothing more than the changing of form of the existing association. Since the case study in this thesis is based on the possibility of including a PSC on free movement of persons in the future Turkish Accession Agreement, the analysis of the existing association regime that follows below focuses specifically on the *acquis* on free movement of persons.

228 For more detailed arguments to that effect, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," 273 and 80-81.

229 According to Hallstein, "association can be anything between full membership minus 1% and a trade and cooperation agreement plus 1%". He is cited in Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.