

**THE POLISH EUROPE AGREEMENT:  
AN ANALYSIS OF IMPLEMENTATION AND  
IMPLEMENTATION THEORY IN EUROPEAN  
UNION EXTERNAL RELATIONS AGREEMENTS**

**LYNN ELIZABETH RAMSEY**

**SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY  
SCHOOL OF LAW  
UNIVERSITY OF GLASGOW**

**April, 1998**

# Contents

<i>Table of Cases</i>		<i>ii</i>
<i>List of Tables</i>		<i>iv</i>
<i>List of Diagrams</i>		<i>v</i>
<b>Introduction</b>		<b>1</b>
<b>Chapter One</b>	<b>Legal and Political Relations from the Cold War to the First Generation Agreements</b>	<b>16</b>
<b>Chapter Two</b>	<b>The Europe Agreement Negotiations: Power Imbalance and Galanter</b>	<b>42</b>
<b>Chapter Three</b>	<b>Theoretical Framework for Implementation</b>	<b>79</b>
<b>Chapter Four</b>	<b>Towards Pre-accession: The Legally Binding and Autonomous Legal Measures Regulating EU-Polish Relations</b>	<b>104</b>
<b>Chapter Five</b>	<b>The Europe Agreement: Textual Analysis</b>	<b>120</b>
<b>Chapter Six</b>	<b>The Europe Agreement: Implementation Structures</b>	<b>156</b>
<b>Chapter Seven</b>	<b>Implementation Disputes</b>	<b>184</b>
<b>Chapter Eight</b>	<b>Conclusions</b>	<b>215</b>
<b>Annex One</b>	<b>Single Market: White Paper measures</b>	<b>245</b>
<b>Bibliography</b>		<b>248</b>

I owe an overwhelming debt of gratitude to Professor Noreen Burrows who has supervised this thesis. Her constant guidance, support and enthusiasm have been invaluable.

Finally, thanks to Mark for all the rest and more.

## Table of Cases

- 22/70      *Commission v Council (ERTA)* [1971] ECR 263
- 21-24/72      *International Fruit Company NV v Produktschap voor Groeten en Fruit* [1972] ECR 1219
- 48/74      *Charmassan* [1974] ECR 1783
- Opinion 1/75      *(Re: OECD Local Cost Standard)* [1975] ECR 1355
- Opinion 1/76      *(Re: Rhine Navigation)* [1976] ECR 754
- 3, 4 & 6/76      *Kramer* [1976] ECR 1279
- Ruling 1/78      *(Re: Draft Convention on the Physical Protection of Nuclear Materials)* [1978] ECR 2151
- Opinion 1/78      *(Re: Natural Rubber Agreement)* [1979] ECR 2871
- 379/78      *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967
- 804/79      *Commission v United Kingdom* [1981] ECR 1045
- Opinion 1/91      *(Re: EEA Agreement)* [1991] ECR 6079
- Opinion 1/92      *(Re: Second EEA)* [1992] ECR 2821
- Opinion 2/91      *(Re: ILO Convention)* [1993] ECR 1061



Opinion 1/94 (*Re: WTO Agreement*) [1994] ECR 5267

25/94      *Commission v Council* [1996] ECR 1464

## **List of Tables**

Table One	Interview details (Brussels)
Table Two	Interview details (Poland)
Table Three	Employment in Poland in 1991
Table Four	Model of the 'ideal type' repeat player and one-shotter
Table Five	Main objectives for the parties to the Europe Agreement
Table Six	Modified Sabatier and Mazmanian framework
Table Seven	Measures regulating EU-Polish Relations in the 1990s
Table Eight	Provisions permitting the adoption of protectionist measures
Table Nine	Provisions enabling consultation to take place on issues beyond the scope of the Europe Agreement
Table Ten	Provisions which are based upon EC law standards
Table Eleven	Implementation structures
Table Twelve	Evolution of Polish implementation strategy
Table Thirteen	Common roots and common triggers
Table Fourteen	Dispute resolution strategies
Table Fifteen	Analysis of the Polish Opinion
Table Sixteen	Polish foreign trade with the EU according to GUS
Table Seventeen	Polish foreign trade with the EU according to EUROSTAT
Table Eighteen	The modified and expanded implementation framework

## **List of Diagrams**

Diagram One	Poland's position on the one-shotter/ repeat player continuum
Diagram Two	The Polish legislative process
Diagram Three	Non-linear implementation

# INTRODUCTION

On 1 February 1994 the Polish Europe Agreement, an association agreement concluded between the EU and Poland, entered into force.<sup>1</sup> This thesis provides an analysis of the implementation of that Agreement. It also evaluates Sabatier and Mazmanian's implementation framework and its relevance to EU external relations agreements.<sup>2</sup>

## The Importance of Implementation Theory

It is vital that commentators consider not just what the law claims or purports to do but also whether the law achieves its objectives, is the legislation effective? It is clear that no universally accepted definition of effectiveness exists, either in general terms or with respect to EC law. Moreover, little empirical research relating to EC law exists.<sup>3</sup>

The debate on effectiveness has tended to concentrate on the importance of implementation as a means of securing effectiveness. One of the most influential studies in the area of implementation theory of EC law was that undertaken at the European University Institute and published in 1988.<sup>4</sup> This study took as its

- 
- <sup>1</sup> In this thesis the following terminology is used:  
Chapter one deals with the period between the 1950s and the 1980s. In this chapter reference is made to the European Economic Community (EEC). Thereafter, for convenience, all references are to the European Union (EU). Where reference is made to the "EU side" this relates to the EU and its Member States. Finally, reference is made throughout to European Community (EC) law as the EU does not, as yet, have legal personality.
- <sup>2</sup> Daniel Mazmanian and Paul Sabatier, *Effective Policy Implementation*, (Lexington, 1983).
- <sup>3</sup> Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" 49 at p58 in T. Daintith (editor), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (J.Wiley, 1996).
- <sup>4</sup> Sidentopf and Ziller (eds), *Making European Policies Work: the Implementation of Community Legislation in the Member States*, 2 Volumes (1988).

starting point a definition of the political process as “a process of problem solving by the politico-administrative system”.<sup>5</sup> Throughout the study, the emphasis is therefore on implementation as being an integral part of the process of the policy cycle. In this way a framework for studying the implementation of EC law was devised. It classified four phases: adoption, implementation, application and enforcement. Snyder has identified a number of problems with this study.<sup>6</sup> First, it focused upon a top-down approach, emphasising the role of the policy-maker at the expense of other levels of government with decision-making power. Secondly, there may be many different levels of implementation and the theory did not always take account of these. Thirdly, implementation may rely on social as well as purely administrative or legal factors and this had been largely ignored. Snyder concluded by calling for a “different approach... in order to eventually elaborate a theoretical conception of Community law”. He considers there to be three aspects to effectiveness: implementation, enforcement and compliance. This thesis focuses upon the first aspect of Snyder’s effectiveness trinity: implementation.

Implementation studies are central to our understanding of the law. This is no less valid for EC law than any other type of legislation. In general terms, the implementation of EC law must begin with an examination of the primary legislative provisions. Article 5 EC requires Member States to “take all appropriate measures whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community”. As a consequence, Member States are under a duty to ensure that they have correctly implemented EC law. This would begin with an examination of whether the existing domestic legislation meets the EC

---

<sup>5</sup> Sidentopf and Ziller (eds), *fn* 4 above at p3.

<sup>6</sup> See *fn* 3 above at p60.

standards. If not, new legislation may be required, existing legislation may require modification, secondary legislation may be necessary or perhaps a change in government agency practice is required.<sup>7</sup>

The field of European competition law provides a good example of the importance of implementation study to EC law, both for the policy maker and for those to whom the policy is targeted. For example, the European Commission cannot be confident of developing effective competition policy unless it monitors the implementation of the legislative and non-legislative measures designed to secure the achievement of competition objectives. Businesses must know what the impact of the competition policy is in order successfully to compete in the market place. To this end, it is not sufficient merely to understand the legislative provisions but it is necessary to have a good working knowledge of how the Commission applies and interprets these rules on a day-to-day basis. In this way, the businesses may assess both the relative merits of complying with the competition rules and the possible costs of failing to comply with the competition regime.<sup>8</sup> In this area of law it is not merely the legally binding provisions, the treaty articles, regulations, directives and decisions which are important. Commission practice (such as the issuing of comfort letters) or the issuing of notices are equally important to an understanding of how the competition policy is implemented.

In the context of European external relations the issue of implementation is equally relevant. European external relations have evolved slowly since the

---

<sup>7</sup> For an analysis of the implementation of EC law in the UK see, Lynn E Ramsey, "The Copy Out Technique: More of a 'Cop Out' than a Solution?" (1996) 17 Statute Law Review 218.

<sup>8</sup> See for example, A. Brown, "Notification: Whether to Submit to the Flawed System" (1992) 17 ELR 323.



inception of the treaties.<sup>9</sup> Legal analysis has largely focused upon the issue of competence in external affairs and the related issue of power-sharing between the institutions. In addition, many commentators have considered the scope and nature of external relations agreements. In general there has been little work carried out which considers the effectiveness of external relations agreements. Some commentators have attempted to analyse the impact of agreements on trade and development.<sup>10</sup>

Others have attempted to predict the impact of agreements upon associated states.<sup>11</sup> Such academic works are invaluable in the development of a critical understanding of European external relations.

This thesis aims to provide an additional dimension to legal studies in the field of external relations. It is difficult to analyse the effectiveness of European external relations policy without first understanding in what ways and to what extent existing agreements have been implemented. Similarly, the continued and developed use of the association agreement as a foreign policy tool cannot be properly evaluated without implementation studies first having been carried out. Within the context of relations with the Central and Eastern European States (CEES) this is particularly important since the association agreement concluded with the Visegrad states, (Poland, Hungary and the former Czechoslovakia) the Europe Agreement has been adopted as a model in agreements with other CEES. Any analysis of the effectiveness of the EU response to the CEES must be based upon analysis of the implementation of these agreements. Moreover, accession

---

<sup>9</sup> See A.G. Toth, *Oxford Encyclopaedia of European Community Law* (OUP, 1990) , pp256-271. See generally, I Macleod, I.D. Hendry and Stephen Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996); Dominic Mc Goldrick, *International Relations of the European Union* (Longman, 1997).

<sup>10</sup> See for example, Addo "A Critical Analysis of the Perennial International Economic Law Problems of EEC-ACP Relationship" (1990) *GerYIL* 33.

<sup>11</sup> See for example, Elizabieta Kawecka-Wyrzykowska "Poland's Trade Relations with the European Community" (1993) 2 *Polish Quarterly of International Affairs* 21.

to the EU is in part dependent upon progress towards successful implementation of the Europe Agreement. A subsidiary, but none the less important, justification for the need for implementation studies in the field of external relations is accountability. The objectives of many association agreements are often supported by EU funding. The correct implementation of these agreements is part of the effective deployment of EU financial resources.

### **Theoretical Framework**

This thesis argues that a tripartite framework based upon a modified Sabatier and Mazmanian framework, power imbalance and institutional considerations may be employed in order to analyse the implementation of the Polish Europe Agreement. The framework which is developed identifies a number of variables which may have a direct impact upon the implementation of the Polish Europe Agreement. This framework is applied in order to assess the progress made in implementation to date. It is used to explain why implementation disputes have arisen and why the parties to the Agreement adopted certain negotiating positions during the implementation disputes. The thesis argues that the implementation framework which has been developed assists our understanding of the implementation of the Polish Europe Agreement. In addition it argues that this implementation framework provides a useful basis for future analysis of European external relations agreements, particularly mixed agreements.

### ***Sabatier and Mazmanian***

This thesis adopts Sabatier and Mazmanian's classic work on the implementation of public policy as the basis for its theoretical framework. Sabatier and Mazmanian divide their analysis of implementation into three broad categories:

1. The tractability of problems;
2. The ability of the statute to structure implementation; and



### 3. Non-statutory variables.

Within these three broad categories Sabatier and Mazmanian have identified a number of variables which, they believe, impact upon implementation.

This thesis analyses the Sabatier and Mazmanian framework in order to test the relevance of its application to the Polish Europe Agreement. The conclusions reached result in modifications to Sabatier and Mazmanian's framework. It is this modified framework which is then tested against the progress and experience of implementing the Polish Europe Agreement. In this way it is possible to develop a theoretical framework which may be employed to analyse the Polish Europe Agreement and other external relations agreements.

#### *Power Imbalance*

This thesis argues that the asymmetry of power between the parties to the Europe Agreement has direct and important consequences for the implementation of the Polish Europe Agreement. Chapter two analyses the relative power of Poland and the EU-side vis-a-vis the Europe Agreement. The analysis is based upon a rational actor thesis which assumes that all states aim to act in a way which maximises their positions. This thesis argues that the outcomes of the process of negotiating the Polish Europe Agreement reflects the power imbalance of the parties to the Agreement. This is consistent with writers such as Moravcsik.<sup>12</sup> Moravcsik argues that "interstate bargaining outcomes are decisively shaped by the relative power of nation-states."<sup>13</sup> Asymmetry of power is assessed using the Nash bargaining theory which asserts that where power imbalance between states exists then the state which benefits most from an agreement, relative to their best unilateral and coalitional alternatives to the agreement, tends to offer the greater

---

<sup>12</sup> Andrew Moravcsik, *the Choice for Europe*, (UCL, 1999).

<sup>13</sup> Andrew Moravcsik, *fn 12 above* at p7.

compromises in order to achieve it.<sup>14</sup> This thesis tests the concept of power imbalance within the Polish Europe Agreement using Galanter's work on the impact of the structure of the legal system upon the ability of the law to attain redistributive change.

This thesis demonstrates that power imbalance directly determines the nature, scope and content of the Polish Europe Agreement. It also analyses how the effects of power imbalance at the negotiating stage continue to impact upon the Agreement at the implementation stage.

### *Institutional Considerations*

It may have been tempting to have approached analysis of the Europe Agreement from an institutionalist perspective or, alternatively, to have assessed the Agreement in terms of integration theory. Neither approach would have proved a truly rounded picture of the complexities of the process of integration. This thesis accepts the premise that "institutions matter" and demonstrates how the non-unitary nature of the EU directly impacts upon the implementation process.<sup>15</sup> Chapter seven describes in detail the implementation disputes which have taken place, some of which have arisen due to the division of competences between the EU and its member states and the difficulties which result when the objectives of these two parties conflict. This thesis also demonstrates the complexity of both the EU and Polish organisations in chapter six. The complexity of the EU institutional structures undermines the ability of the Polish side to negotiate effectively at both the drafting and implementation stage.

---

<sup>14</sup> Nash J, "The Bargaining Problem" (1950) *Econometrica* 155; Nash J, "Non-cooperative Games" (1951) *Annals of Mathematics* 286; Nash J, "Two-person Cooperative games" (1953) *Econometrica* 128. For recent analysis of Nash see generally John F Nash Jr, *Essays in Game Theory* (Edward Elgar, 1996); Osborne M. and A. Rubenstein, *Bargaining and Markets* (San Diego Academic Press, 1990); and Osborne M and A. Rubenstein, *A Course in Game Theory* (MIT Press, 1994).

<sup>15</sup> Laura Cram, *Policy-making in the EU: Conceptual Lenses and the Integration Process* (Routledge, 1997) at p27.

Writing on the new institutionalism has been concerned not with implementation but with policy formulation. It is accepted that the process of implementing the Europe Agreement is partly concerned with policy formulation because in certain areas the text of the Agreement establishes only a framework for cooperation which requires the detail of that cooperation to be agreed later. However, focusing solely upon this aspect using an institutionalist perspective may reduce the importance given to other factors which impact upon the process of implementation such as the importance of the text to the Europe Agreement. The work of Sabatier and Mazmanian demonstrates the dangers of an analysis which does not give due importance to the role of the text in the implementation process. Chapters seven and eight demonstrate the importance of non-institutional and non-policy issues to the process of implementation.

Similarly, an analysis developed solely on the grounds of integration theory ignores broader variables, such as the power imbalance between the parties. This thesis analyses the power imbalance between Poland and the EU side in the process of negotiation and implementation. Chapter two discusses the factors which both contribute to and reinforce this imbalance. First, Poland is economically weaker than the EU and from the 1980s has sought and received financial assistance from the EU. This is discussed in chapters one and two. Secondly, Poland's desire to join the EU was made explicit at the very outset of the negotiations. The EU side have been able to conduct negotiations knowing that the prize of EU membership is Poland's ultimate goal.

Chapters two and seven demonstrates how the EU side exploited Poland's desire for membership to give them a bargaining advantage in both the negotiation and implementation process. Thirdly, the EU side are very experienced in negotiating association agreements. This advantage is reinforced by the EU side's ability to conduct negotiations in English using a draft agreement prepared by the Commission. These factors both create and reinforce the power imbalance between the parties.



This thesis therefore is concerned with the broader issue of implementation rather than concentrating purely upon institutionalism or integration theory.

### **Thesis Structure**

This thesis begins by explaining the significant legal and political developments in relations between Poland and the EU from the cold war period until the conclusion of the negotiations for the Europe Agreement. Chapter two uses Galanter's work in order to highlight the power imbalance between the parties to the Europe Agreement. Chapter three then provides a detailed evaluation of Sabatier and Mazmanian's framework and proposes a modified implementation in the light of this evaluation. Together chapters two and three provide the theoretical framework used to analyse the implementation process in this thesis. Chapters four and seven evaluate the overall progress made in the implementation of the Europe Agreement. These chapters examine: the adoption of legally binding and autonomous legal measures; the significance of the Europe Agreement text for the implementation process; the structures which exist to implement the Europe Agreement; and implementation disputes. Sabatier and Mazmanian's framework is then analysed in relation to the analysis and evidence gathered in this thesis. Galanter's work is used to understand the impact of the power imbalance between the parties on the implementation process. The thesis concludes by highlighting the issues which have played a crucial role in shaping the implementation of the Polish Europe Agreement. It proposes an implementation framework which may be used in future studies on the implementation of EU external relations agreements.

### **Chapter Outlines**

Chapter one examines the developments in legal and political relations between the then EEC and Poland from the post war period until the period preceding the negotiations for the Polish Europe Agreement. It highlights the progress made in these relations. It begins by analysing the cold war period when there was non-recognition of the EEC by the USSR and, therefore, by Poland. It examines the

small-scale sectoral agreements concluded in the 1960s and the adoption of the so-called “autonomous trade policy” by the EEC. It explains the importance of the joint declaration on mutual recognition to the development of legal and political relations between the EEC and Poland. The chapter also considers the importance of internal political developments within Poland. It concludes by examining the first generation agreements and three autonomous developments: PHARE, the EBRD and Tempus.

Chapter two examines the negotiations for the Polish Europe Agreement. This provides an important basis for this thesis for three reasons. First, it analyses the negotiating process highlighting a number of conflicts and explaining how they were resolved. These patterns and strategies are later reflected in the implementation disputes discussed in chapter seven. Secondly, it uses Galanter’s framework to understand the power imbalance between the parties and how this shaped the negotiations process. Finally, it examines how the final text agreed between the parties reflects the conflicts which took place during the negotiation process. The analysis of the power imbalance between the parties is central to a full understanding of the implementation process and is further analysed in chapter eight.

Chapter three examines the implementation framework used in this thesis. It begins with an examination of why Sabatier and Mazmanian’s framework is relevant to this thesis. It analyses their framework, applying it to the Polish Europe Agreement. It concludes by describing a modified version of the Sabatier and Mazmanian’s framework which may be used to analyse the Polish Europe Agreement.

Chapter four examines the developments in Polish-EU relations from the adoption of the interim agreement on 1 March 1992 to the start of official pre-accession negotiations on 30 March 1998. It discusses the complexity of measures which now regulate Polish-EU relations. In particular, it highlights the

distinction between the adoption of binding legal measures, such as the interim agreement and the Europe Agreement, and autonomous legal measures such as the structured relationship, the Commission's White Paper on the Single Market and Agenda 2000. It concludes that the complex structure of measures which has evolved has direct implications for the implementation of the Europe Agreement.

Chapter five analyses the text of the Polish Europe Agreement. It examines each aspect in turn: legal basis and form; political dialogue and institutions of association; free movement of trade; movement of workers; right of establishment; provision of services; financial cooperation; competition provisions and state aids; the approximation of legislation; economic cooperation; cultural cooperation; and financial cooperation. It highlights four ways in which the text of the Europe Agreement may create difficulties for implementation:

1. The Agreement articles vary considerably in level of detail and a number of provisions are ambiguous or lacking in precision;
2. The Agreement contains a number of provisions which permit the parties to derogate from their obligations;
3. The Agreement contains a number of provisions which permit consultation to take place on issues beyond the scope of the text; and
4. The Agreement contains a number of provisions which are based upon EC law standards.

Chapter six examines the structures which have evolved to implement the Polish Europe Agreement. It examines four categories of implementation structure: Polish; Joint Polish/EU; EU; and Member State. It concludes by stressing that the

complex range of implementation structures and implementation processes is constantly evolving. This creates two problems: the need for coordination within structures and the need for coordination between structures.

Chapter seven examines implementation disputes which have taken place in five sectors: tanneries; oil; steel; cars and citrus fruit. It identifies root causes of disputes and the triggers which propel a minor dispute into a major trade dispute which are common to all five disputes. It examines the impact of these common roots and triggers upon the implementation process.

Chapter eight provides the conclusion to this thesis. It begins with an overall evaluation of progress in implementing the Europe Agreement to date. It then applies the modified Sabatier and Mazmanian framework, developed in chapter three, to the analysis of the Europe Agreement provided in this thesis. It suggests a number of additions which should be made to the modified framework. In particular, it stresses the need to develop an understanding of the impact of any power imbalance between the parties upon the implementation process and uses Galanter's framework to assess relative power. The chapter proposes a number of solutions to some of the implementation difficulties which have arisen. It also uses the implementation framework to explain why implementation disputes have taken place and why they have evolved in particular directions.

### **Some Comments on Methodology**

The Polish Europe Agreement is a mixed agreement which seeks to establish, *inter alia*, a free trade area between the parties. For this reason, the implementation process deals with issues which are highly sensitive both economically and politically. There is very little official information relating to the implementation disputes publicly available. This thesis, therefore draws heavily upon information obtained in interviews conducted with implementing



officials and experts. These interviews were unstructured and each lasted between 30 to 60 minutes. They were followed up by letters, faxes and telephone calls. A list of the interviews is provided in tables one and two below.

Whilst access to printed material may have been very restricted, many officials, particularly Polish officials, felt able to talk frankly about the implementation process. The information obtained from these interviews was used to build up a detailed picture of:

1. The implementation structures and processes which have evolved;
2. The evolution of implementation disputes; and
3. The dispute resolution strategies and positions adopted by the parties.

A second area of research difficulty arose in relation to Polish public law. To date there are no texts available in English which deal in any depth with Polish constitutional and administrative law. In addition, there is no official English translation of the new Polish constitution. The analysis in this thesis, particularly in chapter six, is largely based on an unofficial translation of the Polish constitution by Albert Pol and Andrew Caldwell which is unpublished.

The importance of this attempt to use primary resources, wherever possible, should be stressed. Researchers examining European integration have become increasingly criticised for their failure to rely on primary sources. Too often writers pursue a *post facto* analysis where the rationale for state behaviour is inferred rather than attempting to discover from the actors themselves what really happened. This thesis focuses upon the importance of the text of the Europe Agreement and attempts wherever possible to interview the actors involved in the



implementation process.<sup>16</sup>

This thesis represents the law as at 31 March 1998.

Table One: Interview details (Brussels)	
23 September 1996	Geoffrey Harris, Secretary to the EU-Poland Joint Parliamentary Committee.
24 September 1996	Krzysztof Treczynski, Counsellor, Polish Mission to the EU.
24 September 1996	John Bell, Counsellor, DG1A.
25 September 1996	Jorgen Mordenstein, Centre for European Policy Studies.
27 September 1996	Etienne Claeys, Director, PHARE for Poland.
27 September 1996	Richard Jones, UK Permanent Representation to the EU.

---

<sup>16</sup> See for example Andrew Moravcsik, *fn* 12 at pp12-13; Peter Ludlow, "Recasting the European Political System, 1950-1996," *CEPS Review* 1 (Summer 1996) 25-33; Alan S. Milward, "Conclusion: The Value of History" in Milward et al. *The Frontier of National Sovereignty: History and Theory 1945-1992* (London, 1993), 197-198.

Table Two: Interview details (Poland)	
23 October 1996	Michel Pireti, PHARE, EU Delegation to Poland.
23 October 1996	Leszek Kieniewicz, Secretary to the Polish Delegation to the EU-Poland Joint Parliamentary Committee.
23 October 1996	Anna Grupinska, Secretary to the Polish Delegation to the EU-Poland Joint Parliamentary Committee.
25 October 1996	Piotr Babinski, Senior Secretary, Foreign Affairs Committee, Sejm.
25 October 1996	Anna Tuz, Secretary to the Polish Delegation to the EU-Poland Joint Parliamentary Committee.
28 October 1996	Dorota Bartyzel, Deputy Editor in Chief and Managing Editor, The Warsaw Voice.
29 October 1996	Jan Borkowski, Under Secretary, Ministry of Foreign Affairs.
29 October 1996	Dieter Birkenmaier, Second Secretary, EU Delegation to Poland.
30 October 1996	Marek Tabor, Senior Officer, Department of European Integration.
4 November 1996	Jan Willem Blankert, Head of the EU Delegation to Poland.
5 November 1996	Pawel Samecki, Director of Bureau of Foreign Assistance, Department of European Integration.
6 November 1996	Alan Mayhew, Department of European Integration.
6 November 1996	Eugeniusz Piontek, Professor of Law, University of Warsaw.
7 November 1996	Macieji Gorka, Lawyer, Department of European Integration.
7 November 1996	John Mc Clintock, Second Secretary with responsibility for environment and agriculture, EU Delegation to Poland.
7 November 1996	Maria Ptoszynska, task manager for the environment, EU Delegation to Poland.

# CHAPTER ONE

## Legal and Political Relations from the Cold War to the First Generation Agreements

### Introduction

The map describing Poland's location within Europe has altered dramatically over the course of its tumultuous history. Its borders have been drawn, sometimes erased, and redrawn. Yet today Poland is situated in a position which Norman Davies claims to have been constantly, at "the heart of Europe".<sup>1</sup> This description applies not merely to its physical location but to the political and spiritual position which Poland holds in today's Europe.

The country sits with the Baltic sea and Russia to its north. To its west lies Germany (the former German Democratic Republic, GDR), to its south lies the Czech Republic and Slovakia (formally the single country of Czechoslovakia) and to its east lies the Ukraine, Belarus and Lithuania (which were all formally part of the USSR). Poland covers a land area of 311,904 square kilometres of which 60% is agricultural land and 28% is forests.<sup>2</sup> The capital city, Warsaw, lies towards the east of the country and has a population of 1, 638, 300.<sup>3</sup>

This chapter will examine the development of legal and political relations between the then European Economic Community (EEC) and the Peoples Republic of Poland from the post war period until the years preceding the

---

<sup>1</sup> Norman Davies, *The Heart of Europe: A Short History of Poland* (Oxford University Press, 1986). For a fuller picture of the Polish position within European history see Norman Davies, *Europe: A History* (Oxford University Press, 1996). For a detailed analysis of Polish history see Norman Davies, *God's Playground: A History of Poland, Volumes I and II* (Oxford University Press, 1981); see also Adam Zamoyski, *The Polish Way*, (John Murray, 1987).

<sup>2</sup> The Economist Intelligence Unit, "Country Profile 1996-97: Poland" at p2.

<sup>3</sup> The Economist Intelligence Unit, *fn 2* above at p2.

negotiations for the signing of the Polish Europe Agreement. It will describe the dramatic changes in relations from the non-recognition of the EEC by the USSR through to the conclusion of legally binding agreements. It will analyse the adoption of a number of autonomous measures by the EEC during this period, including different funding and trade initiatives. The chapter will also place in context internal political developments in Poland, focusing in particular on the progress towards democratic government.

### Poland After World War 2

After the second world war Poland found itself to the east of the iron curtain and, therefore, a member of the Soviet block, under the political control of the Soviets.<sup>4</sup> It became a member of the Warsaw Pact when that organisation was established in 1955. The Polish economy was also under strict Soviet control. The Council for Mutual Economic Assistance (CMEA) was established in Moscow on 8 January 1949. Initially its purpose was to help "build socialism" using Soviet methods.<sup>5</sup> Essentially the Polish economy was based upon a centrally-planned model where prices were determined by a government body and not by market forces, currency was not convertible and foreign trade was a peripheral activity where production surplus was exchanged in order to make up for any deficiencies within the planned economy.<sup>6</sup> By the 1960s, the Soviet economic strategy had altered slightly, principally as a result of the failure of the Stalinist model to achieve economic success but also in response to the achievements of the EEC.<sup>7</sup>

---

<sup>4</sup> Norman Davies, *Europe: A History* (Oxford University Press, 1984) at p1089 et seq. See also Frances Millard, *The Anatomy of the New Poland* (Edward Elgar Publishing Limited, 1994) pp1-28.

<sup>5</sup> Norman Davies, *fn 4 above* at p 1101.

<sup>6</sup> John Maslen, "The European Community's Relations with the State-Trading Countries:1981-1983" (1984) *Yearbook of European Law* 323 at pp 324-325.

<sup>7</sup> Norman Davies, *fn 4 above* at p1104.



The new approach sought to enhance the profile of the CMEA as the body coordinating joint planning. Each member state was given a specific area of responsibility with varying degrees of success.<sup>8</sup>

### **Early Relations between the EEC and the CMEA**

During this period relations between the EEC and the CMEA were frosty. Each failed to recognise the other and the CMEA dismissed the EEC as “the economic arm of NATO”.<sup>9</sup> The Soviet Union participated in anti- EEC propaganda, attempted to prevent the EEC from acceding to international agreements and organisations and prevented the establishment of EEC diplomatic missions.<sup>10</sup> In 1957 the Soviet *Review Kommunist* published seventeen theses on the Common Market justifying Soviet opposition to the EEC.<sup>11</sup> In 1962 *Pravda* published thirty two theses on imperialist integration in Western Europe. Whilst the theses were still very critical of the EEC they did not exclude economic cooperation and, more importantly, they implicitly recognised the reality of the EEC.<sup>12</sup> In 1963 an *aide-memoire* from the EEC to the Soviet Union concerning tariff reductions indirectly proposed a normalization of relations but little resulted from this overture.<sup>13</sup>

---

<sup>8</sup> For example, the Hungarian economy appeared to thrive when limited free markets were introduced in the agricultural sector whereas the German Democratic Republic, Romania and Bulgaria resisted the new approach.

<sup>9</sup> Dian Thomson, “Relations Between the EC and Eastern Europe” (1990) *European Access* 34 at p34; Lynn E Ramsey, “The Implications of the Europe Agreements for an Expanded European Union” (1995) *ICLQ* 161 at 161; John Maslen, “The European Community’s Relations with the State-Trading Countries:1981-1983” (1994) *Yearbook of European Law* 323 at pp324-326.

<sup>10</sup> John Maslen, “The European Community’s Relations with the State-Trading Countries of Europe 1984-86” (1986) *Yearbook of European Law*, 335 at 335. See also John Maslen, *fn* 9 above at p325.

<sup>11</sup> Bull EC 2-1976, point 1202.

<sup>12</sup> Bull EC 2-1976, point 1202.

<sup>13</sup> Bull EC 2-1976, point 1202.

### **Relations between the EEC and Poland**

Poland was restricted both legally and diplomatically from developing its own links with either the EEC or any of its constituents. The supremacy of the Communist party and Poland's alliance with the Soviet Union was formally enshrined by a constitutional amendment in February 1976. The effect was to protect the position of the Soviet Union so that any attempt to alter the position of the Soviet Union would be declared unconstitutional.<sup>14</sup> Moreover, the Polish-Soviet Treaty of Friendship, Mutual Aid and Cooperation signed on 21 April 1945 and renewed in 1965 ensured that Poland's ability to act independently was almost impossible by providing that the Soviet Union had the power to interpret any Polish action as "unfriendly" and therefore liable to incur penalties.<sup>15</sup> In short, the constitutional amendments and the Treaty enshrined the supremacy of the Soviet Union in Poland's internal and external affairs.

Despite this, some small-scale sectoral agreements were concluded. The first bilateral agreements between the EEC and individual CMEA states were concluded in the 1960s.<sup>16</sup> They amounted to voluntary restraint agreements and basically consisted of an agreement on the part of the EEC not to charge additional levies on the import of certain products provided that the CMEA state did not export below a given price. The first of these agreements was concluded with Poland in 1965 and concerned egg imports.<sup>17</sup> The development of the

---

<sup>14</sup> Norman Davies, *The Heart of Europe: A Short History of Poland* (Oxford University Press, 1984) at pp38-39.

<sup>15</sup> The penalties were provided in the Polish Constitution.

<sup>16</sup> See generally, John Pinder, *The European Community and Eastern Europe* (Pinter Publishers, 1991) at pp10-11.

<sup>17</sup> Reg 54/65 of 7 April 1965, OJ 1965 L59/65. Similar agreements were also concluded with Bulgaria, Czechoslovakia, Hungary and Romania.

Common Agricultural Policy, which regulates a common price policy for the import and export of agricultural goods, had necessitated the conclusion of this type of agreement.<sup>18</sup>

### **Relations between the EEC and the CMEA During the 1970s**

Initial contacts between the EEC and the CMEA took place in 1972 during the period of Brezhnev's leadership of the Soviet Union; Brezhnev issued statements recognising the "realities" in Europe.<sup>19</sup> The European Parliament responded confirming that the EEC "had always been prepared to recognise the realities in other parts of the world".<sup>20</sup> The Conference of Heads of State or Government within the EEC, meeting the same year, noted its determination to "promote a policy of cooperation with other countries of Eastern Europe".<sup>21</sup> On February 16 1976 there was a meeting between the Council President and the CMEA Chairman where the CMEA delivered a message proposing an agreement on relations between the two organisations.<sup>22</sup> A series of contacts, high level meetings and experts meetings took place between this time and December 1980 but it was almost inevitable that little would emerge from the negotiations since each side's negotiating position diametrically opposed the other.<sup>23</sup> The Soviets wished to conclude a block-to-block agreement, whereas the EEC wished to enter into agreements with individual CMEA states. Moreover, the Soviets wished the

---

<sup>18</sup> The Common Agricultural Policy was introduced for most agricultural goods by the end of the transitional period on 1 January 1970. However even where there was no common organisation the national rules were governed by the EEC provisions on free movement of goods; 48/74 *Charmasson* [1974] ECR 1783.

<sup>19</sup> Bull EC 11-1974, point 1301.

<sup>20</sup> Bull EC 6-1972, point 2330.

<sup>21</sup> Bull EC 10-1972, point 13.

<sup>22</sup> Bull EC 2-1976, point 1201.

<sup>23</sup> Council communique on relations between the EEC and the CMEA states, Bull EC 1976-11, point 1301; Meetings took place in 1977, 1978, 1979, Bull EC 1979-9, point 2.243, Bull EC 1978-5, point 2.268; Bull EC 1978-11, point 2.2.60, Bull EC 1979-11, point 2.2.55; Three experts meetings were held in 1980, Bull EC 1980-3, point, 2.2.64, Bull EC 1980-7/8, point 2.2.64, Bull EC 1980-10, point 2.2.63.



agreement with the EEC to be detailed, ensuring the CMEA states would act within the political limits which it had negotiated. The EEC wanted to conclude only a framework agreement with the CMEA leaving it the freedom to conclude more detailed trade and cooperation agreements with individual CMEA states.

### **Toward the Autonomous Trade Policy**

The EEC's power to develop trade relations and conclude agreements is derived from Articles 110-115 EC. Article 113 provides for the establishment of a common commercial policy (CCP), "based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the case of dumping or subsidies". The CCP was to be in place by the end of a twelve year transitional period at which point the EEC would have exclusive competence to conclude trade arrangements.<sup>24</sup> On 27 June 1969 the Council received a Commission proposal for a regulation establishing common arrangements for products imported without quantitative restrictions from state-trading countries.<sup>25</sup> The Regulation established a common list of products to be imported without quantitative restrictions. Provision was made to suspend the operation of the regulation where the Community's interests were threatened, although it was anticipated that this would only be necessary in exceptional cases.<sup>26</sup> The regulation was adopted by the Council on 20 December 1969.<sup>27</sup>

---

<sup>24</sup> The twelve year transitional period ended on 31 December 1969.

<sup>25</sup> Bull EC 8-1969, point 109. The Central and East European countries described by the EEC as "state-trading countries" were Bulgaria, Poland, Hungary, Romania, Czechoslovakia, the GDR and the USSR; Regulation 1765/82.

<sup>26</sup> See *fn* 25 above. This prediction turned out to have been correct. There were relatively few instances of the operation of these measures under the Regulation. See Marc Maresceau, "A General Survey of the Current Legal Framework of Trade Relations Between the European Community and Eastern Europe", in Marc Maresceau (ed), *The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe* (Martinus Nijhoff, 1989).

<sup>27</sup> 109/70, OJ 1970 L19/109. See also Bull EC 2-1970, point 77.



Not all products were covered by the 1969 Regulation; the products most sensitive to Member States were excluded. The Regulation did evolve, albeit not expansively, and was subject to a number of amendments. The essence of the Regulation was to bring the EEC's position in respect of state-trading countries more closely in line with the CCP.

In the absence of official relations between the EEC and the CMEA states it was decided that bilateral agreements concluded between the EEC Member States and the CMEA states could be negotiated until the end of 1972 at which point they would either have expired or would be deemed to have expired at the end of December 1974.<sup>28</sup> From the beginning of 1975 the EEC assumed responsibility from its Member States for the trade agreements with the CMEA states.<sup>29</sup> Trade negotiations with the CMEA states were to be led by the EEC under the leadership of the Commission.

In November 1974 the Commission sent an outline agreement to a number of State-trading countries indicating a number of areas for potential trade between the Community and the recipient state.<sup>30</sup> The agreements envisaged were long-term, non-preferential and reciprocal. They were to include Most-Favoured Nation (MFN) status, safeguard mechanisms and Joint Committees.

The absence of a response to the outline agreement prompted the EEC to adopt a course of action which would be called the "autonomous trade policy". The policy had a number of elements. First, MFN treatment was granted in respect of

---

<sup>28</sup> Bull EC 11-1974 point 1301. See also, John Maslen, "The European Community's Relations with State Trading Countries of Europe 1981-1983" (1983) Yearbook of European Law 324 at p325.

<sup>29</sup> Council decision 74/652/EEC of 2 December 1974. OJ 1974 L 358/1, replaced by Council Decision 75/210/EEC of 27 March OJ 1975 L99/1.

<sup>30</sup> The agricultural sector was not excluded.

tariffs to all CMEA states.<sup>31</sup> Secondly, the EEC assumed responsibility for import quotas which had previously been negotiated with Member States. Member States agreements with individual CMEA states had lists of import quotas. The quotas were streamlined by the adoption of a Council Decision in December 1974 which brought all quotas for state-trading states together in a single legal instrument.<sup>32</sup> The quotas were amended annually thereafter. Thirdly, import conditions, primarily anti-dumping and anti-subsidy legislation, applied.<sup>33</sup> Fourthly, aspects of internal EEC policies affected trade with the CMEA states.<sup>34</sup> For example, the Common Agricultural Policy permits a large degree of control over levies applied to imports and exports to and from the EEC.

Agreements between individual Member States and individual CMEA states continued to be negotiated after 1975. The relevant EEC legislation covering this type of situation is found in Council Decisions 69/494 and 74/393. The former Decision provides that Community procedures should govern trade and commercial agreements with third states; the Commission having responsibility for negotiating such agreements. The latter Decision created a system of prior consultation to ensure that agreements concluded between Member States and third states are compatible with EEC common policies. In this way, Poland

---

<sup>31</sup> Poland was entitled to MFN status in any case by virtue of its membership of the GATT which it joined in 1967; Protocol of Accession of Poland *BISD* 1967. Czechoslovakia, Hungary and Romania were also GATT members at that time. On Poland and the GATT and WTO generally see, Bohdan Boalorucki, "Poland in the GATT and the WTO" 1997 (Spring) *Polish Quarterly of International Affairs* 73.

<sup>32</sup> OJ 1974 L358/1; Bull EC 11-1974, point 1301; Bull EC 12-1974, point 2336.

<sup>33</sup> Regulation 3017/79 OJ 1979 L 339/1. There was some difficulty in gauging whether anti-dumping was taking place since the cost of production was either not known or was presented in a non-convertible currency. For an early example of an anti-dumping action against Poland see OJ 1972 C 51/1 concerning urea imported into the EEC from Poland.

<sup>34</sup> See generally John Maslen, "The European Community's Relations with the State-Trading Countries" (1993) *Yearbook of European Law* 324 at 329.

concluded agreements with a number of Member States such as Germany and Italy but the Member States were required to have Council approval before negotiations could begin.

### **Towards Bilateral Agreements**

In the late 1970s and early 1980s steps began towards the conclusion of a number of limited bilateral cooperation agreements with the EEC in three sectors: agriculture; textiles and iron and steel. Poland concluded an agreement on sheepmeat and goatmeat in April 1981.<sup>35</sup> A textiles agreement between Poland and the Community was signed in Brussels on 4 December 1978 and was in operation *de facto* since 1 January 1979.<sup>36</sup> Finally, voluntary restraint agreements were concluded between 1978-80 which set minimum prices and quantitative restrictions on certain iron and steel products. The most extensive agreement of this period was concluded between the EEC and Romania in 1980; it covered all aspects of trade relations.<sup>37</sup>

Agreements of the type outlined above were perhaps permitted by the Soviets for a number of reasons. It is important to remember the limited importance of the agreements in trade terms; they were, with the exception of the Romanian agreement, largely technical and very restricted as they applied only to trade in specified areas such as sheepmeat. It is also important to bear in mind the economic situation within the CMEA during the 1980s. If we take the Polish economy as an example a very bleak economic picture existed: the agricultural sector could not produce sufficient supplies to feed the nation; in 1980 Poland owed more than \$27 Billion in foreign debt; and industrial output had fallen to an all-time low.<sup>38</sup> Perhaps most important of all was the change in the political

---

<sup>35</sup> Council Decision 81/359/EEC of 28 April 1981, OJ 1981 L137/1.

<sup>36</sup> The agreement was not initialled until 25 January 1979. See Bull EC 1-1979, point 2.218; 13th GEN.REP.EC, point 503; Bull EC 12-1981, point 2.2.16.

<sup>37</sup> OJ 1980 L352/1.

<sup>38</sup> For a more detailed discussion see Norman Davies, *fn* 14 above at pp421-426.



climate; with Gorbachev's rise to power came growing rapprochement in relations with the EEC. With his encouragement of cooperation and interdependence in international affairs came a change in approach to foreign policy in central and eastern Europe.<sup>39</sup> His policy of *Perestroika*, "restructuring", aimed to introduce free market principles to the economy.<sup>40</sup>

## Aid

A combination of food shortages and price increases contributed to a state of crisis. The Polish government appealed to the EEC for assistance in December 1980. The European Council meeting agreed to respond to the Polish request for economic aid "insofar as their resources allowed".<sup>41</sup> The EEC agreed to sell stock piled food below world prices and to donate food.<sup>42</sup> The climate altered with the declaration of martial law on 13 December 1981.<sup>43</sup> The Commission decided to donate emergency aid and food aid through non-governmental organisations.<sup>44</sup> Money was also donated to assist Polish refugees in Austria. In addition, the Council instructed Coreper and the Commission to examine what trade policy measures could be taken against the USSR.<sup>45</sup> By 1984 the situation in Poland had stabilised sufficiently for the EEC to state that no further emergency aid was envisaged.<sup>46</sup>

---

<sup>39</sup> Frances Millard, *fn* 4 above at pp207-212.

<sup>40</sup> See Norman Davies, *fn* 4 above at pp1120-1121, 1108, 1109 and 1116-1117.

<sup>41</sup> Bull EC 12-1980, point 1.1.14(4).

<sup>42</sup> Bull EC 11-1981, point 1.1.11.

<sup>43</sup> This is discussed in more detail below.

<sup>44</sup> Between 1981 and 1984 the EEC donated 41 million ECU in humanitarian aid. Bull EC 12-1981, points 1.41 to 1.4.6; Bull EC 2-1982, point 2.2.44; Bull EC 6-1982, point2.2.71; Bull EC 5-1983, point 2.229, Bull EC 10-1984, point 2.2.31.

<sup>45</sup> This study was undertaken on the understanding that it would be without prejudice to the eventual decisions which may be taken; Greece voted against this resolution. Bull EC-1-1982, point 2.2.38 (2).

<sup>46</sup> Bull EC 10-1984, point 2.231. It was only two years until the EEC would again donate emergency aid to Poland; in 1986 the Commission approved an emergency allocation of

### **Resumption of Negotiations with the CMEA: Towards the Joint Declaration**

In 1985 the CMEA proposed a new solution to the failure of previous negotiations.<sup>47</sup> The idea was to agree a joint declaration establishing official relations between the two parties. Negotiations for the conclusion of a Joint Declaration began in 1986. As part of its strategy the Commission sought to ensure that the EEC was free to conclude agreements with individual CMEA states. Mr. De Clerq, representing the Commission, considered there to be three guiding principles in the Community's policy:

1. Normalization - establishing the normal ties and contacts which the Community maintains with other third states and organisations;
2. Differentiation - treating each country individually taking their circumstances into account;<sup>48</sup> and
3. Parallelism - the parallel development of relations with individual CMEA members and the CMEA.<sup>49</sup>

The policy of "parallel normalisation" was subsequently adopted which pursued parallel negotiations with certain CMEA states.<sup>50</sup> Consequently, the Soviet Union, the GDR, Czechoslovakia, Bulgaria and Hungary all announced the accreditation of diplomatic missions to the EEC in June 1988; diplomatic relations between

---

500.000 ECU to be spent on the purchase of milk powder for children under three. More recently, in 1998, humanitarian aid worth ECU 6.95 million was donated to assist the Polish regions which had suffered flood damage in the previous year.

<sup>47</sup> Bull EC 6-1985, points 2.3.37 and 2.3.38; Bull EC. 7/8-1985, point 2.3.3.; Bull EC 10-1985, point 2.3.29.

<sup>48</sup> The EU has claimed to continue to pursue this policy of differentiation in the negotiation of the Europe Agreements. See chapter two.

<sup>49</sup> Bull EC 10-1086, point 2.228.

<sup>50</sup> Bull EC 5-1986, point 2.2.37. See generally, Dian Thomson, "Relations Between the EC and Eastern Europe" (1990) European Access 34.

Poland and the EEC were established in September 1988. The Joint Declaration establishing official relations between the EEC and the CMEA was signed on 25 June 1988 in Luxembourg.<sup>51</sup>

Although the Joint Declaration is a short document, running to only six clauses, its impact upon the development of legal relations between countries of central and eastern Europe was far reaching. It established a basis for political relations between the parties. The text provides the legal basis for future cooperation agreements between the parties "in areas which fall within their respective spheres of competence or where there is a common interest".<sup>52</sup> It is also interesting to note that a territorial clause was included ensuring that the agreement covered the territory of West Berlin; this was a significant concession for the CMEA negotiators at that time.

### Political Developments in Poland

Food price increases were not merely a phenomenon of the 1980s in Poland; price increases in 1970 and 1976 led to confrontation with the government.<sup>53</sup> The food price increases of August 1980 were to have even greater ramifications. The workers in the Lenin Shipyards, Gdansk, rejected a local strike settlement and forced the Communist government to sign an agreement guaranteeing workers' rights to join trade unions and the right to strike.<sup>54</sup> An organisation emerged representing strike committees from all Polish provinces. With roughly ten million members it represented more than a quarter of the entire Polish

---

<sup>51</sup> OJ 1988 L157/35.

<sup>52</sup> Clause 2 of the Joint Declaration.

<sup>53</sup> See, Jacqueline Hayden, *Poles Apart: Solidarity and the New Poland* (Irish Academic Press, 1994) at pp11-12.

<sup>54</sup> This was the so-called Gdansk Agreement of 31 August 1980; Norman Davies, *fn* 14 above at p17.

population and more than 75% of the working population.<sup>55</sup> It was led by Lech Walesa and was named Solidarnosc (Solidarity).

A series of strikes took place during 1981. Solidarity began to flex its political muscles, calling for free elections and a referendum on the Polish alliance with the Soviet Union on 3 December 1981. Tensions heightened with the mobilization of Soviet and Warsaw Pact troops along Polish borders. On 13 December martial law was declared under the leadership of General Wojciech Jaruzelski. Solidarity was banned and civil liberties were suspended.<sup>56</sup> Martial law lasted formally until 22 July 1983 although membership of Solidarity was to remain illegal for quite some time.

As the decade progressed economic conditions worsened. In some desperation, the Polish government leaders initiated round table talks with the banned organisation, Solidarity, in 1989. The result was partially free elections where 65% of the seats were reserved for Communist candidates. Solidarity won seats in every constituency which it contested. In many constituencies leading Communist candidates were unable to gain re-election even where they were the only candidate standing; voters crossed their names from the ballot paper.<sup>57</sup> The Communists were forced to invite Solidarity to form the new Polish government; Tadeusz Mazowiecki, a Solidarity member became Prime Minister. (At this point the President was still a member of the Communist party).

---

<sup>55</sup> Mark Salter and Gordon McLachlin, *Poland: The Historical Framework* (Rough Guides, 1996) at p620.

<sup>56</sup> Frances Millard, *fn* 4 above at pp 18-23. For a personal account of the lives of Solidarity members during the period of martial law see Jacqueline Hayden, *fn* 53 above.

<sup>57</sup> Norman Davies, *fn* 4 above at pp1122-1123.



Events began to unfold at speed.<sup>58</sup> In 1990 the CMEA and the Warsaw Pact became defunct and in December of the same year Lech Walesa became President in the first free postwar presidential elections. The Polish political scene in the 1990s has been marked by a growth in political parties and a swing in popular support from the right of centre to the left of centre. In the early 1990s Solidarity's popularity had begun to wane in the wake of harsh economic realities resulting from the free market economic reforms implemented by the finance minister, Leszek Balcerowicz. Solidarity began to split into a number of smaller, mainly right of centre, parties. At the same time, the Communist party began to assert its influence through the emergence of new right of centre parties such as the Democratic Left Alliance (SLD) and the Polish Peasant's Party (PSL).

The main Solidarity parties, the Democratic Union (UD) and the Congress of Liberal Democrats (KLD), were unsuccessful in the 1993 elections.<sup>59</sup> The electoral system, a form of proportional representation, favoured the post-

Communist parties even although the votes cast were distributed across the political spectrum.<sup>60</sup> The SLD and the PSL formed an alliance giving them 66% of the seats in the lower House (Sejm).<sup>61</sup>

---

<sup>58</sup> On the political developments in Poland in the 1990s see generally: Andrew A. Michta, "Democratic Consolidation in Poland after 1989", in *The Consolidation of Democracy in East-Central Europe*, Karen Daisha and Bruce Parrot (editors) (Cambridge University Press, 1997); Joanna Regulska, "Democratic Elections and Political Restructuring in Poland 1989-91", in *The New Political Geography of Eastern Europe*, John O'Loughlin and Herman van der Wusten (editors) (Belhaven Press, 1993); and Frances Millard, *fn* 4 above.

<sup>59</sup> These parties were later to merge to form the Freedom Union (UW).

<sup>60</sup> The SLD gained 20.4% of the vote, the PSL 15.4%. However, their combined vote of 35.8% was translated as 66% of the seats in the lower house. The post-Solidarity parties received in total 35.8% of the votes but suffered badly as a result of the fragmentation of the party; its only parliamentary representation was through the Confederation for an Independent Poland which received under 5% of the seats. The Economist Intelligence Unit, *fn* 2 above.

<sup>61</sup> The structure of government is discussed in more in chapter six.



The most recent legislative elections took place on 21 September 1997. The election resulted in the formation of a coalition government between the Solidarity Electoral Action (AWS), a coalition of around forty smaller parties and pressure groups organised around the Solidarity trade union movement, and the Freedom Union (UW), a centrist party.<sup>62</sup> The current Prime Minister is Jerzy Buzek (AWS). There are two deputy Prime Ministers, Leszek Balcerowicz (UW), who is also Minister of Finance, and Janusz Tomaszewski (AWS), who is also Minister of the Interior. The President, elected in the November 1995 elections, is Aleksander Kwasniewski. The Polish political scene remains very active, with new parties emerging all the time. For example, in January 1997, the conservative People's Party (SKL) was established through a merger between the small Conservative Party and the Peoples' Christian Party.

### **The First Generation Agreements**

A number of CMEA states entered into trade and commercial and economic cooperation agreements with the EEC in the late 1980s/early 1990s; these came to be called the "First Generation Agreements".<sup>63</sup> Exploratory talks between the Commission and Poland on bilateral links were concluded in September 1987. Already a difference in expectation between the two sides had emerged: the Commission anticipated the conclusion of a trade agreement dealing with industrial and agricultural products; the Polish side sought a much wider agreement covering economic and commercial cooperation.<sup>64</sup> The Commission proposed that the Council grant it a mandate to negotiate a trade and cooperation agreement with Poland on 23 December 1988.<sup>65</sup> The Council granted the

---

<sup>62</sup> The coalition government may face many challenges in the future over issues such as abortion, reform of the security services and the role of former Communists in public life. See *Financial Time* 31 October 1997.

<sup>63</sup> The first agreement was concluded with Hungary, OJ 1988 L327/2. Similar agreements were subsequently concluded with: the USSR OJ 1990 L 68/2; Czechoslovakia 1990 OJ L 291/28; and Bulgaria.

<sup>64</sup> Bull EC 9-1987, point 2.2.25.

<sup>65</sup> Bull EC 12-1988, point 2.235.

Commission a mandate to conclude a trade and *commercial* and *economic* agreement on 20 February 1989.<sup>66</sup> Negotiations opened in Brussels on 21 and 22 March 1989.<sup>67</sup> The negotiations proceeded apace and the agreement was signed in Warsaw on 19 September 1989.<sup>68</sup> The signatories issued a joint communique saying that the agreement came at a crucial stage of political and economic reform in Poland.<sup>69</sup>

All these so-called "first generation" agreements follow a similar format although there are some small differences. For example, the Polish agreement had an initial duration of five years, whereas the Hungarian agreement had a duration of 10 years. The legal basis for the agreements is found in Articles 113 and 235 EEC. It is interesting to note that the EEC did not evolve a new type of trade agreement to apply to these states but based the agreement on the approach devised in 1976, that is the "Commercial and Economic Cooperation Agreement" which it had used with other states.<sup>70</sup>

The lack of substantial differentiation between the first generation agreements reflects the power imbalances between the CEES and the EU side which is examined in chapter two. The EU was able to use its superior position to dictate the form and content of the first generation agreements. This may be understood

---

<sup>66</sup> Bull EC 2-1989, point 2.2.21.

<sup>67</sup> Bull EC 3-1989, point 2.28.

<sup>68</sup> OJ 1989 L339/12. COM(89) 435 final. See also Bull EC No.9-1989, point 2.2.11.

<sup>69</sup> The agreement was amended by Council Decision 90/115/EEC which suspended Article 12(1), the provisions covering agricultural concessions in Annexes IV and V to the agreement, so that the EEC could grant greater concessions under its generalised preferences system.

<sup>70</sup> OJ 1976 L260/1. Indeed Heinz Kramer in "The European Community's Response to the 'New Eastern Europe'" (1993) *Journal of Common Market Studies* 213 notes at p226, "In the beginning this [the Agreements] was not conceived as a special policy approach by the Community in reaction to the changes in Central and Eastern Europe, but was more of a 'standard procedure' in EC behaviour towards 'newcomers' in the field of Community foreign relations."

by using the Nash bargaining model which predicts that states which require unilateral or coalitional policy adjustments by others in order to achieve domestic policy goals gain more from cooperation. Where asymmetry of power exists in this way then the state which has most to gain from cooperation is likely to grant the greatest number of concessions in order to secure the agreement.<sup>71</sup> Poland accepted both the lack of differentiation and the content of the first generation agreement because signing the agreement improved its economic position. It did not improve Poland's economic position in the best possible way but at that time the agreement represented a better alternative than the status quo, that is small scale sectoral agreements with the EU. Moreover, it was the best trade agreement with a large trading group which Poland could secure; there were no alternative offers representing equivalent opportunities with other trading groups which would have improved Poland's economic position in a superior way.

The issues of power imbalance is examined in detail in chapter two and developed throughout the thesis.

### **Main Features of the First Generation Agreement**

The agreement has four titles and runs to 25 Articles. Title I deals with trade and commercial cooperation and begins with the parties reaffirming their commitment to accord each other MFN treatment, in accordance with Article 2 of the GATT. The title provides for the phasing out of quantitative restrictions on imports for certain products with the liberalisation of the more sensitive products taking longer.<sup>72</sup> The parties agreed to "make every effort to promote, expand and diversify their trade" on the basis of non-discrimination and reciprocity.<sup>73</sup> To this end, the Agreement encourages the use of arbitration to settle disputes.<sup>74</sup> The

---

<sup>71</sup> Andrew Moravcsik, *The Choice for Europe*, (UCL, 1999) at pp64-65.

<sup>72</sup> Article 8 and 9 of the agreement.

<sup>73</sup> Article 16 of the agreement.

<sup>74</sup> Article 17 of the agreement.



parties also agree to consult each other where import quantities “may cause or threaten to cause serious injury to domestic producers” and to ensure the publication of commercial data.<sup>75</sup>

Title II deals with economic cooperation. Article 18 provides that the aim of the title is to strengthen and increase economic links between the parties and to contribute to the development of their economies.<sup>76</sup> It was hoped that the parties would make particular efforts to encourage economic cooperation in a number of sectors including industry, agriculture and mining.<sup>77</sup> Suggestions are made as to how the objective of economic cooperation could be realised such as measures from the development of an investment climate to the encouragement of joint research and development projects.<sup>78</sup>

Title III provides for the establishment of a Joint Committee comprised of representatives from both parties. It was the task of the Joint Committee to ensure the proper functioning of the agreement.<sup>79</sup> Whilst the Joint Committee was given a role to play in trade disputes it did not have the power to take legally binding decisions; it was restricted to issuing recommendations.<sup>80</sup>

The final title, Title IV deals with general and financial provisions ensuring, *inter alia*, that the agreement does not conflict with any right or obligation arising under the GATT.

---

<sup>75</sup> Articles 15 and 16(1) of the agreement.

<sup>76</sup> Article 18(1) of the agreement.

<sup>77</sup> Article 18(2) of the agreement.

<sup>78</sup> Article 18(3) of the agreement.

<sup>79</sup> Article 20(2)(a) of the agreement.

<sup>80</sup> [The Joint Committee shall] “seek appropriate means of avoiding possible difficulties in the fields of trade and cooperation”, Article 20(2)(b).

A number of commentators have described the first generation agreements as limited, both legally and economically, but are quick to acknowledge that the importance of the agreements did not lie in their scope but in their very existence.<sup>81</sup> They provided an important stepping stone to the development of relations between the associated states and the EEC.

## PHARE

In the late 1980s the level of the economic crisis and the need for restructuring and development within Poland and Hungary was becoming apparent. The G7 Summit of Heads of State held its annual meeting in Paris in July 1989 and affirmed their readiness to deliver economic aid supporting the moves towards restructuring the Polish and Hungarian economies. They also considered that other interested institutions and states should act together with the G7 and the European Commission was invited to coordinate the aid programmes.<sup>82</sup> This role was an important recognition of the status of the Commission as an actor in the international arena and it proceeded not only to carry out its coordinating role but to propose an action plan at the meeting in Brussels on 26 September 1989.<sup>83</sup> By now the G24 group of countries was involved together with the IMF, the World Bank and the Paris Club.<sup>84</sup> A programme of coordinated assistance in a number of sectors began to develop which became a framework for EEC action and the Commission proposed that 200 million ECU should be donated from the 1990 budget.<sup>85</sup> The Commission also suggested improving market access conditions for Poland and Hungary by abolishing all quantitative restrictions imposed upon the

---

<sup>81</sup> Dan Horowitz, "EC-Central/East European Relations: New Principles for a New Era" (1990) CMLRev, 259 at 269; Heinz Kramer, *fn* 70 above; and Richard Behar, "Towards a New Federal Europe" (1992) New Law Journal 664 at p660.

<sup>82</sup> Bull EC 7/8 1989, point 1.12.

<sup>83</sup> Helen Wallace and William Wallace, *Policy Making in the European Union* (Oxford University Press, 1996, 3rd edition) at p 359.

<sup>84</sup> See *fn* 82 at point 2.27; Bull EC 10-1989, point 1.1.1.

<sup>85</sup> The sectors at this point were: agriculture and food; access to markets; investments, vocational training; and the environment.



two countries by virtue of their status as State-trading countries.<sup>86</sup> In this way Poland and Hungary would be in the same position vis-a-vis the EEC as other non-State-trading countries.<sup>87</sup> The Council accepted the Commission's proposal.<sup>88</sup> In addition, the Council asked the Commission to examine the non-specific quantitative restrictions applying to Poland and Hungary. Agreements were quickly reached detailing the phased removal of such restrictions by the end of 1994 for Poland and by the end of 1995 for Hungary.<sup>89</sup>

The Commission proposal for the establishment of a legal basis for economic aid to Poland and Hungary was transmitted to the Council on 25 October 1989.<sup>90</sup> The proposal was accepted by the Council on 4 December 1989.<sup>91</sup>

In this way the PHARE (Poland and Hungary: Aid for the Restructuring of Economies) programme came to be launched. The French acronym was deliberately chosen as a pun, the PHARE (*lighthouse*) programme was to act as a beacon for the new EEC response towards the CEES. Initially, PHARE funding had one objective: assisting economic restructuring in Poland and Hungary. However, as relations developed a secondary objective emerged, namely helping the states prepare for European Union membership.<sup>92</sup> The programme was widened on a number of occasions to include nine other states.<sup>93</sup> Between 1990

---

<sup>86</sup> That is the abolition of Regulation 3420/83, OJ L 346, 8/12/83 which governed trading conditions with State-trading countries at that time.

<sup>87</sup> At that time such trade was governed by Regulation 288/82, OJ L 35, 9/2/82.

<sup>88</sup> Regulation 3381/89, OJ 1989 L 326/6.

<sup>89</sup> OJ 1989 L339/1; OJ 1989 L327/1.

<sup>90</sup> OJ 1989 C 296/6; COM(89)536final; Bull. EC 10-989, point 1.1.18.

<sup>91</sup> Regulation 3906/89, OJ 1989 L 375/11; Bull EC 12-1989, point 2.2.25.

<sup>92</sup> European Commission, *PHARE in Poland: An Initiative for Poland's Membership of the EU* (PHARE Information Office, 1995).

<sup>93</sup> Regulation 2698/90 amended Regulation 3906/89 to include Bulgaria, Czechoslovakia, the German Democratic Republic, Romania and Yugoslavia. Regulation 3800/91

and 1994 PHARE funds of 1,011.6 million ECU were made available to Poland in the form of capital grants, guarantees, credit lines and investment in infrastructure development.<sup>94</sup> The PHARE budget for 1995-1999 is in excess of 1 billion ECU and will be paid in annual instalments of 203 million ECU.

### **The European Bank for Reconstruction and Development (EBRD)**

The EBRD was established on 29 May 1990.<sup>95</sup> The bank has three aims:

1. To contribute to economic progress and reconstruction;
2. To foster the transition towards open market-oriented economies; and
3. To promote private and entrepreneurial initiative in the CEES.<sup>96</sup>

The EBRD's broad purpose is to make public sector money available to fund private sector developments. It may make or guarantee loans not only to private enterprises but also to public sector enterprises which are being privatised or run on the basis of free competition. In addition, it can invest in and finance such enterprises.

---

extended the programme to Estonia, Latvia and Lithuania and removed the German Democratic Republic. Regulation 1764/93 removed Czechoslovakia and introduced the Czech Republic and the Slovak Republic. Regulation 1366/95 included Croatia.

<sup>94</sup> Making PHARE the leading grant funder to Poland during this period.

<sup>95</sup> OJ 1990 L472/4; Bull EC 5-1990, point 1.3.1. For discussion of the events leading up to the EBRD's establishment see Dunnet D, "The European Bank for Reconstruction and Development: A Legal Survey" (1991) CMLRev 571; Weber S, "Origins of the European Bank for Reconstruction and Development" (1994) International Organizations 1.

<sup>96</sup> Article one of EBRD agreement.

The EBRD is not, strictly speaking, a European Union institution.<sup>97</sup> There are 42 shareholders: the EEC, the European Investment Bank (EIB) and forty states including the US, Japan, Korea, Egypt, Morocco and Israel. The EEC and the EIB have the majority share in the bank (51%); the US has the next largest share at 10%.<sup>98</sup> The EBRD is run along similar lines to the EIB and the EEC is represented by the Commission.<sup>99</sup>

There has been some criticism both of PHARE and the EBRD.<sup>100</sup> Some consider these responses to the problems of the CEES to be ad hoc, displaying a lack of will to provide a solution which was political as well as technical and which was long term.<sup>101</sup> During the Europe Agreement negotiations the Polish negotiators sought to have a separate financial protocol inserted which would have overtaken the PHARE and EBRD funding creating a more bilateral rather than an autonomous arrangement.<sup>102</sup> Balazs describes the EU's use of autonomous legal form of actions as "strikingly characteristic".<sup>103</sup>

The ability of the EU to pursue autonomous legal forms of action again reflects the power imbalance between Poland and the EU discussed above. Poland, with

---

<sup>97</sup> Lasok and Bridge, *Law and the Institutions of the European Union* (Butterworths, 1994; 6th edition) at p238.

<sup>98</sup> Helen Wallace and William Wallace, *fn* 83 above.

<sup>99</sup> Lasok and Bridge, *fn* 96 above at p238.

<sup>100</sup> For a critical review of the operation of PHARE in Poland see: Pawel Samecki, "The Necessary Changes in PHARE" delivered at the round table conference, "Calender for Europe" International Vienna Council, Trieste, February 29 March 1996; Pawel Samecki, "Polish Reforms and Foreign Assistance Strategies and the Role of Economic Assistance to Central and Eastern Europe" in Harmut Elsenhantz (ed), *Transformation Strategies and the Role of Economic Assistance to Central and Eastern Europe*, (forthcoming) University of Leipzig. See also the special report on the functioning and transparency of PHARE, OJ 1997 C175/2.

<sup>101</sup> Helen Wallace and William Wallace, *fn* 83 above at p369.

<sup>102</sup> This is discussed in more detail in chapter two.

<sup>103</sup> Peter Balazs, in Marc Maresceau (ed), *fn* 26 above at p369.

its relatively weak position, was unable to compel the EU to sign a contractual obligation on financial commitments. Perhaps inevitably, as the recipient of financial assistance, Poland was unable to achieve its favoured objective; a separate financial protocol. However, because receiving funding through PHARE and the EBRD is preferable to receiving no funding and Poland has no alternative sources offering comparable levels of funding, Poland has accepted the status quo.

It is clear that the EU side do not agree with the implication that this disadvantages Poland. EU officials are keen to stress the PHARE-funded projects are "demand driven", that is Poland must bring forward proposals to the Commission and the Commission may not finance its own projects.<sup>104</sup> In addition, they state that the Commission would only refuse to fund a project under PHARE if it did not fall within the PHARE framework. This interpretation is not shared by Polish officials. One official considered that funding for a project may be refused for at least one of three reasons:

1. In the eyes of the donor the project does not qualify because of poor past experience. This could be, for example, because of poor management or lack of experience. In 1995 the Polish government hoped to spend 13 million ECU on further support for privatisation but the Commission pointed out that between 1992-94 progress in this area had been rather slow and so further funding was not merited;
2. The Polish government prepared proposals in sectors which were not considered to be priorities by the Commission. For example in 1996 the Polish government proposed a small programme designed to counteract domestic violence against women and children. The Commission considered that the project was an isolated one which did not sit well with social sector reforms. The Polish side accepted that whilst this may have



been true, social security reforms were not due to start until the preceding year and they wished to attempt to tackle the problem of domestic violence in the interim; and

3. Links with disputes. For example in the 1996 programme programmes proposed by the Polish side were refused by the Commission because of arguments connected to steel restructuring. (This dispute is discussed in more detail in Chapter 6).<sup>105</sup>

So it is clear that the funding mechanisms which regulate EU-Polish relations are not without controversy. Indeed, recently there has been a change to the PHARE programme. The Commission has introduced PHARE horizontal programmes as part of the pre-accession strategy, this is discussed in chapter four. These programmes are to cover actions which the Commission considers to be essential to the pre-accession strategy but which are not requested by the partner state. Such programmes are to be created and run by the Commission directly and will account for 5% of the PHARE budget.

### Tempus

Tempus (Trans-European Mobility Scheme for University Students) was established on 7 May 1990.<sup>106</sup> It was originally envisaged as a five year programme but was extended so that TEMPUS II will run until 1998.<sup>107</sup> The programme aims to establish joint training programmes between Central and East European Universities and enterprises and similar bodies in the Member States. It also promotes travel for teachers, students and administrators. Initially the programme operated only in Poland and Hungary, but it was quickly extended to include certain former Soviet Union states and states eligible for PHARE funds.

---

<sup>105</sup> Interview with Pawel Samecki.

<sup>106</sup> OJ 1990 L131/21; COM(90); Bull EC1/2-1990, point 1.2.6; Bull EC-5 1990, point 1.3.2.

<sup>107</sup> Council Decision 93/246, OJ L112/134, 1993.

There are a number of additional programmes open to participants from the CEES. The *Youth for Europe* programme promotes cooperation programmes for young people.<sup>108</sup> The *Socrates* Programme promotes the development of quality in education and training and contributes to the establishment of a European area for cooperation in education.<sup>109</sup> The *Leonardo da Vinci* programme established an action programme for vocational training.<sup>110</sup> The *TACIS* programme provides technical assistance for training programmes.<sup>111</sup> Finally, the European Training Foundation aims to help adapt training systems to new market conditions.<sup>112</sup>

### Conclusions

The development of legal and political relations between Poland and the EEC from the postwar period until the early 1990s has been dramatic. The changes reflect the wider political and economic climate of the period. The tensions of the cold war period are given expression in the non-recognition of the EEC by the CMEA. Despite this, relations between the EEC and individual CEES were developing. Small-scale sectoral agreements were concluded between the EEC and some CEES.

In 1969 the EEC began to develop its autonomous trade policy. This approach to relations with the CEES persists today. Chapter four will examine the use of autonomous legal measures by the EU side in the 1990s. Chapter eight analyses the impact of autonomous legal measures upon the implementation process of the Europe Agreement.

---

<sup>108</sup> OJ 1995 L87/1.

<sup>109</sup> Decision 819/95, OJ 1994 L87/10.

<sup>110</sup> Decision 94/819, OJ 1994 L 340/8.

<sup>111</sup> Regulation 2053/93, OJ 1993 L187/1.

<sup>112</sup> Regulation 3906/89, OJ 1989 L375/11; Bull EC 1,2-1990, point 1.2.6.

The 1980s saw the start of a growing closeness in east-west relations with Gorbachev's rise to power in the USSR. His policies of *perestroika* and *glasnost* paved the way for the conclusion of the Joint Declaration on Mutual Recognition in 1988 and ultimately for the adoption of far-reaching and legally binding agreements.

This chapter has demonstrated how developments in Polish-EEC relations were shaped by the political and economic developments of the time. This thesis shall demonstrate, in the chapters which follow, how the wider political and economic context is equally relevant to Polish-EU relations today.

## CHAPTER TWO

### The Europe Agreement Negotiations: Power Imbalance and Galanter

#### Introduction

The Polish Europe Agreement entered into force on 1 February 1994.<sup>1</sup> Just two months later, on 5 April, Poland submitted its official application for membership of the European Union. The speed at which the membership application was submitted could be perceived as a failure in that the Agreement could not, and did not, meet the needs of Poland at that time. The Europe Agreement had barely begun to be implemented, any potential for positive effects whether economic, legal or social could not have hoped to have taken effect.<sup>2</sup> Meneks believes the quick membership application did not arise from a disappointing evaluation of the performance of the Agreement.<sup>3</sup> In his opinion the motivating force was “a gap between the political aspirations of Poland (and the other Visegrad Group countries) to membership in the Union and the other European (WEU) and transatlantic (NATO) integration groupings and the political response of these institutions to our expectations”.<sup>4</sup>

This chapter will examine the negotiations of the Europe Agreement. Any analysis of the Europe Agreement must proceed hand-in-hand with an examination of the pertinent aspects of accession negotiations. The negotiation process often established a pattern analogous to the implementation process; conflicts arose on a number of occasions and similar positions have been adopted

---

<sup>1</sup> OJ 1993 L348/2.

<sup>2</sup> Although the evaluations which had been carried out by this point were, on the whole, positive. See Jerzy Menkes, “Evolution of the Europe Agreement and Changes in Poland-EU Relations” (1995) *Polish Quarterly of International Affairs* 81 at pp82-83.

<sup>3</sup> Jerzy Menkes, *fn* 2 above pp81-83.

<sup>4</sup> Jerzy Menkes, *fn* 2 above at p84.



by the parties. This chapter will demonstrate how the final text agreed between the parties reflects the conflicts which took place during the negotiation process and how some of the implementation disputes which were to follow have their genesis here. Moreover, the chapter will also demonstrate, using Galanter's framework, how the power imbalance between the parties shaped the negotiations process. Chapter seven will demonstrate how the power imbalance has impacted upon the implementation process in the same way.

### **The Competence of the EU in the External Field**

This thesis is not principally concerned with the competence of the EU to conclude agreements with third parties. However, it is important to understand the law relating to the division of competence between the EU and its Member States in the external field before examining the negotiations for the Europe Agreement. This is because the division of competence between the EU and its Member States is neither clear cut nor static. This is especially true in an agreement such as the Europe Agreement which, being a mixed agreement, requires the participation of both the EU and its Member States.<sup>5</sup> This has significance for implementation because a complex institutional framework is required to implement an agreement where the third party, in this case Poland, negotiates with a non-unitary institutional structure. Chapter six demonstrates how the Europe Agreement requires the involvement of many layers of institutions in the process of policy implementation. Chapter seven examines a number of implementation disputes, some of which are aggravated because of the non-unitary nature of the EU side. Chapter seven analyses a number of trade disputes between the EU side and Poland which have arisen in the context of the Europe Agreement. Some of these disputes, such as the steel dispute, were prolonged and to an extent inflamed by the division of power between the EU and its Member States. In this dispute Poland, negotiating through the Commission, believed it had agreed a deal on steel. When the Commission presented the deal to the Member States certain Member States found it unacceptable. Moreover, the

---

<sup>5</sup> The law relating to mixed agreements is examined below.

division of power between the EU and the Member States means that the negotiating interests of the two may not necessarily coincide. Again the disputes in chapter seven illustrate this point. For example, during the tanneries dispute Italy pursued a domestic trade policy which, although of sectoral importance to Italy, was negligible in terms of overall trade between Poland and the EU.

As the discussion below will demonstrate the Commission will often represent the EU side, that is the EU and its Member States, in negotiations with third states. This may lead to a degree of confusion on the part of the third state which may assume that the EU side is unitary in its internal policies. This is understandable since it is in the Commission's interest to present a unitary policy preference on behalf of the EU side. Chapter seven clearly illustrates the difficulties which may arise during implementation as a result of the non-unitary nature of the EU side.

### Competence

The legal competence of the EU is derived from its founding treaties. The EU has competence to conclude agreements in the external field within the limit provided by these treaties. The Member States have transferred certain competences to the EU on accession. The ECJ has described the consequences of this:

“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”<sup>6</sup>

---

<sup>6</sup>

6/64 *Costa v ENEL* [1964] ECR 585 at 593 and 594.

The question as to whether the EU or its Member States has competence in the external field is complex.<sup>7</sup> The ECJ distinguishes between EU competence (either expressly provided in the treaties or arising impliedly) and competence shared between the EU and the Member States.<sup>8</sup>

### Express Competence

Express competence relates to those powers expressly conferred in one of the founding treaties. The scope of any express competence is determined by the reference to the treaty article, the practice of the Council and the case law of the ECJ.<sup>9</sup> Express competence derived from the Treaty of Rome may be described in three categories:

1. Power to conclude agreements;<sup>10</sup>
2. Power to foster cooperation at the international level; and
3. Power to cooperate with international organisations.

---

<sup>7</sup> See generally, Leopold, "External Relations Power of the EEC in Theory and Practice" (1977) 26 ICLQ 54; K.R. Simmonds, "The Evolution of External Relations Law of the European Economic Community" (1979) 28 ICLQ 644; C.W.A. Timmermans and E.L.M. Volker, *Division of Powers Between the European Community and their Member States in the Field of External Relations* (Kluwer, 1981); Groux and Manin, *The European Communities in the International Order* (European Perspectives, 1985); and I. MacLeod, I.D. Hendry and Stephen Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996) pp 37-74.

<sup>8</sup> Opinion 2/91 (*Re ILO Convention*) [1993] ECR I-1061.

<sup>9</sup> Opinion 1/94 (*Re WTO Agreement*) [1995] 1 CMLR 205 at para 52; ECR I 5267.

<sup>10</sup> The Treaty of Rome only granted express competence in two areas: common commercial policy (Article 113) and association agreements (Article 238). Subsequent treaties have extended the use of express powers: Article 109(3); Article 130i; Article 130m; Article 130r(4); and Article 130y.

## Implied Powers

The use of express competence in Treaty of Rome was rather limited. As a result, the ECJ developed the doctrine of implied competence in a series of cases.<sup>11</sup> The doctrine provides that:

“ [A]uthority to enter into international commitments [which] may arise not only from an express attribution by the Treaty, but may also flow implicitly from its provisions....[In] particular... whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence an express provision in that connection. At paragraph [20] in its judgement in Joined Cases 3, 4 and 6/76 *Kramer and Others* [1976] ECR 1279, the Court had already pointed out that such authority could flow by implication from other measures adopted by the Community institutions within the framework of the Treaty provisions or the acts of accession.”<sup>12</sup>

Implied competence is created in one of three ways:

1. Measures have been adopted by the EU institutions using an internal power;
2. Power to legislate internally exists but has not been exercised; and
3. Power to act externally is implicit in a treaty article conferring an internal power.<sup>13</sup>

---

<sup>11</sup> 22/70, *Commission v Council* [1971] ECR 263; Opinion 1/76 (*Re European Laying Up Fund for Inland Waterway Vessels*) [1976] ECR 754.

<sup>12</sup> Opinion 2/9, *fn* 8 above.

<sup>13</sup> See I. MacLeod, I.D. Hendry and Stephen Hyett *fn* 7 above at pp50-53.



In practice, the adoption of the doctrine of parallelism by the ECJ, which ascribes corresponding competencies in the external field where these exist in the internal field, has removed the need for a distinction between express and implied powers.<sup>14</sup>

## Exclusive and Shared Competence

### *Exclusive Competence*

In certain areas the EU has sole power to act in the external field. The ECJ has made it clear that in such situations Member States are prohibited from acting in the same area.<sup>15</sup>

Exclusive competence exists in relations to the following areas:

1. Common commercial policy (Article 113);<sup>16</sup>
2. Conservation of fisheries (Article 102);<sup>17</sup>
3. Competition (Articles 85 to 90);<sup>18</sup>
4. Supply of ores, source materials and special fissile materials;<sup>19</sup>

---

<sup>14</sup> Opinion 2/9, *fn* 8 above.

<sup>15</sup> Opinion 1/75 (*Re OECD Local Costs Standard*) [1975] ECR 1355 at para 17; 804/79 *Commission v UK* [1981] ECR 1045 at paras 17, 18 and 20.

<sup>16</sup> Opinion 1/7, *fn* 15 above at para 1364.

<sup>17</sup> 804/79 *Commission v UK* [1981] ECR 1045 at para 17.

<sup>18</sup> Opinion 1/92 (*Re EEA*) ECR I-2821 at paras 32-33.

<sup>19</sup> Ruling 1/78 (*Re the Draft Conventions on the Physical Protection of Nuclear Materials, Facilities and Transports*) [1978] ECR 2151 at para 14.

5. Nuclear common market;<sup>20</sup> and
6. Ownership of nuclear materials covered by the Treaty.<sup>21</sup>

### *Shared Competence*

The EU and Member States may share competence in certain areas. Where competence is shared the right of the EU and the Member States to act in the external sphere co-exist. Shared competence arises in five ways:

1. Where the treaty provisions provide that the EU competence does not prejudice the Member States' competence in the external field;<sup>22</sup>
2. Where the EU has the power to adopt common rules but has not yet done so;<sup>23</sup>
3. Where the agreement includes areas within the exclusive competence of the Member States and areas within the exclusive competence of the EU;<sup>24</sup>
4. Where the EU's external competence is derived from internal rules setting minimum standards;<sup>25</sup> and
5. In areas such as intellectual property where it is possible for EU level trade marks and Member State level trade marks to co-exist.

---

<sup>20</sup> Ruling 1/78, *fn* 19 above at para 18.

<sup>21</sup> Ruling 1/78, *fn* 19 above at para 27.

<sup>22</sup> See for example Articles 109(5) and 139r(4).

<sup>23</sup> 3,4 and 6/76 *Kramer* [1976] ECR 1279 at para 39.

<sup>24</sup> Opinion 1/78 (*Re Natural Rubber Agreement*) [1979] ECR 2871.

<sup>25</sup> Opinion 2/9, *fn* 8 above.

The division of competence between the EU and the Member States is neither clear cut nor static. The Council and the Commission have tended to adopt differing positions on the issue of competence.<sup>26</sup> The traditional perception has been that the Member States, representing their interests in the Council, have tended to adopt strategies aimed at minimising the role of the EU in external relations. This may be manifest in the Member States' reluctance to act at all in the international arena, especially where this would lead to an extension of the scope of the common commercial policy.<sup>27</sup> The Commission's strategy has been to attempt to maximise the EU's role in external relations.<sup>28</sup>

### Mixed Agreements

Where both the EU and the Member States are parties to an agreement then that agreement is considered to be a mixed agreement.<sup>29</sup> Many commentators argue that the only "truly" mixed agreements are those where certain provisions fall within the competence of the EU whilst other provisions fall within the competence of the Member States.<sup>30</sup> This is the case with the Europe Agreement. Member States were required to be party to the Agreement for two reasons. First,

---

<sup>26</sup> See Dominic McGoldrick, *International Relations Law of the European Union* (Longman, 1997) pp109-113.

<sup>27</sup> See Weiler J, "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle" in O'Keefe and Schermers (eds), *Mixed Agreements* (Kluwer, 1993) 35, 75. On the extension of the common commercial policy and criticism of the ECJ's opinion in the WTO case (Opinion 1/94 (*Re World Trade Organisation*) [1994] ECR I-5267) see: Bourgeris, "The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession" (1995) 32 CMLRev 763; M. Hilf, "The ECJ's Opinion/94 on the WTO- No Surprise but Wise ?" (1995) 6 EJIL 245; N. Emiliou "The Death of Exclusive Competence ?" (1996) 21 ELRev 294.

<sup>28</sup> See A. Dashwood, "The Limits of European Community Powers" (1996) 21 ELRev 113 at 126.

<sup>29</sup> See generally, O'Keefe and Schermers (eds), *fn 27* above; E.L.M. Volker, C.W.A. Timmermans, *The Division of Power Between the Communities and the Member States in the Field of External Relations* (Kluwer, 1981); N. Neuwal, "Joint Participation in International Treaties and the Exercise of Powers by the EEC and its Member States: Mixed Agreements" (1991) 28 CMLRev 717.

<sup>30</sup> See for example, I. MacLeod, I.D. Hendry and Stephen Hyett *fn 7* above at pp142-144.

the Agreement contains provisions which are not present in any of the three founding treaties so certain aspects are not within the competence of the EU. Secondly, the funding for some projects contained in the Agreement is derived from the Member State rather than the EU.<sup>31</sup>

### *Duty of Close Cooperation*

The fact that the Europe Agreement is a mixed agreement has consequences for the processes of negotiation, conclusion and implementation. The Member States and the institutions are bound by the duty of close cooperation. This duty has been stressed by the ECJ in a series of cases.<sup>32</sup> The court considers the duty to be one of the fundamental principles of the external relations of the EU.<sup>33</sup> More recently the ECJ has described the duty in the following terms:

“It must be remembered that where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.”<sup>34</sup>

Where the duty of cooperation applies the institutions and the Member States are bound to “take all necessary steps to ensure the best possible cooperation”.<sup>35</sup>

---

<sup>31</sup> Such as the PHARE programme.

<sup>32</sup> Ruling 1/78, *fn* 19 above; Opinion 2/91, *fn* 8 above; Opinion 1/94, *fn* 9 above; and 25/94 *Commission v Council* [1996] ECR I-1469.

<sup>33</sup> Ruling 1/78, *fn* 19 above at para 35.

<sup>34</sup> 25/94 *Commission v Council*, *fn* 32 above at paras 48-50.

<sup>35</sup> Opinion 2/91, *fn* 8 above at para 38.



### *General Negotiation Procedure*

The respective roles of the institutions and the Member States in the negotiation of external relations agreements is contained in Article 228(1) EC which provides:

“Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with the special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it. In exercising the powers conferred upon it by this paragraph, the Council shall act by qualified majority, except in the cases provided for in the second sentence of paragraph 2, for which it shall act unanimously.”

In this way the Commission has the dominant role in negotiations. Even in the case of a mixed agreement the Commission will usually negotiate on behalf of the EU. The Council may appoint special committees which may be consulted during the negotiations process and often play an important role in ensuring that any agreement reached is acceptable to the Member States.<sup>36</sup>

The Commission conducted the negotiations for the Europe Agreements on behalf of the EU and its Member States. For this reason and because of the “duty of close cooperation” described above, this thesis refers collectively to the EU institutions and its Member States as the “EU side”. It is important to bear in mind however that the EU is not a unitary actor. The consequences of the non-unitary nature of the EU will be examined through an analysis of the parameters of the “duty of close cooperation” carried out in chapters seven and eight.

---

<sup>36</sup>

Article 113EC provides a similar procedure to Article 228EC in relation to the common commercial policy; the relevant special committee is called the Article 113 Committee.

## Exploratory Talks

In May 1990, Poland submitted a memorandum to the Commission on the opening of association negotiations.<sup>37</sup> The first unofficial meeting between the EU side and the Polish side took place on 25 July 1990 in Poland.<sup>38</sup> The Commission delegation took part in exploratory talks on an association agreement and agreed to use the Polish government memorandum. The talks quickly defined the scope of the agreement; there would be no customs union, only a free trade area was on offer. In addition, these talks also highlighted some of the issues which were to become contentious in the months to follow such as the question of whether the agreement was linked to accession and the treatment of the so-called “sensitive sectors” of agricultural products, textiles, steel, coal and fisheries. Both sides appeared to agree in principle to the inclusion of a financial protocol and a title on political cooperation. The Commission representatives stated that they considered that the talks would proceed quickly with negotiations proper beginning towards the end of 1990 or the beginning of 1991 and the completion of the ratification process by January 1992.<sup>39</sup>

The Commission issued a communication on the conclusion of association agreements with the countries of Central and Eastern Europe which was considered by a special meeting of the European Council.<sup>40</sup> The Communication, formally adopted on 27 August 1990, provided details of the aims and content of the association agreements to be known as “Europe Agreements”. The agreements would contain provisions on political dialogue, free trade, freedom

---

<sup>37</sup> Renata Stawarska, “Poland’s Association with the EEC” (1992) *Polish Western Affairs* 77 at p79.

<sup>38</sup> Marek Tabor, “Dynamika i Uwarunkowania Procesu Negocjacji Układu Europejskiego” in *Polska w Procesie Integracji z Wspólnotami Europejskimi* 1994 (Wydawnictwo Naukowe PWN, 1994) translated by Joanna Kazic July 1997.

<sup>39</sup> Marek Tabor, *fn* 38 above.

<sup>40</sup> Conclusions of the special meeting of the European Council held in Dublin; Bull EC 4-1990, point 1.2.

of movement and economic, financial and cultural cooperation and would include institutional provisions.<sup>41</sup>

At a second preliminary meeting it was agreed that the free trade area would comply with the terms of Article XXIV of the GATT. Agreement was also reached on the inclusion of provisions on the development of border cooperation and regional policy.<sup>42</sup> However, disagreement emerged in a number of areas. The Commission proposed that due to its sensitive nature, agricultural provisions should be contained in a separate document. It also became apparent that the scope of the provisions on free movement of services was likely to be limited; the Commission stressing that the power to regulate treatment of non-EU nationals was largely within the control of individual Member States. The issue of Poland's accession to the EU was again raised. The Commission explained that some Member States would find the economic and political costs of Polish accession too high.

These preliminary meetings served to set the tone for the official rounds which followed, highlighting some of the issues which were to prove controversial.

### **The Negotiation Rounds: Issues and Conflicts**

The Commission's mandate was to negotiate Europe Agreements not only with Poland but also with Hungary and Czechoslovakia.<sup>43</sup> Later agreements would also be negotiated with other CEES.<sup>44</sup> The draft directive provided for an association

---

<sup>41</sup> Bull EC 7/8-1990, point 1.4.5.

<sup>42</sup> Marek Tabor, *fn* 38 above.

<sup>43</sup> Bull EC 12-1990, point 1.4.6. See also Bull EC 11-1990, point 1.4.1. OJ 1993 L 347/2 (Europe Agreement with Hungary). With the dissolution of Czechoslovakia separate Europe Agreements were negotiated with the Czech Republic and Slovakia. See OJ 1994 L360/2 and 359/2 (Agreements with Czech Republic and Slovak Republic).

<sup>44</sup> OJ 1994 L358/3, 357/2, 373/1, 374/1, 375/1 ( Europe Agreements with Bulgaria, Romanian, Estonia, Latvia and Lithuania). COM (1995) 341 final (Europe Agreement with Slovenia).

agreement covering political dialogue, free trade, freedom of movement and economic, financial and cultural cooperation with an institutional framework.<sup>45</sup> In total, eight official rounds of negotiations took place between the Polish and the Commission negotiators before the Europe Agreement was initialled on 22 November 1991. The negotiations, although not lengthy, were certainly longer than the Commission had anticipated during the preliminary talks (see below).<sup>46</sup> This was due in no small part to the conflicts which arose during negotiations. It is instructive to examine the conflicts in more detail in order to better understand some of the reasons why similar conflicts were to arise later when the Europe Agreement came to be implemented.

In many ways the most prominent and symbolic issue was Polish accession to the EU. It was apparent from the start of the negotiation process that Poland was not content with mere associate status and that accession was the principal economic and political objective of the Polish government.<sup>47</sup> Poland wanted the association agreement to stipulate explicitly that Poland was in a pre-accession phase so that the association agreement would, as had been the case in the Portuguese agreement, provide the legal, economic and political basis which would lead to accession. It should be noted in this context that an apparent promise of membership does not necessarily result in accession. Turkey is a case in point. The membership promise contained in the 1973 association agreement between the EEC and Turkey is as yet unfulfilled. However, it is equally true that the promise of membership can have important political consequences. It has been

---

<sup>45</sup> Bull EC 7/8-1990, point 1.4.5.

<sup>46</sup> Certainly a number of Polish commentators considered the negotiations to be protracted. See Ilona Romiszewska "The European Communities and the Central and East European Countries: from Aloofness through Co-operation to Association and Membership ?" (1992) *Polish Western Affairs* 61 at p69 and Jerzy Menkes, *fn* 2 above at p 85.

<sup>47</sup> See for example, Renata Stawarska *fn* 37 above at p79.



judged that the membership promises contained in the Greek and Portuguese association agreements added political support for these governments in their adoption of pro-European integration strategies.<sup>48</sup>

Menkes denounces the failure to link the Europe Agreement more closely to membership as a “weakness of political support” and believes that “feelings of frustration (and even accusations of being betrayed or scorned by the West) are aroused by an unwillingness or inability to make gestures that cost nothing (financially) in support of efforts and sacrifices of societies which are having to pay the price for unswerving adherence to reform.”<sup>49</sup> Indeed the European Parliament Committee on External Economic relations considered the EU’s approach to the issue to be “inappropriate and unsuitable”.<sup>50</sup> Commissioner Frans Andriessen, suggested a compromise whereby certain CEES would be granted affiliate membership status.<sup>51</sup> In this way these states would have full membership rights and obligations in only limited areas, initially the financial and political fields only. The idea was treated sceptically both by the CEES and the EU side and was not developed any further.

The deadlock was broken by an extension to the Commission’s negotiation mandate on 15 April 1991. The draft preamble was amended to read:

---

<sup>48</sup> “Report of the Committee on External Economic Relations on a General Outline for Association with the Countries of Central and Eastern Europe,” European Parliament, 13 March 1991, EN/RP/105815.

<sup>49</sup> Jerzy Menkes, *fn* 2 above at p84.

<sup>50</sup> “Report of the Committee on External Economic Relations on a General Outline for Association with the Countries of Central and Eastern Europe,” European Parliament, 13 March 1991, EN/RP/105815, p11.

<sup>51</sup> Helen Wallace and William Wallace, *Policy-Making in the European Union* (Oxford University Press, 1996, 3rd edition) at p367.

“Recognising the fact that the final objective of Poland is to become a member of the Community and that this association in the view of the parties will help to achieve this objective.”

The EU would not concede that membership was the aspiration of “all parties” to the Europe Agreement and no obligation to admit Poland to the EU was created. Despite this, the Polish side was reasonably pleased with this concession. Tabor remarks that the Polish negotiators found “the relative easiness with which the consent to include a provision on the accession to the Community was achieved a bit surprising”.<sup>52</sup> Indeed the negotiators were hopeful that the “concession” demonstrated the Commission’s readiness to adopt a more liberal approach in relation to the Agreement’s economic provisions.<sup>53</sup> The Polish reaction to the change to the Preamble probably demonstrates a certain degree of naivety and lack of experience. In truth the Commission had conceded almost nothing although the Polish side continued to stress the symbolic importance of the amendment.

The Europe Agreement provides for a free trade area created on an asymmetrical basis: the EU agreed to open its markets more quickly than Poland.<sup>54</sup> This model does not apply, however, in the case of the sensitive sectors.<sup>55</sup> From the third round of negotiations these sectors caused “the most severe clashes”.<sup>56</sup> Indeed, on two occasions disputes over agriculture almost led to the collapse of the

---

<sup>52</sup> Marek Tabor, *fn* 38 above.

<sup>53</sup> Marek Tabor, *fn* 38 above.

<sup>54</sup> The asymmetry within the Agreement reflects the asymmetry of bargaining power between the parties discussed in chapter two. This is discussed in more detail in chapter five.

<sup>55</sup> Stanislaw Soltysinski, “Agreement on Association of Poland with European Communities (Legal and Economic Issues)” (1991-1992) *Polish Yearbook of International Law* 179 at p184.

<sup>56</sup> Marek Tabor, *fn* 38 above.

negotiation process.<sup>57</sup> In order to understand the cause of the conflict it is instructive to undertake a brief examination of the crucial role of these sectors within the Polish economy described in table three below.<sup>58</sup>

Table Three: Employment in Poland in 1991		
Sector	Percentage of population employed	G.D.P.
Agriculture	27.4%	6.2%
Textiles	4%	2.6%
Iron and Steel	1.2%	1.4%

Between 1990 and 1992 there was a large decline in Polish trade with its former CMEA partners. At the same time, exports to the EU increased significantly from 32% of total Polish exports in 1989 to 60% in 1992.<sup>59</sup>

The importance of access to EU markets for these sectors becomes clear when a breakdown of these exports is examined. In 1991, Poland exported the lion's share of goods in these sectors to the EU: 64% of all agricultural exports; 67% of all textiles exports; and 66% of iron and steel exports.<sup>60</sup>

The Polish negotiators sought to maximise market access for these sectors. Stawarska believes that the Commission's reaction provided "a textbook-like example of the protectionism applied by the Community with regard to [these] products".<sup>61</sup> Both Ireland and France resisted the granting of concessions in

---

<sup>57</sup> Interview with Eugeniusz Piontek.

<sup>58</sup> Based on figures from Elizabieta Kawecka-Wyrzykoska and Jozef Misala, "Sensitive Products in Poland's Exports: Access to the EC Market Under the Europe Agreement" Paper no.42, Foreign Trade Research Institute, 1993, Warsaw.

<sup>59</sup> Elizabieta Kawecka-Wyrzykoska and Jozef Misala, *fn* 58 above at p4.

<sup>60</sup> Elizabieta Kawecka-Wyrzykoska and Jozef Misala, *fn* 58 above at pp4-5.

<sup>61</sup> Renata Stawarska, *fn* 37 above at p84.

relation to agriculture.<sup>62</sup> Portugal took a similarly strong stance in relation to textiles.<sup>63</sup> The question of beef and lamb quotas almost led to a breakdown in the negotiations after the seventh round.<sup>64</sup> France proposed the solution of “triangular assistance” whereby the additional agricultural goods which Poland sought to import into the EU would instead be imported into the Soviet Union.<sup>65</sup> An agreement increasing beef and lamb quotas was eventually agreed on 30 September 1991 by the Council of Ministers. Despite this small achievement, the Polish side gained little in terms of widening market access for goods from sensitive sectors, reflecting the asymmetry of power between the parties which is analysed below. The limited scope of the relevant Europe Agreement provisions is discussed in detail in chapter five.

The Polish negotiators had made clear their desire for a separate financial protocol defining the levels of financial support to be provided for each of the Agreement’s objectives.<sup>66</sup> Polish negotiators considered that long-term funding was necessary in order to expedite financial planning and presented proposals for a detailed draft protocol. This was rejected. The title on financial cooperation contained within the Europe Agreement falls short of this goal and has been compared unfavourably with other association agreements.<sup>67</sup> Polish commentators consider that the financial provisions lack coherence and need to be improved if the EU wishes to respond more effectively to Polish problems.<sup>68</sup>

---

<sup>62</sup> Marek Tabor, *fn* 38 above.

<sup>63</sup> Marek Tabor, *fn* 38 above.

<sup>64</sup> Marek Tabor, *fn* 38 above.

<sup>65</sup> This proposal was also supported by the smaller states of Ireland, Greece and Spain.

<sup>66</sup> Andrzej Harasimowicz and Jarosław Pietras, “State and Prospects of Poland’s Relations with the EU” (1994) *Polish Quarterly of International Affairs* 59 at p73.

<sup>67</sup> Article 96-101 of the Europe Agreement. See Renata Stawarska *fn* 5 at p91.

<sup>68</sup> Eugeniusz Piontek, “Europe Agreement EEC- Poland (Legal Concept of a Scheme) (1991-1992) *Polish Yearbook of International Law* 133 at p146; Ilona Romiszewska *fn* 14 above at p69; and Jacek Saryusz-Wolski “The Reintegration of the ‘Old Continent’:



In relation to free movement of workers, Polish negotiators were unable to achieve many concessions in relation to the rights of migrant workers; the provisions essentially grant equivalent treatment to those workers already legally established in a Member State.<sup>69</sup> In this area it was the UK, a champion of the Polish cause on market access, who was firmly opposed to any expansion of immigration policy. By contrast, the provisions on movement of services and the right of establishment are more generous. Winters draws attention to the different treatment of professionals, which is reasonably positive, and labour intensive occupations which is very limited.<sup>70</sup> Indeed the Polish provisions on services are considered to be more advantageous than the equivalent provisions contained in the Hungarian Agreement.<sup>71</sup>

Even a cursory look at the competition provisions of the Europe Agreement reveals that the Polish negotiators had little impact in the creation of the provisions. They are derived almost verbatim from the Treaty of Rome. Piontek believes that Poland was keen to accept the competition rules because it demonstrated its desire to achieve a fully functioning market economy and the rules which go along with that.<sup>72</sup> Alan Mayhew adopts a more critical position arguing that the competition provisions reveal a lack of experience on the part of Polish negotiators. He believes that the negotiators should not have accepted the inclusion of provisions equivalent to the EC competition law provisions since the

---

Avoiding the Costs of the 'Half Europe' in Simon Bulmer and Andrew Scott (editors), *Economic and Political Integration in Europe: Internal Dynamics and Global Context* at p22.

<sup>69</sup> This is discussed in more detail in chapter five.

<sup>70</sup> A. Winters, "The Association Process: Making it Work for Europe" in *Material Konferencji EWG poświęconej umowom europejskim*, Brussels 27 February 1992 at p6. See also, Lynn E Ramsey, "The Implications of the Europe Agreements for an Expanded European Union", (1995) 44 ICLQ 161 at p167.

<sup>71</sup> Stanislaw Soltysinski, *fn* 55 above at p188.

<sup>72</sup> Eugeniusz Piontek, *fn* 68 above.

Europe Agreement's anti-dumping provisions were sufficient to protect the Europe Agreement's objectives.<sup>73</sup>

### Asymmetry of Bargaining Power

This thesis argues that there is a power imbalance between Poland and the EU side. This power imbalance determined the nature and the scope of the Europe Agreement and directly impacts upon the process of implementation of the Europe Agreement.

The Nash bargaining model is employed here to explain the concept of asymmetry of power. The model is built upon a rational actor thesis which assumes that states actively pursue policies which they consider to be in their own best interest. The essence of the Nash model applied to international negotiations is quite simple; the state which will benefit most from the signing of an agreement is most likely to grant greater concessions in order to secure the agreement. Moravcsik follows the Nash model to develop an analytical framework relevant to European integration.<sup>74</sup> It must be accepted that Moravcsik's work deals with inter-EU bargaining and he tests his theoretical framework against agreements reached between EU Member States, such as the Single European Act. This thesis clearly deals with external EU bargaining. However, Moravcsik's approach is still relevant since one of his central claims is that the study of EU integration is not *sui generis*. Rather he argues that European integration is merely one example of regional integration and that his theoretical approach may validly be applied to other forms of regional cooperation. The Europe Agreement represents an example of regional cooperation between the EU, its Member States and Poland. Furthermore, the Agreement may be viewed as a stepping stone to closer European integration for two reasons. First, the Agreement binds Poland to many EU legal standards. Secondly, the Agreement has come to be used as a mechanism to test Poland's

---

<sup>73</sup> Interview with Alan Mayhew.

<sup>74</sup> Andrew Moravcsik, *The Choice for Europe* (UCL Press:1999).

fitness to join the EU.<sup>75</sup> Moravcsik argues that economic necessity is the only really important causal factor propelling European integration. Whilst this thesis accepts the primacy of relative economic strength in determining the outcome of negotiations between states it also argues that other factors, for example geopolitical, historical and institutional factors, play an important role in determining the asymmetry of power between Poland and the EU side.

Poland came to the negotiations table as the economically weaker party. Chapter one demonstrated how Poland faced, and continues to face, the financial burden of economic and political restructuring. Poland requires financial assistance from the EU, such as access to the PHARE programme which supports economic restructuring. Poland's traditional guaranteed markets with Russia and the other CEES had all but disappeared with the collapse of COMECON. In these economic circumstances Poland required access to EU markets. Moreover, if Poland hoped to be able to compete in these new markets it required access to know-how and technical expertise. In stark contrast the EU had little to gain in economic terms by negotiating a closer trade agreement with Poland; the EU and its Member States had an array of alternative trading options and access to Polish markets and those of the other CEES merely represented an new economic opportunity to be exploited. In short, the EU had little to gain in economic terms by granting Poland a very favourable agreement.

For Poland the Europe Agreement represented an advance on its position under the first generation agreement. In economic terms its position under the Europe Agreement was better than the status quo. It did not have the luxury of considering other more beneficial trade agreements with other states or trading blocks. So, applying the Nash model, Poland would benefit more than the EU side from the signing of the agreement and for this reason was prepared to agree to greater compromises in order to secure the agreement.

---

<sup>75</sup>

This discussed in chapter four.



There were other factors, such as historical and institutional factors, which also contributed to the asymmetry of power. As this chapter makes clear, Poland was relatively inexperienced in international negotiations. For many years as part of the Soviet Union it was precluded from negotiating on its own behalf in the international arena.<sup>76</sup> Poland was in the unenviable position of attempting to evolve a negotiating style and strategy in foreign affairs whilst simultaneously attempting to deal with problems of economic and democratic restructuring. In comparison, the EU side, represented by the Commission, were experienced in negotiating both external trade agreements in general and association agreements (which are an EU “creation”) in particular. The Agreement was based upon a draft prepared by the Commission and was used in negotiations with other CEES. These factors worked together to ensure and reinforce the EU side’s strength in the processes of negotiation and implementation.

Another important factor to consider is the role of the EU institutions in the process of negotiating, concluding and implementing an association agreement. The significance of the role of the institutions in the policy-making process has received growing recognition in the work of the new institutionalists.<sup>77</sup> In essence these writers argue that “institutions matter” and that a methodology which takes this into account is better able to deliver a more rounded appreciation of the process of European integration.<sup>78</sup> Although this thesis does not strictly speaking adopt the methodology of new institutionalism, certain aspects of this methodology offer insight into the issue of power imbalance in the Europe Agreement. Three aspects in particular are worthy of consideration.

---

<sup>76</sup> This was discussed in chapter one.

<sup>77</sup> See generally: Kenneth Armstrong and Simon Bulmer, *The Governance of the European Market* (Manchester University Press, 1998); Laura Cram, *Policy-making in the EU: Conceptual Lenses and the Integration Process* (Routledge, 1997); Armstrong, “Regulating the Free Movement of Goods: Institutions and Institutional Change” in Shaw and Moore (eds), *New Legal Dynamics of the European Union* (OUP, 1995); Tamara Hervey, *European Social Law and Policy* (Longman, 1998).

<sup>78</sup> Laura Cram, *fn 77 above* at p27.



First, it is important to stress the non-unitary nature of the EU side which has been outlined above. Armstrong and Bulmer emphasize that the EU is “a multi-level system of governance: a confederation located between inter-state and intra-state patterns of rule”.<sup>79</sup>

Secondly, recognition should be made of the fact that the institutions which comprise the EU side do not have equal roles to play in determining policy. As a result the institutional structure itself may determine the form of the policy process. Armstrong and Bulmer argue that the strong position of the Council “privileges national governments and their civil servants in the policy process”.<sup>80</sup> The respective roles of the Council, the Commission and the Member States in the Europe Agreement have been outlined above.

Finally, the Commission itself is not a monolithic unit.<sup>81</sup> It is made up of twenty three Directorates General, each one responsible for certain aspects of EU policy and each one having evolved different working practices. Moreover, the interests and goals of the various Directorates General may conflict. During the Europe Agreement negotiations there was conflict between DGI and DG III.<sup>82</sup>

These three factors combine to produce a very complex institutional structure. In the context of the Europe Agreement, Poland must negotiate with the EU side. EU law and policy determines that the Commission represents the EU side in these negotiations. At the same time the Member States and the Council have the power to determine the scope of the Commission’s mandate. The European Parliament, the institution most critical of the Commission’s approach to EU

---

<sup>79</sup> Kenneth Armstrong and Simon Bulmer, *fn 77* above at p66. See also Laura Cram, *fn 77* above at p26.

<sup>80</sup> Kenneth Armstrong and Simon Bulmer, *fn 77* above at p57.

<sup>81</sup> Laura Cram, *fn 77* above at pp155et seq.

<sup>82</sup> Helen Wallace and William Wallace, *fn 51* above at p372.

relations with the CEES, is largely excluded from external relations matters.<sup>83</sup> More importantly, the approval of all Member States is required before any agreement reached by the Commission can become effective and it is the task of the Commission to mediate between the Member States.<sup>84</sup>

In the early stages of Poland's negotiations with the EU it had been felt that there was consensus within the EU side as to how to respond to the CEESs. The process of negotiations was not without controversy. Sedemeier and Wallace observe that:

“[S]ome of those involved on the CEES side were able to observe, as fast as they indentified issues on which they wanted to press for more open market access, they found that an EC-based lobby had beaten them to the EC negotiators”.<sup>85</sup>

The EU institutional structure places Poland at a distinct disadvantage in the negotiations process since it must negotiate at arms length from the institutions which have the real decision making power, namely the Council and the Member State. There are many examples of individual Member States pursuing national interests to the detriment of the Polish side. These are discussed in detail below particularly in chapters seven and eight.

For all the reasons outlined above the EU side may be considered to be more powerful than Poland. This power imbalance allows the EU to adopt a variety of negotiating strategies which helps to reinforce and strengthen its dominance over the Polish side.

---

<sup>83</sup> See European Parliament, *fn* 50 above.

<sup>84</sup> Kenneth Armstrong and Simon Bulmer, *fn* 77 above at p74.

<sup>85</sup> Helen Wallace and Ulrich Sedelmeier, “Policies Towards Central and Eastern Europe” in Helen Wallace and William Wallace, *fn* 51 above at p371.

The complexity and multi-layered nature of the institutional structures involved here has direct impact upon the implementation framework chosen to analyse the Europe Agreement in this thesis. Table five in chapter three demonstrates that where more than one institution exists then each institution will adopt implementing goals for the Agreement. In general these implementing goals will seek to favour the position of each institution and as a result there may be conflict between the implementing goals of the institutions. The conflicts which arise as a consequence and the implications of these conflicts upon both the balance of power between the parties and the process of implementation is discussed in chapters seven and eight.

It has been argued that the imbalance in power between the negotiating parties was clear at the outset and was a crucial factor determining the course of negotiations.<sup>86</sup> Marc Galanter has developed a framework for analysing how the basic structure of the legal system creates and defines the ability of the law to attain redistributive change.<sup>87</sup> The approach considers how differences in size, the state of the law and resources mean that some actors will regularly make use of the courts whereas others will do so rarely. He classifies actors as one-shotters, those who rarely have recourse to the courts, and repeat players, who may often participate in similar litigation. Between the two extremes of one-shotter and repeat player there may be other categories of actor, such as the recidivist criminal. Galanter counsels that the one shotter-repeat player classification should be treated as a continuum rather than as a dichotomous pair. The repeat player is the larger actor so that for her, the stakes in any case are relatively small. By contrast, the one-shotter is smaller and so for her the stakes in any case would

---

<sup>86</sup> Helen Wallace and William Wallace, *fn* 51 above at p370: "The asymmetry of bargaining power made the shape of outcome rather predictable."

<sup>87</sup> Marc Galanter, "The Architecture of the Legal System" in *Law and Society*, C.M. Campbell and Paul Wiles(editors) (Martin Robertson and Co, 1979). Based upon Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.

tend to be high, such as personal injuries or a criminal accused.<sup>88</sup> A model of the 'ideal type' repeat player and one-shotter is provided in table four below:

Table Four: Model of the 'ideal type' repeat player and one-shotter	
Repeat Player	One-Shotter
Anticipates repeated litigation	Claim large (relative to size)
Low stake in case outcome	Cost large relative to outcome
Resources to pursue long-term goals	Limited resources

#### Applying Galanter to the Asymmetry of Power within the Europe Agreement

Galanter's model focuses upon a number of factors in order to understand the dynamics of the litigation process. He uses these factors to explain the relative strength and success of parties within that process. The process of court room litigation has many parallels with external relations negotiations because the ability of parties to achieve a successful outcome is dependent upon a number of comparable factors. First, it is important to consider the parties relative economic strength. Galanter stresses the importance of the resources available to the parties; the Repeat Player has sufficient financial resources to enable him to continue to pursue legal action until he reaches a favourable outcome. The Nash model demonstrates how the economically stronger party is better able to resist attempts to accept a compromise to the agreement. Secondly, the relative expertise of the parties plays a significant role in determining the outcome. For Galanter, the greater the party's experience of the litigation process the more effective their performance during the litigation. Similarly, as is argued below, the EU side have been able to use its superior knowledge and negotiating experience to disadvantage Poland in the Europe Agreement negotiations. Finally, Galanter emphasises the importance of the Repeat Player's relatively low financial interest in the outcome of any individual case. This parallels the application of the Nash

<sup>88</sup>

By, contrast the one-shotter could find that the cost of enforcing a claim outweighs the rewards of a successful action. Marc Galanter, *fn* 87 above at p161.



model discussed above which places importance upon the relative gains to be realised; the party which would benefit most from the agreement will agree to greater compromise in order to secure a deal.

Both the litigation process and external relations agreements operate within an environment constrained by rules of procedures and norms of behaviour. For example, all parties involved in litigation are constrained by rules of evidence. Similarly, the parties to external relations agreements must operate within the framework of other international agreements to which they are signatories. For example, the parties to the Europe Agreement are all signatories to the WTO agreement and so any agreement reached must not infringe the rules of the WTO.<sup>89</sup>

Galanter's model is particularly helpful in assessing the concept of power in external relations agreements because he makes it clear that his concept of power is both relative and fluid. Diagram one, below, demonstrates how the balance of power between the parties may change over time. This may be due to factors such as a change in economic circumstances or because of the influence of an external influence.

Galanter's classifications for the "architecture of the legal system" may be usefully employed when considering the asymmetry of bargaining power within the Europe Agreement. The EU may be classified as the Repeat Player and Poland the One-Shotter. The EU is clearly the larger party to the negotiations in terms of financial resources. In economic terms the EU did not need to conclude a trade agreement with Poland.<sup>90</sup> Furthermore, the EU could use the Europe

---

<sup>89</sup> Indeed certain parts of the Europe Agreement, such as those relating to textiles, are currently being re-written in light of commitment agreed at the GATT Uruguay round. These will be dealt with by the adoption of autonomous legal measures on the part of the Council.

<sup>90</sup> Although there were other imperatives, such as security concerns, which drove the negotiations.

Agreement as a staging post in its developing relations with Poland. Poland, on the other hand, entered the negotiations in a financially weak position. It required financial assistance and grants from the EU, was in need of greater access to EU markets, in part because of the decline in trade with the former Comecon states, and it was also keen to become a member of the EU. Although Polish negotiators had some experience of complex international negotiations during the GATT negotiations they were at a disadvantage facing the Commission. This was really Poland's first attempt at negotiating such a complex agreement.

The Galanter model is used to demonstrate how the asymmetrical relationship identified using Nash may be exploited by the stronger side in the negotiation and implementation process. Galanter's nine indicators help to demonstrate how the EU side used their superior power in order to control both the negotiations process and the outcome of the negotiations.<sup>91</sup> Galanter's model also helps to explain that power between the parties is relative and to understand the role of external influences upon the balance of power between the parties.

Galanter outlines nine ways in which a repeat player has an advantage during litigation. In a similar way these advantages may be ascribed to the EU in association agreements in general and in the case of the Polish Europe Agreement in particular.

1. *Repeat players, having done it before, have advance intelligence; they are able to structure the next transaction and build a record. It is the repeat player who writes the form contract, requires the security deposits and the like.*

The Commission had greater control over the direction of negotiations. All the Visegrad states were involved in negotiations using a draft drawn up by the Commission. The draft was in English, rather than their native language, and this

---

<sup>91</sup> This is sometimes referred to as "agenda setting". See for example,

placed additional strains upon the CEES negotiating teams.<sup>92</sup> In addition, the Commission had extensive past experience of negotiating association agreements and were able to follow a uniform procedure in their negotiations with each of the CEES.

2. *Repeat players develop expertise and have ready access to specialists. They enjoy economies of scale and have low start-up costs for any case.*

The Commission had access not only to the expertise of DG1A, which has responsibility for external relations to the CEES, but also to expertise across the range of issues topics covered by the Europe Agreement.<sup>93</sup> For example, DGIV could advise on the competition law articles. Many of the provisions contained in the Europe Agreement are derived either from the EC treaty, such as the competition law provisions, or are to be found in many other association agreements, such as the institutional framework, providing the EU side with a working knowledge of the subject matter.

It is clear that Poland was at a comparative disadvantage. Whilst it was relatively easy to have access to specialists in relation to the more general aspects of the Agreement, the Poles found much greater difficulty in finding specialists outwith the Commission who could provide expertise on the more specialist or technical aspects of the Agreement.<sup>94</sup> Moreover, while the Polish negotiating team may have enjoyed a relative advantage in size over the rival Visegrad negotiating teams they could not match the size and expertise of the Commission and Member States negotiating teams.<sup>95</sup>

---

<sup>92</sup> See, Renata Stawarska, *fn* 37 above at p81.

<sup>93</sup> The role and work of DG1A is discussed in chapter six.

<sup>94</sup> Interview with Macieji Gorka.

<sup>95</sup> Interview with Geoffrey Harris.

3. *Repeat players have opportunities to develop facilitative informal relations with institutional incumbents.*

The Commission has had a long history of working with the Council and the Member States in negotiating external relations agreements. Poland had relatively restricted experience of contact with international institutions. A limited relationship had been built up with the EU institutions through the small trade agreements and the first generation agreement.<sup>96</sup>

It has also been suggested that Polish inexperience was apparent in its failure to use the media to its advantage during the negotiation process.<sup>97</sup> Poland was unsuccessful in persuading the western media both of the importance of trade in sensitive goods for the Polish economy and the limited threat of such imports for EU industries<sup>98</sup>

4. *The repeat players must establish and maintain credibility as a combatant. His interest is in his 'bargaining reputation' which serves as a resource to establish 'commitment' to his bargaining positions. With no bargaining reputation to maintain, the one-shotter has more difficulty in convincingly committing himself in bargaining.*

The Commission has been careful to develop and protect its power to negotiate external relations agreements. It has clear pre-eminence to negotiate in areas where the EU has exclusive competence. At the same time, Member States' negotiators were quick to defend their domestic interest during the course of the negotiations.

---

<sup>96</sup> These are discussed in more detail in chapter one.

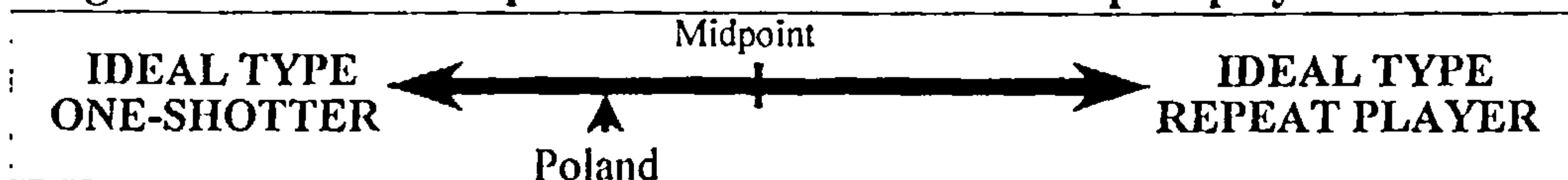
<sup>97</sup> Renata Stawarska, *fn* 37 above at p82.

<sup>98</sup> Starwarska says this can be compared with sympathetic coverage of striking French farmers during the negotiations.



The Polish approach during the negotiations was not the approach which would be adopted by what Galanter would call the 'ideal type' one-shotter. Poland was willing to adopt a strong stance during the negotiations in an attempt to establish a bargaining reputation. The reason for this could be that Poland is not always a one-shotter in its relations with the EU. The aims of the Polish government is to join the EU and therefore Poland had a vested interest in maintaining and developing a relationship with the parties to the Agreement. In this way Poland is not at the one-shotter end of the continuum but edging towards repeat player status:

**Diagram One: Poland's position on the one-shotter/repeat player continuum**



These dynamics are also found in the implementation process (see chapters seven and eight).

5. *Repeat players play the odds. The larger the matter at issue looms for the one-shotter, the more likely he is to adopt a strategy minimizing the probability of maximum loss. Repeat players can adopt strategies calculated to maximise gain over a long series of cases, even where this involves risk of maximum loss in some cases.*

Political desire within Poland contributed to the pressure to conclude the negotiations as quickly as possible. This stemmed partly from the desire of the incumbent government to conclude the Europe Agreement before the impending parliamentary elections. During the negotiations an internal rift developed within the Polish government. The Ministry of Foreign Affairs stressed the political importance of the Europe Agreement and pressed to sign as quickly as possible in the hope that amendments could be negotiated at a later date. Other cabinet members disagreed and believed that the quality of the Europe Agreement was crucial and that their negotiators should hold out in order to achieve the best deal

possible.<sup>99</sup> Geoffrey Harris considers that Poland concluded the Europe Agreement too hastily and that as a result they made concessions which they may not have done had the negotiations been less rushed. In particular he feels the constant demands for membership weakened their position because they no longer had the threat of refusing to join the EU.<sup>100</sup>

6. *Repeat players can play for rules as well as for immediate gains. The repeat player may expend resources influencing the creation of rules through, for example, lobbying.*

A good example of this type of strategy may be seen in the asymmetrical nature of the Europe Agreement. The EU was content to make more rapid concessions in market access than Poland safe in the knowledge that ultimately both sides must reach the same standards. In this way the EU could appear to make concessions which were relatively generous without giving away any ground in the long term.

7. *Repeat players can also play for the rules in litigation itself. The one-shotter is unconcerned with the outcome of similar litigation in the future. The repeat player will consider that anything that will favourably influence the outcome of future cases is a worthwhile result.*

The Europe Agreements concluded with the Visegrad states were to be used for the conclusion of almost identical agreements with other CEES. The Commission negotiators were aware that where concessions were granted in say the Polish Europe Agreement this would create an expectation in subsequent negotiations with other CEES.

---

<sup>99</sup> The Commission negotiators appear to have been unaware of these divisions within the Polish government. Internal divisions have also affected the Polish side during implementation. See for example, the discussion on the citrus fruit dispute in chapter seven.

<sup>100</sup> Geoffrey Harris, *fn* 95 above.

8. *Repeat players, by virtue of experience and expertise, are more likely to be able to discern which rules are likely to 'penetrate' and which are likely to remain merely symbolic commitments. They can trade off symbolic defeats for tangible gains.*

The conflicts and the solution accepted over accession illustrate this. The Commission was aware that the reference to accession in the Preamble did not amount to a firm commitment on Polish membership of the EU. The Polish side however, regarded the solution as a concession on the part of the EU and a significant step on their path to membership.

9. *Since penetration depends in part on the resources of the parties (knowledge, attentiveness, expert services, money), repeat players are more likely to be able to invest the matching resources necessary to secure the penetration of rules favourable to them.*

In blunt terms, Poland's eagerness to join meant that it had far more to lose than the EU had to gain. In many respects the EU was holding all the cards. Poland required to trade with the EU, whereas Poland was a marginal market for the EU. Poland required EU grants and loans to help finance the economic restructuring programme. There was however one goal which was common to all parties; security. Poland sought closer links with the EU partly to alleviate the threat of the Soviet Union. The EU is all too aware of the dangers caused by instability within the CEES and is keen to ensure that its eastern-most borders are strong.<sup>101</sup>

Galanter's framework helps to bring into focus the parties' relative position of advantage. In particular it helps to illustrate how certain advantages, such as

---

<sup>101</sup> The Moscow Coup which took place during the negotiations heightened awareness of the wider security dimension. On the importance of "security externalities" see Joanna Gowa, *Allies, Adversaries and International Trade* (Princeton, NJ, 1994); Joseph Grieco, *Cooperation Among Nations: Europe, America and Non-tariff Barriers to Trade* (Ithaca, NY, 1990).

economic power, tend to reinforce and augment other advantages, such as expertise. There are clear differences with the context in which Galanter operates and the present context. In particular within the context of litigation a third party, the judiciary, would ultimately decide the outcome. In the context of negotiating association agreements it is for the parties to agree on the outcome.<sup>102</sup> What Galanter's framework helps to demonstrate is the relative positions of the parties and as a consequence their power to influence the outcome of the negotiations.

### Cooperation Amongst the Visegrad States

In Galanter's framework he suggests that lawyers may help to equalise the parties' positions.<sup>103</sup> There was a route open to Poland which could have similarly strengthened its bargaining position: cooperation with the Visegrad states. Mayhew believes that had the three states better coordinated their positions they could have achieved a better agreement.<sup>104</sup> Perhaps more asymmetry in trade, perhaps more in agriculture, perhaps in freedom of services, perhaps even in financial cooperation. Lack of coordination between the three states made it easier for the Commission to negotiate by playing states off against each other.<sup>105</sup> Even one of the negotiators has admitted that "cooperation and exchange of information would have improved the bargaining position of each candidate".<sup>106</sup>

Although half-hearted attempts at cooperation were made and meetings between the three states took place on a number of occasions, there was little evidence of

---

<sup>102</sup> However, the implementation disputes which have taken place have shown a tendency to involve third parties or external standards in the dispute resolution process, see chapter seven.

<sup>103</sup> Marc Galanter, *fn* 87 above. Although Galanter suggests that the repeat player, having access to greater resources, would also have access to superior legal advice.

<sup>104</sup> Alan Mayhew, *fn* 73 above.

<sup>105</sup> Alan Mayhew, *fn* 73 above: "They would say that they quite understood the Polish position but just the other day they agreed "x" with Hungary and so they could not now agree "y" with you."

<sup>106</sup> Renata Stawarska, *fn* 37 above at p81.



real cooperation. The reasons are complex. It appears that both Hungary and Czechoslovakia were eager to distance themselves from the disagreements and delays which dogged the Polish negotiations. The Hungarian Prime Minister, Mr. Antall, urged the Commission to ensure that delays with the Polish Europe Agreement did not affect the date of signing of their Europe Agreement.<sup>107</sup> The three states became fiercely competitive, each wishing to be first to sign the Europe Agreement and ultimately join the EU. The Commission insisted that all three states sign their respective Europe Agreements at the same time. Negotiations with Hungary and Czechoslovakia had concluded some two months before Poland. During this period the two states attempted to bring political pressure upon Poland to conclude negotiations.<sup>108</sup> Historical factors contributed to the unwillingness to cooperate. The three states had been subject to a unified “foreign policy” for more than forty years, as members of the Warsaw Pact. This led the states to emphasize their role as independent actors in the field of foreign affairs. Their relative lack of experience may also explain the reluctance to adopt a more pragmatic approach through cooperation.

In many ways the Europe Agreement negotiations took place at a time of historic and economic change both within Poland and the EU. Piontek states that the EU seemed to be overwhelmed by the speed of events and neither Commission officials nor the Member States were fully prepared to respond to developments in the CEES.<sup>109</sup> This wider context influenced both the content of the Europe Agreement and the shape of the negotiations. For example, the Moscow coup forced the Council of Ministers to bring forward their internal discussions on progress with the Europe Agreements.<sup>110</sup> Another factor which influenced the

---

<sup>107</sup> Marek Tabor, *fn* 38 above.

<sup>108</sup> Marek Tabor, *fn* 38 above.

<sup>109</sup> Eugeniusz Piontek, *fn* 68 above.

<sup>110</sup> The meeting scheduled for 30 September was brought forward to 20 August as a result of the coup d'état.

Europe Agreement was the unsympathetic economic climate.<sup>111</sup> With recession starting to bite in several Member States, EU largesse was not at its most generous. The signing of the Europe Agreement also coincided with the negotiations to amend the Treaty of Rome which resulted in the Maastricht Treaty. As a result, many commentators believe that the EU was absorbed by internal disputes and unable to grant the Europe Agreement proper attention.<sup>112</sup>

The Europe Agreement negotiations were marked by a conflict on the part of the Member States between protecting domestic industries, such as French agriculture, or domestic concerns, such as the British position in relation to immigration.<sup>113</sup> These concerns were pursued with vigour even where they threatened wider political goals such as security concerns or longer term economic development such as wider markets for EU goods. Member States continued to adopt this type of negotiating stance right up to the very end of negotiations. Ninety minutes prior to the ceremony to sign the Europe Agreement, Spain insisted that the Europe Agreement could not be concluded unless the Visegrad states agreed to sign an additional protocol on steel.<sup>114</sup> The reasons behind the Member States' behaviour are manifold and stem from political, economic and historical origins. The conflict arises due to the competing roles of the Council of Ministers. Council members are acutely aware that they are responsible to their own nationals who have the power to determine whether or not they return to office. The negotiations saw individual Member States act

---

<sup>111</sup> See generally, Andrzej Harasimowicz and Jaroslaw Pietras, *fn* 66 at pp66-67.

<sup>112</sup> Ilona Romiszewska, *fn* 46 above at p62; and Jacek Saryusz-Wolski, *fn* 68 above at pp19-20.

<sup>113</sup> See generally, Jacek Saryusz-Wolski, *fn* 68 above at p23 et seq.

<sup>114</sup> On this occasion the Visegrad states stood firmly together and rejected the protocol.

primarily to protect domestic industries: the French and Irish in relation to agriculture; the Spanish and Germans in relation to steel; and the Portuguese in relation to textiles.<sup>115</sup>

Tabor believes that the French attitude during the negotiations can also be attributed to their fears of an expanded EU where the power base would shift towards the east, increasing the power of Germany. He also believes that it was a fear of expansion, and the subsequent demands on the structural funds, which motivated the smaller states such as Greece and Ireland to lobby against Polish interests.<sup>116</sup>

Conflicts between short and long term goals are detrimental to the development of coherent EU foreign policy.<sup>117</sup> Too often during negotiations Member States reacted adopting a protectionist attitude rather than analysing the most beneficial long term interest both of their domestic economy and consumers. This conflict which characterised the Europe Agreement negotiations has continued to plague the implementation process.<sup>118</sup>

## Conclusion

Analysis of the Europe Agreement negotiations is central to the analysis of the implementation of the Europe Agreement itself which follows. It highlights issues on which the parties disagree, demonstrates the importance of the interests of individual Member States and explains how the content of the Agreement reflects the negotiations process. These themes are developed in chapters five, six and seven.

---

<sup>115</sup> Helen Wallace and William Wallace, *fn* 51 above at p372.

<sup>116</sup> This was also an issued raised in the Agenda 2000 documents discussed in chapter four.

<sup>117</sup> The conflict within the Council was mirrored by the conflict within the Commission where DG I and DG III clashed. See Helen Wallace and William Wallace, *fn* 51 above at p372.

<sup>118</sup> This is discussed in more detail in chapters seven and eight.

Galanter's framework demonstrates how the power imbalance between the parties shaped the course of the negotiations process. It also demonstrates how the stronger side to the negotiations, the EU side, could more easily control the outcome of the negotiations. Chapter five builds upon this theme analysing the text of the Europe Agreement in order to demonstrate the ways in which the Agreement favours the EU side's objectives.

The chapter which follows analyses Sabatier and Mazmanian's implementation framework. Together with the analysis of Galanter's framework in this chapter it will provide the basis for implementation framework used in this thesis. Chapter eight explains how these studies may be consolidated and modified in order to develop a theoretical framework for implementation. This may be used to evaluate the implementation both of the Polish Europe Agreement and other European external relations agreements.



## CHAPTER THREE

### Theoretical Framework for Implementation

#### Introduction

This study uses as the basis for its theoretical framework Sabatier and Mazmanian's classic work on the implementation of public policy.<sup>1</sup> This framework has been selected for a number of reasons. First, whilst it is clear that Sabatier and Mazmanian's context of domestic public policy differs in a number of respects from the context of an external agreement, here an association agreement, there are many features common to both contexts. In both it is possible to identify general stages in the implementation process from negotiation and enactment to the final impacts of the legislation. It is also possible to identify variables which may affect effective implementation and to examine the relative importance of those variables. Secondly, the framework does not merely consider a top-down approach to implementation but also takes into account the extent to which public and private actors require to change their behaviour.<sup>2</sup> Thirdly, the framework acknowledges the dynamic nature of implementation and considers the means by which changes in socio-economic conditions and other factors may impact upon implementation. This aspect is particularly relevant within the context of external relations. The Europe Agreements were designed to run for an initial ten year period and it is clear that political, social and economic events will have altered significantly over this period. Finally, Sabatier and Mazmanian's framework, whilst acknowledging and building upon earlier implementation studies, addresses some of the short-comings which may be identified in these theories. (Principally, the works of Martin Rein and Francine Rabinovitz,

---

<sup>1</sup> Daniel Mazmanian and Paul Sabatier, *Effective Policy Implementation* (Lexington, 1983).

<sup>2</sup> Which was one of Snyder's criticisms of earlier implementation studies discussed in the Introduction. See Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tolls and Techniques" 49 in T.Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (J.Wiley, 1996).

Berman, Bardach, Van Meter and Van Horn).<sup>3</sup> Sabatier and Mazmanian's framework attempts to understand the links between individual behaviour and the wider context (political, economic and legal) in which it occurs. It places special emphasis on the extent to which the legal measure (in Sabatier and Mazmanian's study the statute, in this study the association agreement) can "structure" the implementation process. It also stresses the relevance of how difficult the problem is to solve. This is especially pertinent in the analysis of an association agreement because of the range and complexity of issues addressed by the agreement. Finally, previous studies largely ignored the evaluation of programmes which related to the behaviour of private actors. This is important in the context of this thesis since association agreements deal not merely with goods and services but also with private individuals in, for example, the non-discrimination provisions and environmental standards provisions.

This chapter will examine Sabatier and Mazmanian's framework for implementation and will highlight those aspects which are pertinent within the context of European external relations. It will also indicate some of the weaknesses which exist within the framework. These will be expanded in subsequent chapters.

### **Sabatier and Mazmanian's Framework**

Sabatier and Mazmanian divide their analysis into three categories :

- A. The tractability of the problems;
- B. Ability of the statute to structure implementation; and

---

<sup>3</sup> Martin Rein and Francine Rabinovitz, *Implementation: A Theoretical Perspective*, Working Paper No 43 (Cambridge, Mass: Joint Centre for Urban Studies, March 1977); Paul Berman, "The Study of Macro- and Micro-Implementation," (1978) 26 Public Policy 157; Eugene Bardach, *The Implementation Game* (MIT Press, 1977); Donald Van Meter and Carl Van Horn, "The Policy Implementation Process: A Conceptual Framework," (1975) 6 Administration and Society 445.

C. Non-statutory variables.

These categories may be modified to provide a framework for analysis of the Europe Agreement. Within each broad category Sabatier and Mazmanian have devised a number of variables which may impact upon implementation.

A. The Tractability of the Problems

This would pre-suppose that the agreement addresses any problems at all. The agreement certainly attempts to alter the status quo and therefore if we consider that the reason for such a course of action is disquiet at the status quo it may be reasonable to interpret the agreement's objectives as problem solving. Indeed one must assume that the provisions are not to be designed for their own sake but to attain some objective. So that, for example, the competition law provisions are not designed merely to incorporate EC competition law standards into Polish law but represent an attempt to improve the regulation of competition within Poland<sup>4</sup>. Similarly, in relation to agriculture, one must assume that the motivation for the inclusion of the requirement for Poland to meet EC law agricultural standards was motivated not by a desire for harmonisation for harmonisation's sake but to improve the standards within Polish agriculture.<sup>5</sup> Of course one may ascribe many motivations or objectives to the provisions of the Europe Agreement. The limited nature of the trade provisions could be perceived as maximising EU accession to Polish markets whilst at the same time adopting a protectionist stance in relation to their own markets. Are the trade provisions designed to improve trade between the two states or to protect EU markets from cheap imports from Poland ? Could both objectives be ascribed to the agreement ?

One measurement of the Europe Agreement's objectives would be to use the Preamble to the Agreement and consider the objectives it outlines. It must be accepted though that the perception of success or failure of implementation will

---

<sup>4</sup> The competition law provisions are discussed in chapter five.

<sup>5</sup> The agricultural provisions are discussed in chapter five.

vary depending upon which party makes the assessment. Generally speaking, parties will favour the course of action which best protects or advances their interests. Nonetheless the Preamble provides a useful starting point to gauge the Europe Agreement's objectives. They may be summarised as follows:

1. Strengthening the links between the EU and Poland;
2. Allowing Poland to participate in European integration;
3. Strengthening political and economic freedoms;
4. Contributing to stability within Europe;
5. Full implementation of the Europe Agreement linked to successful political, economic and legal reforms within Poland;
6. Establishing political dialogue;
7. Securing EU support for the process of reform within Poland;
8. Establishing instruments of cooperation, economic, technical and financial assistance;
9. Ensuring free trade in line with the GATT (now WTO) principles;
10. Establishing a new climate for economic relations, development and trade and investment;
11. Establishing cultural cooperation;
12. Establishing exchanges of information; and



13. Helping Poland to become a member of the EU.

The extent to which Sabatier and Mazmanian's view of implementation may be adopted wholesale in the context of EU external relations must be questioned. Whilst it is true that the Preamble suggests a wide range of objectives it must be accepted that in a tripartite agreement such as the Europe Agreement the issue of identifying objectives is more complex. This is because the perception of what constitutes the Agreement's objectives will vary depending upon which party's view is considered and each body's objectives must be considered to be valid. Some of the main objectives for each of the parties to the Europe Agreement are summarised in the table five below. The table is not intended to be exhaustive but merely highlights the main objectives for the parties.

Table Five: Main objectives for the parties to the Europe Agreement		
Poland	Member States	Commission
<ul style="list-style-type: none"><li>• Strengthen political links with the EU and its Member States</li><li>• To join the EU</li><li>• Financial and other assistance for economic reforms</li><li>• Increase exports to the EU</li><li>• Protect domestic industry</li><li>• Security concerns</li></ul>	<ul style="list-style-type: none"><li>• Strengthen democracy within the CEES</li><li>• Promote security and peace in Europe</li><li>• Expanding political influence in CEES</li><li>• New trade markets</li><li>• Protect domestic markets</li></ul>	<ul style="list-style-type: none"><li>• Exporting EC legal models to CEES</li><li>• New markets</li><li>• Trade liberalisation</li><li>• Progress towards enlargement</li><li>• Protecting wider European interest (e.g. protection of natural environment)</li><li>• Expansion of EU role in external relations</li></ul>

The objectives are wide ranging but may be grouped within a number of broad categories such as economic objectives, political objectives and security objectives. In addition there are a combination of short term objectives, such as access to immediate financial support, and longer term objectives, such as EU membership. There may also be wider foreign policy objectives. So that for Poland an objective may be to be treated as an independent actor on the international stage. The Commission may wish to develop its capacity to represent the interests of the EU within the field of external relations. By contrast

the Member States may wish to ensure the minimum erosion of their competence to conclude international agreements and consequently seek to restrict the Commission's role.

In relation to the Member States' objectives, it should be born in mind that the objectives are not necessarily common to all the Member States. There may be differing views, as there were during the negotiations for the Europe Agreement, as to the openness of trade, the speed of accession, how different sectors are to be protected, the development of free movement of persons and agriculture. In addition, the ranking of objectives by the various Member States may vary. So that whilst all Member States may hope that the conclusion and implementation of the Europe Agreement contributes to the security and political stability with the CEES, this objective may be ranked more highly by those states which have common borders or which are geographically closer to the East.

Some of the objectives would appear to go beyond that which may be reasonably attained within the framework of the Europe Agreement. For example, accession to the EU will not automatically result from the successful implementation of the Agreement although it will be one of the factors taken into account. Economic reform will be as, if not more, dependent upon Polish government economic policy and world markets than successful implementation. Similarly, security issues must be judged within a wider context than the EU so that such issues are dependent upon many variables such as relations with NATO and other CEES.

It would be an impossible task to design an exhaustive list of objectives for any party to the Europe Agreement. This is not merely because the objectives were never articulated in this way but also because the number and ranking of objectives may vary over time as a reaction to other influences be they political, economic, social or legal. The Preamble does not rank or prioritise the objectives. However, the Europe Agreement itself gives some indication of ranking in two ways. First, the Europe Agreement contains a timetable for



implementation, running for a period of ten years further subdivided into two periods. So for some parts of the Agreement a definite and agreed timetable applies. Secondly, the Europe Agreement varies in the degree of detail contained within the articles. This necessarily results in a ranking of the provisions to be implemented potentially for pragmatic reasons, if no other. It may be relatively easy for the Polish authorities to comply with, for example, detailed standards where the levels of tariffs to be implemented are clearly expressed. In contrast, other areas of the Agreement merely provide for further cooperation leaving the detail of that cooperation to be agreed at a later stage.

The limitations of any implementation analysis in this field must therefore be made clear at the outset. First, the perception of success or failure of implementation must vary depending upon which party is making the assessment. Secondly the perception of the relative success of implementation may vary as the parties review their ranking of the objectives. Thirdly, any implementation can only provide a snap shot of the progress towards successful completion of the Agreement's objectives. The Europe Agreement is designed to run initially for ten years. Implementation work taken one year or three years hence may paint quite a different picture. Finally, this thesis argues that the implementation outcomes of the Europe Agreement will reflect the relative power of the parties. The explanation of party preferences for the Europe Agreement is grounded in economic, political, security and geopolitical concerns. The party which will gain most from the agreement, that is Poland, has compromised most during negotiation and implementation in order secure implementation. Whereas, the parties which will gain least from the implementation of the Europe Agreement, that is the EU side, will impose conditions on the implementation process.<sup>6</sup>

---

<sup>6</sup> This reflects Moravcsik's analysis of European integration: "...the EC was shaped by more than convergence of national preference in the face of economic change. There were important distributional conflicts not just within states but among them." Andrew Moravcsik, *The Choice for Europe* (UCL, 1999) at p3.

Sabatier and Mazmanian suggest four variables within this category:

*1. Difficulties in handling change.*

This variable stresses the need for some sort of causal link. If the outcome contained in the Agreement is achieved will it result in a change in the problem? Sabatier and Mazmanian give the example of environmental pollution. Will reducing sulphur emissions from power plants (the statute's objective) reduce the levels of sulphur dioxide and improve public health (the target problem)? Sabatier and Mazmanian also point out that the success of a statute may be dependent upon the ability of technology to achieve the objective. Again using the environmental example, is there a reliable and affordable method of removing sulphur from coal either before or after it is used in power generation? In the absence of such technology it will be impossible to meet the statute's objective.

So, within the Europe Agreement, it may be relatively easy to see that, for example, the abolition of quantitative restrictions and measures having equivalent effects has taken place. The broader objective may be to improve trade between the parties. The volume of trade may be assessed by reference to trade figures but the interpretation of the figures may be less easy. There may be many reasons why trade may have increased such as the improved performance of Polish companies, the loss of traditional Polish markets, or even an increase of foreign direct investment.

Technological limitations could also affect the ability to achieve the objectives of the Europe Agreement. The most obvious example would be in the field of environment. Similarly, technology lag within Poland, most noticeably within the telecommunications sector, may inhibit or hinder the possibility of achieving objectives contained in other parts of the Europe Agreement such as economic cooperation.



## 2. *Diversity of proscribed behaviour.*

The scope of the Europe Agreement is extensive. Chapter five describes in detail the range of activities covered. Within each of the sectors addressed much legislation and ultimately “behaviour” in the broadest sense must be altered. So that for example, Article 68 relates to harmonisation of Polish legislation. It is intended to cover a variety of areas including: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment. If the example of the environment is considered, the adoption of almost 100 regulations on issues ranging from sewerage to car exhaust standards is required. It is estimated that it will cost Poland 927 billion ECU to comply with the environmental standards required for accession to the EU.<sup>7</sup>

The harmonisation of legislation is an extensive task requiring not merely that legislation is transposed into the Polish domestic legal system but that the legislation achieves the standards proscribed. The question is whether Sabatier and Mazmanian’s proposition is correct and whether a diversity of behaviour/objectives necessarily means that the framing of clear regulations becomes more difficult.

Sabatier and Mazmanian admit that economic incentives may be used to reduce the impact of this problem. This is a way of ensuring compliance through the use of sanctions such as taxes or fines.

## 3. *Percentage of population within a political jurisdiction whose behaviour needs to be changed.*

---

<sup>7</sup> Financial Times, 3 March 1998.

Very few constituents of Polish society will remain untouched by the Europe Agreement. The Polish legislature is required to ensure that they implement the targets contained within the Agreement and that existing legislative provisions do not conflict with these standards. The civil service will be required not only to draft appropriate legislation but to develop new methods of working to ensure that the standards are consistent between government departments. In addition, they will require to adapt to working closely with the EU and Member States officials. The Polish courts will be required to apply the Europe Agreement to the extent that it is considered to be superior to Polish domestic law.<sup>8</sup> The Polish business community will be required to act with the European framework of standards within areas such as company law. Also, certain features of the Europe Agreement, such as the rules on cumulation of origin, may force Polish manufacturers to cooperate more with certain states than others. Individuals may be affected in many ways because the scope of the Europe Agreement is so wide. So for example, Article 76 deals with educational cooperation. Implementation of this title may impact upon educationalists, teachers, lecturers and pupils. The Polish legal profession will be required to understand the Europe Agreement in order to ensure that clients both comply with its terms and make the best use of its opportunities. Within the EU, the Europe Agreement may have a direct effect on creating rights and obligations for individuals.<sup>9</sup> The EU institutions will have to grow accustomed to cooperation with Polish officials and representatives. At the level of Member States governments similar cooperation strategies and mechanisms must be developed.<sup>10</sup>

---

<sup>8</sup> See Ewa Skrzydło-Telfelska, "Polish Practice in International Law" (1995-96) 12 Polish Yearbook of International Law 208; See also Władysław Czapliński, "International Law and Polish Municipal Law: A Case Study" (1995) 8 Hague Yearbook of International Law 31.

<sup>9</sup> The Court has said that the purpose, spirit and general scheme and the terms of the agreement must be considered: Joined cases 21-24/72 *International Fruit Company NV v Produktschap voor Groeten en Fruit* [1972] ECR 1219. See generally, P. Pescatore "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) 8 ELRev 153.

<sup>10</sup> Chapters five and six deal with inter-institutional relations.



A good example of a specific subject area would be agriculture. The number of employees involved is very large. The problem to be aware of here is that agriculture is not really covered in any great detail within the text of the Europe Agreement, see chapter five below.

From the foregoing, it would suggest that in terms of Sabatier and Mazmanian's analysis the large size and diversity of the Europe Agreement's target group would imply that implementation may be rather difficult.

#### **4. *Extent of Behavioural Change Required of Target Groups.***

The greater the amount of behavioural change required, the more problematic successful implementation, ie some problems are more tractable than others.

This could impact upon the Europe Agreement in a number of ways. For example, the environmental changes required are very onerous as compared with the free trade provisions. (See above). Another example is found in competition law where it would appear easier for Poland to comply with Article 85 than with state aids.

It should be borne in mind however, that Sabatier and Mazmanian caution against putting too much emphasis on this point. Instead they call for work towards developing a more adequate causal theory.

#### **B. *Extent to which the statute coherently structures the implementation process***

Sabatier and Mazmanian believe that statutes not only stipulate the problems to be addressed and the objectives to be pursued they may also provide a means of structuring the implementation process. The statute does this by selecting the implementing institutions, providing legal and financial resources to these

institutions, biasing the likely policy orientation of agency officials and regulating participation by non-governmental actors in the implementation process. Sabatier and Mazmanian consider that the ability of a statute to structure the implementation process enhances the success of the implementation process and may even off-set the difficulties where a significant degree of behavioural change is required.

Some of the indicators which Sabatier and Mazmanian use under this broad heading are helpful to the present analysis. Others are less relevant. In addition, whilst some of the indicators may be valid within the present context they may not necessarily derive from the statute or the character of the statute. They may instead derive from the funding for the CEES, external relations practice, issues relating to the EU institutions, issues of diplomatic relations or issues of Polish domestic governance.

Sabatier and Mazmanian list seven categories.

*1. Precision and clear ranking of statutory objectives.*

- Sabatier and Mazmanian consider the precision, clarity and ranking of statutory objectives provides “an indispensable aid in program evaluation ..[an] unambiguous directive to implementing officials and a resource available to supporters of those objectives”.

Applying this to the Europe Agreement, three points may be made. First, the precision of the Agreement varies from article to article. The trade provisions are the most detailed and provide the level of quotas or duties to be altered or abolished, listings of the products covered and a timetable for achieving these standards. By contrast, many other articles are in the style of framework provisions, providing only for cooperation sometimes within a wide subject area, for example the title on culture. Within these framework articles, no targets or



timetables are set, indeed all that is expressed is the desire to work together at some point in the future.

Secondly, to an extent, the level of detail provides a basis for the ranking of the Agreement's objectives. In addition, the use of the interim agreement ensured that the trade provisions were given pre-eminence in implementation. This reinforces the perception that the trade provisions are considered to be more important than the other provisions of the Agreement.

Finally, the ranking may change over time, perhaps as new structures evolve. The Commission's White Paper on the Single Market provided clarity on the issue of the nature and scope of the harmonisation outlined briefly in Article 76 and also established a new priority of action for the Polish implementors.<sup>11</sup>

## 2. *The validity of the casual theory incorporated into the statute.*

Sabatier and Mazmanian state that all major reforms contain a causal theory explaining how the objectives are to be attained. The causal theory need not be explicit. They consider two features to be essential:

- a. That the main causal links are understood; and
- b. That the implementing officials have sufficient jurisdiction to attain the objectives.

This raises issues similar to those considered above in relation to category (A) on the "Tractability of Problems". The understanding of causal links may vary depending upon which party's perspective is considered. Whilst the Europe Agreement may indeed imply a variety of causal theories, again these may not necessarily accord with each party's view of valid causal theories.

---

<sup>11</sup> The Commission's White Paper is discussed in chapter four.

The Europe Agreement provides for a restricted institutional framework.<sup>12</sup> If this were the only mechanism for implementing the Europe Agreement one may have concluded that in Sabatier and Mazmanian's words the Agreement lacked sufficient "jurisdiction over a sufficient number of critical linkages to actually attain the objectives". In fact very complex structures for implementation have evolved both within Poland and in conjunction with the EU and its Member

States. These structures are not made explicit within the Europe Agreement and indeed are only implied to the extent that the Agreement contains provisions relating to political dialogue.<sup>13</sup>

### 3. *Financial resources available to the implementing agency.*

Sabatier and Mazmanian state that "a threshold level of funding is necessary for there to be any possibility of achieving the statutory objectives and the level of funding above this threshold is (up to some saturation point) proportional to the probability of achieving those objectives".

Within the context of implementing the Europe Agreement, financial resources<sup>14</sup> derive from a variety of sources. First, is the extent to which the Polish government may make resources available. Secondly, resources may be available through EU related sources such as through PHARE funding or EIB loans.<sup>14</sup> Thirdly, other international organisations or states may provide a source of grants or loans. Finally, foreign direct investment may, indirectly, help to fund implementation. It is apparent from the foregoing that none of the resources is specifically provided for within the Europe Agreement. In the case of PHARE funding Alan Mayhew has said that the fact that the scope of the Europe

---

<sup>12</sup> This is discussed in chapters five and six.

<sup>13</sup> Both political dialogue and the institutional framework are discussed in chapter five.

<sup>14</sup> PHARE funding is discussed in chapter one.

Agreement and PHARE overlap is more to do with coincidence than strategic planning.<sup>15</sup>

In addition to the level of financial resources available, an important issue must be the level of resources available. For example, the level of expertise amongst implementing officials within the EU, Member States and Poland.

4. *The extent of hierarchical integration within and among implementing institutions.*

Sabatier and Mazmanian consider that one of the most important attributes of any statute is the extent to which it hierarchically integrates the implementing agencies. They cite two factors as important:

- a. the number of veto/clearance points involved in attaining the statutory objective; and
- b. the extent to which supporters of the statutory objectives have sufficient inducements and sanctions to assure acquiescence among those with a potential veto.

Chapter six examines in detail the implementation structures for the Europe Agreement. Part of this analysis considers the question of veto/clearance points. It is important to reiterate at this point, however, that many of the implementation structures and consequently the veto/clearance points do not arise directly from the Europe Agreement itself.

The issue of inducements or sanctions is one which varies depending upon which party is considered. One of the main inducements is the desire of the parties to attain the Agreement's objectives. It has been noted that the perception of

---

<sup>15</sup>

Interview with Alan Mayhew.



objectives varies depending upon which party makes the assessment. The Europe Agreement itself provides a number of inducements and sanctions, principally the anti-dumping procedures and the dispute resolution procedure. Again, there are also inducements and sanctions which do not arise from the Europe Agreement itself but which may be relevant to the implementation of the Agreement such as accession to the EU, proceedings before the European Court of Justice or the Polish Courts and the GATT/WTO mechanisms.

It is submitted that any analysis under this head should consider the complexity of veto/clearance points and whether they apply in a linear fashion.

5. *Extent to which decision-rules of implementing agencies are supportive of statutory objectives.*

Sabatier and Mazmanian believe that the statute can bias the implementation process by stipulating the formal decision-rules of the implementing agencies. This is relevant to the extent that the institutional structure provided for within the Agreement is covered. Certain powers are provided. In addition, the arbitration process is provided as a mechanism for dispute resolution.

However, many implementing agencies are not mentioned in the Europe Agreement, let alone their implementing rules. That said it must undoubtedly be the case that the rules of the implementing agencies could have a significant impact upon the process of implementation. For example, the Sejm's provisions to check for consistency with the *acquis* or the systems within the civil service for cooperation between governmental departments which are discussed in chapter six below.

6. *Assignment of implementing agencies/officials committed to the statutory objectives.*



Officials in implementing agencies must be strongly committed to the achievement of the statute's objectives. Sabatier and Mazmanian point to a number of "statutory framers" which may help ensure that the implementing officials are so committed.

- a. *Assigning implementation to agencies whose policy orientation is consistent with the project.*

Sabatier and Mazmanian say this is most likely where a new agency is created to administer the implementation issues. Nonetheless, it is interesting to note that the Poles have created new agencies and structures with the specific task of working towards European integration. In addition, within the EU delegation there are a number of officials dealing solely with implementation.

- b. *Stipulating that top implementing officials are selected from social sectors which are supportive of the legislation's objectives.*

This type of analysis would require an extensive in-depth analysis in its own right which goes beyond the scope of this particular work. However, what is relevant and may be the subject of discussion is the levels of expertise and competence of the implementing officials and the support mechanisms available to such officials. This will be covered as part of the analysis of implementation structures in chapter six.

7. *The extent to which opportunities for participation by actors external to the implementing agencies are biased towards supporters of statutory objectives.*

This relates to the difficulties for consumers in general to find the necessary standing in order to challenge the implementation of a programme. Again, this would require an independent study in its own right which must exclude it from

the scope of this thesis. The extent to which the Europe Agreement may give rise to direct effect is discussed above.

### C. Non-Statutory Variables

Sabatier and Mazmanian believe that the process of implementation is driven by at least two influences:

1. the need for constant and/or periodic infusions of political support to overcome inertia; and
2. the effect of changes in socioeconomic and technological conditions on support for the objective(s). They go on to examine how, what they describe as “the major non-legal variables” may affect policy output.

Within the context of analysing an association agreement some of these variables inevitably prove to be more relevant than others. In addition, some of the variables have appeared in a slightly different form within the previous two categories. Whilst this may have been necessary for Sabatier and Mazmanian’s approach, given the restrictive approach to implementing agencies in the second category which as was discussed above, it is not really helpful within the context of an association agreement.

1. *Variation over time and among governmental jurisdiction in social, economic and technological conditions affecting the attainability of statutory objectives.*

Sabatier and Mazmanian give four ways in which such conditions affect implementation:

- a. Variation in socioeconomic conditions can affect perceptions of the relative importance of the problem addressed by statute;

- b. Local variation in socioeconomic conditions can render implementation more difficult;
- c. Support for regulation aimed at environmental or consumer protection or worker safety seems to be correlated with the economic viability of target groups and their relative importance in the total economy; and
- d. Change/lack of change in technology is crucial in the case of policies (such as pollution control) that are directly related to technological conditions.

Each of these categories would appear to impact, to a greater or lesser extent, upon the implementation process. Category (a) is particularly relevant and is discussed in some detail in chapter seven below. Category (b) relates to the variations in implementation which may take place across Poland. For example, unemployment rates vary widely across Poland. Whilst unemployment in the big cities such as Warsaw, Gdansk, Krakow or Poznan may be falling in the rural areas it may be as high as 27%.<sup>16</sup> Category (c) refers to an area where the problems facing Poland are extensive. Recently the Estonian environment minister admitted that the public did not share the government's enthusiasm for environmental standards. A recent opinion poll ranked environment in 10th place "because there are more important problems such as security, education, health care and the economy".<sup>17</sup> Polish experience is likely to be similar. Sabatier and Mazmanian suggest that the lower the diversity and prosperity of the target group the less likely subsidies are to be effective and the greater the need for police power (meaning some form of sanctions). Category (d) would apply to the implementation of the Europe Agreement in a number of ways. For example, privatisation, harmonisation of telecommunications and restructuring.

---

<sup>16</sup> Interview with Dorota Bartyzel.

<sup>17</sup> Financial Times, *fn* 7 above.



2. *The amount and continuity of media attention to the problem addressed by a statute.*

Sabatier and Mazmanian highlight two ways in which the media may impact upon implementation:

- a. May affect the perception of changes in socioeconomic conditions by the general public and political elites; and
- b. The short attention span of media

It is certainly the case that during the course of implementation there has been a fair degree of media reporting. To the extent that such reporting provides information on the nature and content of implementation disputes these reports are discussed in chapter seven. In addition, the use of the media by the Commission during implementation disputes is also examined. The wider role of the media described by Sabatier and Mazmanian would provide the basis for an interesting inter-disciplinary study which would provide an additional dimension to the understanding of legal implementation studies. However, such a study would necessarily take this aspect outwith the framework of this thesis.

3. *Variations over time and jurisdiction in public support for statutory objectives.*

Sabatier and Mazmanian stress three factors:

- a. Public opinion can strongly affect the political agenda;
- b. Substantial evidence that legislators are influenced by their constituents on issues salient to those constituents, particularly when opinion within the district is relatively homogeneous; and



c. Public opinion polls.

It is relatively easy to identify public opinion polls which seek to assess popular support for EU membership. Such polls consistently point to very strong support for EU membership, the most recent demonstrates support in the region of 64%.<sup>18</sup> A recent survey of the Catholic clergy in Poland showed even higher levels of support for EU membership at 84%.<sup>19</sup> However, there has been no work carried out analysing the impact of public opinion on the implementation process.

This thesis will however consider how Polish officials may modify their implementation strategy or alter the pace of implementation to take account of public opinion. This may be seen in the discussion on implementation disputes in Chapter seven.

Sabatier and Mazmanian's remaining three heads would require in-depth studies in their own right which must take them beyond the scope of this thesis.<sup>20</sup>

### **Modification of Sabatier and Mazmanian's Framework**

This thesis uses Sabatier and Mazmanian's framework as a basis. It has been necessary to adapt this framework from the outset for four main reasons. First, as was acknowledged at the beginning of this chapter, Sabatier and Mazmanian's framework is designed to operate within a specific context, namely domestic public policy. The implementation of domestic public policy necessarily differs

---

<sup>18</sup> Figures from study commissioned by the Institute of Public Affairs, a non-Partisan think-tank reported in the Financial Times, 24 March 1998.

<sup>19</sup> This is significant given the strong role of the Catholic church especially in the countryside where 40% of the Polish population live. Financial Times, 24 March 1998.

<sup>20</sup> 4. Changes in resources and attitudes of constituency groups toward statutory objectives and the policy outputs of implementing institutions;  
5. Continued Support for Statutory Objectives among sovereigns and implementing institutions; and  
6. Commitment and Leadership Skill of Supportive Implementing Officials.

from the implementation of an association agreement. Contrasts may be identified in relation to the following:

- a. The scale and nature of the content;
- b. The relative impact of external factors such as global politics, global economics and EC and international law; and
- c. The scale of the intended impact both in terms of the scope of behavioural change required and in terms of the number of actors affected.

Secondly, there is a degree of overlap in Sabatier and Mazmanian's framework. A number of indicators are included under more than one category without adding additional levels of analysis or information to their framework.

Thirdly, Sabatier and Mazmanian, in Section B of their framework focus largely upon the extent to which legislation structures implementation. It is submitted that an over-reliance upon implementation structures derived from legislation excludes the examination of other possible levels and structures for implementation. For this reason this thesis has re-oriented Sabatier and Mazmanian's framework in order to take a broader approach which will examine different levels of implementation structures.

Fourthly, it must be recognised that the EU is not a monolithic institution and that the structure of the EU is very complex.<sup>21</sup> This should be borne in mind, particularly when considering heads three and four for the reasons discussed below.

Head three requires consideration to be given to "the extent of hierarchical integration within and among implementing institutions. Head four requires

---

<sup>21</sup> This was discussed in chapter two.



consideration to be given to “the extent to which decision-making rules of implementing agencies are supportive of the Agreement’s objectives. Chapter six demonstrates the complexity of the institutional structure which governs the Europe Agreement. The EU side itself is non-unitary and is comprised of the Member States and the various EU institutions. Chapter two highlighted the lack of certainty which exists in the division of competences between the EU and its Member States in association agreement such as the Europe Agreement and demonstrated how this may directly impinge on the process of negotiation. Here it is possible that the competing interests of the various institutions may conflict in a way which may threaten to disrupt the implementation process. For example, the Spanish intervention in the Europe Agreement just prior to the official ceremony marking the signing of the agreements with the Visegrad states was an attempt to agree a special protocol on steel which would have protected Spanish domestic interests. Similar issues in the process of implementation are discussed in chapter seven. Moreover, as table five clearly demonstrates, each of the Parties to the Europe Agreement will have specific objectives for the Europe Agreement. Some of these objectives appear to overlap, such as Poland’s concerns about the military threats posed by countries to its east and the Member States’s desire to promote peace in Europe. However, it is equally obvious that there is potential for conflict between the Parties’ goals. For example, Poland’s desire to increase exports to the EU as compared with the Member States’ desire to protect their domestic markets. Chapter seven analyses a number of conflicts which arise principally because of such a clash of objectives.

Finally, some features of Sabatier and Mazmanian’s framework must fall outwith the scope of this thesis. This requirement arises for two main reasons. Some indicators necessarily require an in-depth empirical study in their own right. This may be seen in relation to category C5 relating to the commitment and leadership skill of supportive implementing officials. Alternatively, certain indicators require analysis dependent upon inter-disciplinary study such as certain aspects of category C2 relating to the media. In both scenarios these indicators are

considered to be valuable additions to the implementation framework and worthy of further research. However, they must necessarily be considered to fall beyond the scope of this study.

### **The Implementation Framework for this Thesis**

Using Sabatier and Mazmanian's framework as a base and taking into account the modifications made for the reasons outlined above, or for language reasons, the implementation framework for this thesis may be summarised in table six below:

<b>Table Six: Modified Sabatier and Mazmanian framework</b>		
<b>A. Tractability of the Problems</b>	<b>B. Coherency of the Structure of the Implementation Process</b>	<b>C. Variables Affecting Implementation which are not Derived from the Agreement</b>
<ol style="list-style-type: none"> <li>1. Difficulties in handling change</li> <li>2. Diversity of proscribed behaviour</li> <li>3. Percentage of population within a political jurisdiction whose behaviour needs to be changed</li> <li>4. Extent of behaviour required of target groups</li> </ol>	<ol style="list-style-type: none"> <li>1. Precision and clear ranking of the Europe Agreement's objectives</li> <li>2. Financial resources available to the implementing institutions</li> <li>3. The extent of hierarchical integration within and among implementing institutions</li> <li>4. Extent to which decision-making rules of implementing agencies are supportive of the Agreement's objectives</li> </ol>	<ol style="list-style-type: none"> <li>1. Variation over time in social, economic and technological conditions affecting the attainability of the Agreement's objectives</li> <li>2. The amount and continuity of media attention to the problem addressed by the Agreement</li> <li>3. Variations over time and jurisdiction in public support for the Agreement's objectives</li> </ol>



## Conclusions

Sabatier and Mazmanian's framework examines the problem-centred, statutory and political variables which affect the implementation process. They suggest that legislative staff and other statutory framers could employ their checklist of variables to estimate the probability that a statute will achieve its mandated objectives.

This thesis seeks to use the check list of modified variables above to determine which aspects of implementation may be problematic. Chapters four, five, six and seven will provide an in-depth analysis of some of the crucial issues relating to the implementation of the Polish Europe Agreement: an analysis of the autonomous legal measures which regulate Polish-EU relations; an analysis of the text of the Agreement; an analysis of the structures which have evolved to implement the Agreement; and an analysis of five implementation disputes. These chapters will provide the basis for a final analysis of Sabatier and Mazmanian's modified framework in chapter eight which will assess the extent to which it indicates potential problems for the implementation of Europe Agreement. It will then compare these indicators against the experience of implementation thus far. This analysis will then be used to assess the extent to which the framework assists in understanding implementation in the context of the Europe Agreement. Proposals for the modification of the framework in the light of this analysis will be discussed.

# CHAPTER FOUR

## Towards Pre-Accession:

### The Legally Binding and Autonomous Legal Measures Regulating EU-Polish Relations

#### Introduction

The issue of accession has been central to Polish-EU relations since the Europe Agreement negotiations began in 1990. The EU side has responded to the challenge of enlargement to the east in a manner which has at times appeared to be *ad hoc*. This chapter will examine the developments which have taken place since the conclusion of the Europe Agreement negotiations. It will examine the legally binding and autonomous measures which have been employed in order to demonstrate the complexity of measures which regulate Polish-EU relations. This has implications for the implementation process which will be further developed in chapters seven and eight.

#### Interim Agreement:

Although the Europe Agreement was signed on 1 March 1992, it did not enter into force until almost two years later on 1 February 1994. The Europe Agreement, being a mixed agreement, required to be ratified by each Member State's parliament.<sup>1</sup> This proved to be a time-consuming process and, in order to ease the delay, interim agreements were enacted covering those areas falling wholly within the EU's competence, that is trade and trade -related aspects.<sup>2</sup> The interim agreement entered into force on 1 March 1992.<sup>3</sup>

---

<sup>1</sup> Mixed agreements are discussed in more detail in chapters five and seven.

<sup>2</sup> OJ 1992 L114/1.

<sup>3</sup> Interim agreements with the Czech and Slovak Federal Republic and Hungary also entered into force on 1 March 1992; OJ 1992 L115/1, L116/1.

## The Development of Accession Criteria

Meanwhile, pressure continued upon the EU to develop a more appropriate response to the needs of the CEES.<sup>4</sup> The European Councils were to provide the forum where policy developments would be announced. Poland submitted formal requests for membership to the EU on 1 April 1994. Article O Treaty on European Union (TEU) provides that “Any European State may apply to become a member of the Union”. The conditions for accession are not articulated, instead these are to be the “subject of an agreement between the Member States and the Applicant State”. At the Copenhagen Summit of June 1993 the members of the European Council outlined the conditions which it considered necessary for accession to the EU as follows:

1. The need for stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities;
2. The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union;
3. The Union’s capacity to absorb new members, while maintaining the momentum of European integration; and
4. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.<sup>5</sup>

Although both the Maastricht and Lisbon Summits had agreed to examine the general implications of enlargement this was the first occasion where, albeit vague, membership criteria had been articulated; it marked a more concrete

---

<sup>4</sup> As part of this evolving process DG1 was formally divided and DG1A was created dealing with external relations issues concerning the CEES.

<sup>5</sup> These conditions were first proposed by the Commission; “Towards a Closer Association with the Countries of Central and Eastern Europe” SEC(93) 648 final.



acceptance of eventual accession. The Summit also agreed to open EU markets more rapidly.<sup>6</sup> The conditions specified were both political and economic and depended not merely upon the performance of the CEES but also upon the development of the EU itself.<sup>7</sup>

The next milestone on the road to accession came with the Essen Summit in December 1994 which accepted two important Commission proposals, one focusing upon the political dimension (the structured relationship with the EC institutions), the other focusing upon the economic dimension (the White Paper on the Single Market).

The “structured relationship” was designed in part to address concerns relating to the bilateral nature of the Europe Agreements by creating multilateral frameworks. Members of the European Council and the President of the Commission meet with their counterparts from the CEES at least once a year. There are also regular meetings at ministerial, political director, European correspondent and working group levels. The pattern of meetings has developed slowly towards more substantial dialogue, especially at ministerial level.<sup>8</sup>

The principal aim for the structured relationship is to “develop practical cooperation between the governments of the Member States and of the associated countries” in areas of common interest. It was hoped that the Associated States would become familiar with the workings of the EC institutions through their attendance at certain Council and European Council meetings. Obviously the

---

<sup>6</sup> Market access to sensitive sectors was also increased although to a more limited degree; OJ 1994 L25/1.

<sup>7</sup> For an analysis of the conditions see: Lynn E Ramsey, “Towards a Wider European Union: A Commentary on the Possible Accession of Poland and Hungary to the European Union” (1995) European Public Law 189.

<sup>8</sup> See generally Pal Duncay, Tomas Kende and Tomas Szucs, “The Integration of Central and Eastern Europe into the Common Foreign and Security Policy of the European Fifteen” in Marc Maresceau (ed) *Enlarging the European Union: Relations Between the EU and Central and Eastern Europe* (Longmans, 1997) at pp 316-346.



structured relationship is limited. It does not grant the Associated States the ability to propose, vote on or oppose EU policy. It merely provides the opportunity for consultation. However, it does serve to move consultation onto a multilateral basis enabling the development of cooperation between the CEES. ( This will be very important if internal conflict within an expanded EU is to be minimised). In addition, it provides the CEES with the opportunity to present ideas at the highest EU level.<sup>9</sup>

The structured relationship builds upon and to an extent overtakes the provisions on political dialogue discussed in chapters two and five.

The White Paper on “Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union” was published by the Commission in May 1995.<sup>10</sup> It is a very detailed document running to 478 pages and was drafted in response to the Essen Council’s exhortation that the integration of the Associated States into the internal market was “the key element in the strategy to narrow the gap”.<sup>11</sup> The main aim of the White Paper is to help the Associated States prepare for the internal market. The paper does not cover the entire *acquis communautaire*, which must be adopted by all Member States, but only those aspects which relate to the internal market.<sup>12</sup> The White Paper was designed to act as a pre-accession “blue-print” for the Associated States. It defines “key measures” in each sector of the internal market and suggests the order in which the approximation of legislation should be

---

<sup>9</sup> Pal Duncay, Tomas Kende and Tomas Szucs, *fn* 8 above at p 324.

<sup>10</sup> COM(95) 163 final and annex COM(95) 163 final/2.

<sup>11</sup> See generally, “EU Builds Bridges in Eastern Europe” June (1995), Issue no 95 -VI, *Financial Times East European Business Law*, 8.

<sup>12</sup> Helen Wallace and William Wallace, *Policy-Making in the European Union* (Oxford University Press, 1996, 3rd edition) at p382 suggest that in drawing up the White Paper in this way implies that certain aspects of the *acquis*, that is those aspects directly relating to the more commercial aspects, are more important than others.

addressed.<sup>13</sup> Support for achieving these goals is provided through a multi-country PHARE programme and technical assistance is provided through the establishment of technical assistance information office (TAIEX).<sup>14</sup>

Drawing up the White Paper was coordinated across the Commission. For example, DGXV had responsibility for regulatory convergence and DG1A had responsibility for the PHARE aspects, although there was some internal conflict before the division of responsibility was agreed.<sup>15</sup>

The standards contained within the White Paper overlap with some aspects of the Europe Agreement, an important qualitative difference being that the Europe Agreement created legal rights and obligations vis-a-vis the parties. The White Paper imposes no obligations on Poland, or any of the Associated States. It is intended to assist with pre-accession strategy and should also assist with the implementation of the Europe Agreement because it provides guidelines for implementation and additional financial resources through PHARE.

The Madrid Summit decided that the Commission should forward its first Opinions on membership applications to the Council "as soon as possible after the conclusions of the Intergovernmental Conference". The Commission took the novel approach in formulating its Opinions by issuing a questionnaire to each applicant state in April 1996. The Document was extensive; at around 150 pages, and covered more than 1000 questions. The main part of the questionnaire was common to all applicant states. There were additional annexes covering issues which related to particular states.<sup>16</sup>

---

<sup>13</sup> P2 of the White Paper.

<sup>14</sup> P35 of the White Paper.

<sup>15</sup> Helen Wallace and William Wallace, *fn* 12 above at pp382-383.

<sup>16</sup> For example the Lithuanian question contained additional questions on fisheries - Interview with Jorgen Mordenstein.



The Questionnaire did not follow the format of the White Paper nor was it restricted to the content of either the White Paper or the Europe Agreement. It contained questions covering general background information requiring statistics on, *inter alia*, demography, production, trade, employment, health care, economic growth and school population. It also contained questions requiring precise information on the legal and administrative framework in sectors falling within EU competence. Information on the application and enforcement of legislation in these sectors was required.

Polish officials complained that they were given insufficient time to respond to the questionnaire.<sup>17</sup> The applicants were given the opportunity to present additional information at bilateral talks held in May 1997.

### The Opinions and Agenda 2000

The Commission's Opinions on the applicants together with its views on the impact of accession for the EU were published together in the communication Agenda 2000.<sup>18</sup> The Commission prepared its reports using a variety of sources drawing not merely upon the questionnaires and bilateral reports but also upon Member States' assessments, European Parliament Reports and resolutions and reports from international organisations, non-governmental organisations and what are described as "other bodies".<sup>19</sup> In addition, progress in implementing the Europe Agreement, the White Paper and other aspects of the *acquis* was considered. A report was prepared for each of the applicants assessing their ability to join the EU by measuring their performance under each of the Copenhagen Summit criteria outlined above. The opinions are based upon both factual evidence and predictions based on economic and political criteria. None

---

<sup>17</sup> Indeed the Commission took longer to draw up the questions than the recipients were granted to submit their replies to the often complex questions. Interview with Krzysztof Treczynski.

<sup>18</sup> *Agenda 2000: For a Stronger and Wider Union*, COM(97) 2000 final, 15.07.1997

<sup>19</sup> *Fn 18 above*, Volume I at p 41.

of the applicants was considered to satisfy all of the criteria. However, the Commission considered that Poland, Hungary, Estonia, the Czech republic and Slovenia could reach the necessary standard in “the medium term” provided “they maintain and strongly sustain their efforts of preparation”. The main findings of the Polish opinion are discussed in chapters seven and eight.

The Commission recommends that the existing pre-accession strategy be adapted to better prepare the applicants for membership. There are four features to the new pre-accession strategy. First, the Commission envisages that pre-accession aid, in addition to monies under PHARE, should be granted to the applicants.<sup>20</sup> There would be two aspects to the aid: agricultural development, at ECU 500 million per year; and structural aid, at ECU 1 billion each year. The structural aid is to be used to familiarise the recipients with the EU arrangements for implementing structural funds, especially the Cohesion Fund.

Secondly, a new instrument is to be created which is to be “the key feature of the reinforced strategy”, the Accession Partnership. Two elements will exist. The first element will require the applicants to accept precise commitments on democracy, macro-economic stabilization and nuclear safety. In addition, a national programme to adopt the *acquis* has been drawn up between the Commission and the Applicants using priorities identified in the Opinions. Each programme will have a timetable and implementation will depend upon “accession conditionality” with evaluation procedures and continuous dialogue with the Commission. Financial assistance will be on the basis of annual agreements, conditional upon achieving the programme’s objectives. The second element deals with the resources necessary to prepare for accession. The Commission calls for a “mobilisation of all resources available” both from the EU and also from

---

<sup>20</sup>

*Fn* 18 above, Volume I at pp62-63.



international financial institutions, suggesting that PHARE is used as a way of co-financing projects with the EIB, the EBRD and the World Bank.<sup>21</sup>

The preparation of the Accession Partnerships began in the second half of 1997 and progress will be regularly reported to the European Council. The first report is due to be submitted at the end of 1998, thereafter an annual report will be presented.

Thirdly, participation in Community programmes and mechanisms to apply the *acquis* is to be open to applicants.<sup>22</sup> The Europe Agreement provided for this and participation in certain progress is already underway (see chapter two). The Commission recognises the need to ensure that participation in programmes is effective and suggests that PHARE funding is used to co-finance participation beyond the 10% limit specified at the Essen Summit. The motivation for extending participation to the applicants is an attempt to better prepare them for membership by helping with the adoption of the *acquis* and helping to resolve more technical problems.

Finally, the creation of the European Conference which would meet once a year at the level of Heads of State or Government and the President of the Commission and at ministerial level, where necessary.<sup>23</sup> Membership would be open to the EU Member States and all European states “aspiring to membership” with an association agreement. The Conference would provide a forum for consultation on issues related to Common Foreign and Security Policy and Justice and Home Affairs. The Commission suggests that issues, including *inter alia* security, relations with Russia, drug trafficking, money laundering and illegal

---

<sup>21</sup> The Commission proposes that pre-accession aid to states preparing to join the EU should total 3 billion ECU a year for 2000-2006. It considers that PHARE should support two priorities; strengthening administrative and judicial capacity and investments related to the adoption and application of the body of law. IP/98/258.

<sup>22</sup> *Fn 18*, Volume I at p64.

<sup>23</sup> *Fn 18*, Volume I at pp66-67.

immigration, could be discussed in order to improve cooperation and to develop joint actions and declarations.

The first meeting of the European Conference took place in London on 12 March 1998. It was decided to focus initially upon: combatting transnational organised crime, improving environmental protection and promoting sustainable development; foreign and security policy; competitive economies and regional cooperation.

Agenda 2000 highlighted the impact of expanded membership for the EU. The Commission estimates the cost of absorbing the proposed new members will be around 1.27% of the EU GDP between 2000 and 2006.<sup>24</sup> The EU institutions will have to be reformed if they are adequately to deal with the additional demands which a significantly larger Union will bring.<sup>25</sup> Although the Treaty of Amsterdam made some changes to the functioning of the institutions, the Commission considers that they merely represent “a new step on the road to the unification of Europe”. It proposes that it is necessary to reform the weighting of voting in the Council and reduce the number of Commissioners to one per state before the first enlargement. But it stresses that these reforms alone will not be sufficient to proceed with a substantial enlargement. It suggests that an Intergovernmental Conference be convened as soon as possible after 2000 to reform the composition and functioning of the institutions. Perhaps more controversially the Commission also called for reform of the EU budget spending (discussed below).<sup>26</sup>

The Luxembourg Council approved the Commission's Agenda 2000 communication and agreed that the accession process would begin on 30 March

---

<sup>24</sup> This ceiling was agreed at the Edinburgh Summit in December 1992.

<sup>25</sup> *Fn 18 above*, Volume I at pp5-6.

<sup>26</sup> *Fn 18 above*, Volume I at pp14-34.



1998. Bilateral conferences will be convened in the spring of 1998 to begin negotiations with Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia on the conditions for their entry into the Union.

### **Overview of Pre-accession and Agenda 2000**

Poland's inclusion in the Commission's list does not mean that EU membership is now automatic. Progress in implementation of the *acquis* must be maintained and enforcement mechanisms are to be strengthened. Difficult areas remain such as agriculture, steel, iron, coal, road networks and privatisation. Moreover it is clear that accession cannot proceed unless the necessary reforms to the structural funds and the Common Agricultural Policy (CAP) take place. On 18 March 1998 the Commission set out its proposals for future policy in these areas which currently represent over 80% of the EU budget.<sup>27</sup>

The Commission proposals would reduce the coverage of regions eligible for structural funds support from 51% of the EU's population to 35-40%. The aim is to direct spending into the least developed regions. Under the Commission proposals no Member State will have an increase in the number of regions benefiting and the Objective 1 list (regions where the GDP per head of population is lower than 75% of the EU average) is likely to be cut in all Member States except Greece.

The CAP reforms are designed to improve the competitiveness of EU agriculture by reducing the risk of surplus and avoiding over-compensation. To this end the Commission proposes: a reduction in payments to large farms; that Member States may choose to make payment conditional on environmental standards; and that intervention prices for dairy, arable and beef sectors are fixed for the period of Agenda 2000.



The Commission hopes to finalise Agenda 2000 by the beginning of 1999. However, reaching agreement on the budget reforms may prove to be particularly difficult.<sup>28</sup> Member States are reluctant to commit to higher contributions to the EU budget particularly when they have had to adopt tight domestic spending strategies to meet the criteria for economic and monetary union (EMU). This is compounded by the fact that Germany is financially weakened by the process of unification; past budget reform, such as those in 1988 and 1992, were substantially funded by the German government. The Commission is scheduled to consider contributions to the EU budget in October 1998 but the financial climate coupled with pressure from some Member States, principally Germany and the Netherlands, may compound the difficulties in reaching agreement.<sup>29</sup>

The Agenda 2000 documents have raised some more general issues about accession to the EU. All new Member States must have ratified the ECHR prior to joining.<sup>30</sup> This despite the fact that an existing Member State, the UK, has not yet incorporated the Convention.<sup>31</sup> The Treaty of Amsterdam, which amends the TEU, was signed on 2 October 1997.<sup>32</sup> The new treaty incorporates the Schengen *acquis* into the framework of the EU with a new chapter on an “area of freedom, security and justice” which aims to achieve the free movement by relaxing police and customs controls on persons and goods at borders. The result is that all applicants would be obliged to accept that part of the *acquis* in full.<sup>33</sup> This may

---

<sup>28</sup> See Financial Times 19 March 1998.

<sup>29</sup> “The Budget is Done; Let the Battle Begin”, *The European* (409) 23-29 March at p16.

<sup>30</sup> *Commission’s Opinion on Poland’s Application for Membership of the European Union*, COM(97) 2002 final at p5.

<sup>31</sup> Although the present UK government is currently in the process of incorporating the ECHR into its domestic law.

<sup>32</sup> The new Treaty will not enter into force until ratified by all Member States.

<sup>33</sup> *Fn 30 above* at p89.

be problematic since it is unclear exactly what the Schengen *acquis* is.<sup>34</sup> Moreover, only seven of the current Member States apply the convention, although six are working towards implementation.

The European Council has excluded the possibility of partial adoption of the *acquis*.<sup>35</sup> Derogations agreed during the negotiation process will still be available. Some of the standards which new Member States must achieve have been clarified. It had been feared by some commentators that full participation in the third stage of EMU would be required.<sup>36</sup> The Commission has stated that EU membership only implies acceptance of the goal of EMU; applicants will have to achieve the convergence criteria but not necessarily on accession.<sup>37</sup>

One of the Commission's recommendations which may prove to have a decisive impact upon the course of negotiations is the decision that the simultaneous opening of negotiations "does not imply that negotiations will be concluded simultaneously".<sup>38</sup> The Visegrad states resented that they were required to sign Europe Agreements at the same time. Hungary considered that Poland was too confrontational and impeded its progress. All the applicants are fiercely competitive and eager to ensure that their state is the first to join. At the same time, a number of commentators have noted that greater concessions may have been achieved under the Europe Agreement had the Visegrad states adopted common negotiating positions. It will be interesting to see how these factors influence the leading group of applicants. Will they seek to achieve the most

---

<sup>34</sup> Protocol 2, Article 8 Treaty of Amsterdam provides:  
"For the purposes of the negotiation for the admission of new Member States into the EU, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all the state candidates for admission".

<sup>35</sup> This is the same approach adopted in all other accession negotiations.

<sup>36</sup> Lynn E Ramsey, *fn 7 above* at pp195-196.

<sup>37</sup> *Fn 30 above* at p57.

<sup>38</sup> *Fn 18 above*, Volume I, Final Recommendations at p69.



favourable deal by establishing negotiating pacts? Or, will they become adversaries in a bid to become the first CEES to join the EU ? It will be interesting to monitor the Polish approach .

On the whole, Poland will be content with the outcome of Agenda 2000. Jan Kulakoski, a lawyer and former secretary general of the International Labour Organisation, has been appointed Poland's chief negotiator in the forthcoming accession talks with the EU. Already the Polish side is attempting to adopt a tough stance, particularly in relation to agriculture where it is calling for the EU to extend the same levels of agricultural support currently enjoyed by existing EU farmers to Polish farmers.<sup>39</sup> Only time will tell how successful the Polish approach will be but what is clear is that the next few years will be crucial in establishing Poland's role within the EU.

### Conclusions

One analyst suggests that the Europe Agreement is now largely irrelevant as a result of the White Paper and membership application.<sup>40</sup> Whilst the trade provisions may continue in importance, because they provide concrete goals and obligations, such provisions were in any case mostly covered by the interim agreements.

This interpretation is flawed for four main reasons:

1. The Europe Agreement is the only legally binding instrument which applies between Poland and the EU. If progress towards accession were suddenly to slow down or even halt the Europe Agreement would continue to bind the parties;

---

<sup>39</sup> Financial Times 17 March 1998, "Farming is not an area where we want to strike bad compromises. We want the same duties and the same rights."

<sup>40</sup> Jorgen Mordenstein, *fn* 16 above.



2. Progress on implementation of the Europe Agreement was one of the main indicators used by the Commission in drawing up its Opinions;
3. The Luxembourg Council stressed the continuing importance of the Europe Agreement; it considered that the Agreements remained “the basis of the Union’s relations with these States”; and
4. The Association Council spends the majority of its time on issues related to the Europe Agreement rather than on the White Paper.<sup>41</sup>

This chapter has described the evolution of legal and non-legal measures which regulate Polish-EU relations. The goal of accession has been the driving force behind pressure for developments from Poland and the other CEES. The EU side often appear to have reacted in an unstructured way.<sup>42</sup> For example, the accession questionnaire issued to the applicant states does not directly relate to the content of either the Europe Agreement or the White Paper.

Table seven below demonstrates the complicated picture which has emerged during the 1990s. In addition to the legally binding agreements a series of binding and autonomous measures has been adopted. Poland has played no role in determining the content of the autonomous measures. It has no control over when or whether the EU adopts such measures and no guarantee that compliance with such measures will result in EU accession. Evans believes that this type of “voluntary harmonisation” may not work in the CEES’s favour. He considers that while it may improve legal access to the Community market it may “do less to assist such countries develop their capacity to exploit the trading opportunities entailed [and] encourage their real economic qualification [for EU

---

<sup>41</sup> Interview with Jan Willem Blankert.

<sup>42</sup> Balazs considers that the extensive use of autonomous legal measures reflects “an extremely cautious attitude towards the CEES and towards the whole process of preparing the eastern enlargement of the EU”. Peter Balazs in Marc Maresceau (ed) *fn 8* above at p370.

membership]”.<sup>43</sup> This is because the autonomous framework is unable to take account of structural economic problems as severe as those faced by the CEES. Whilst this may be true, it is equally apparent from the discussion in chapter two that where legally binding agreements are concluded between the parties the inequality in bargaining positions has often meant that the outcome reflects the EU standards (often pre-determined) and not some compromise which reflects the particular dynamics of the economic or other difficulties facing the CEES.

Table Seven: Measures Regulating EU-Polish Relations in the 1990s	
Binding Legal Measures	Autonomous legal measures
<ul style="list-style-type: none"> <li>• Interim agreement</li> <li>• Europe Agreement</li> </ul>	<ul style="list-style-type: none"> <li>• PHARE</li> <li>• Structured dialogue</li> <li>• White Paper</li> <li>• Agenda 2000</li> <li>• Various Summit declarations on accession</li> </ul>

Once again the pursuit of autonomous measures by the EU side reflects and reinforces the asymmetry of power between the parties. If Poland chooses to comply with the autonomous measures, as is likely, its decision to pursue closer European integration arises because of its weaker position. Again, employing the Nash model, Poland will choose to adopt these measures, notwithstanding their lack of input into their formulation, because they hope that this will improve their economic, geopolitical and security position.

The use of autonomous measures demonstrates how the EU side is able to exploit the asymmetry of power in order to set the agenda. This chapter has demonstrated however, that agenda setting on the part of the EU side has been neither clear cut not systematic. The piece-meal approach to policy vis-a-vis the CEES reflects a lack of clarity of purpose within the EU side. This in turn reflects the absence of a unified institutional structure within the EU side which was discussed in chapter two. For example, divisions have appeared between the Member States and

---

<sup>43</sup> Andrew Evans “Voluntary Harmonisation in Integration Between the European Community and Eastern Europe” (1997) 22 ELRev 210 at 219.



between the Commission and the Council in the approach to the question of accession to the EU.<sup>44</sup> A number of approaches were mooted. The so-called regatta option advocated that the EU open negotiations with all applicants at the same time. This approach was supported by five Member States: Austria, Sweden, Finland, France and Denmark. The differentiated approach favoured opening negotiations with a select group of states: Poland, Hungary and the Czech Republic. This was proposed by the German government. The route which the EU side has chosen to follow was proposed by the Commission in an attempt to find a solution which could appear to be objective and a-political. The ultimate result was Agenda 2000 where the Commission "tested" the applicants suitability for membership against criteria determined by the EU side. This provided a compromise result which, as was discussed above, approved the accession of certain CEES who were deemed to have met the criteria. The remaining CEES would have their applications reviewed annually.

In terms of implementation, a real problem emerges. Namely, that there is no clear hierarchy which should apply to the range of measures which now exist. Is Poland more likely to strive to comply with the Europe Agreement because it is a legally binding document ? Is compliance with the White Paper a greater priority since it is a more recent and more precisely detailed document ? A very complex structure of measures now exists which has direct implications for the implementation of the Europe Agreement. This is further examined in chapter eight.

---

<sup>44</sup> See generally, Lykke Friis, "The End of the Beginning of Eastern Enlargement-Luxembourg Summit and Agenda-setting" European Integration online papers Vol2 (1998) No7.



# CHAPTER FIVE

## THE POLISH EUROPE AGREEMENT: TEXTUAL ANALYSIS

### Introduction

This chapter provides a textual analysis of the Polish Europe Agreement. It also highlights some aspects of the Agreement which may prove problematic in terms of implementation. Unless otherwise stated all article references are to the Europe Agreement.

On 1 February 1994 the second generation of agreements between the European Community and Poland entered into force.<sup>1</sup> This was one of the first of the so-called Europe Agreements.

The Europe Agreements share a common framework although each agreement purports to consider the needs of the individual CEES. The principal features are:

- a. A common legal basis and form;
- b. Political dialogue and institutions of association;
- c. Free movement of trade;
- d. Movement of workers;
- e. The right of establishment;
- f. The provision of services;

---

<sup>1</sup> 1993 OJ L348/1. The Polish Europe Agreement was signed on 16 December 1991.

g. Financial cooperation, competition provisions and State aids;

h. The approximation of legislation;

i. Economic cooperation;

j. Cultural cooperation; and

k. Financial cooperation.

#### **a. Legal Basis and Form**

The Polish Agreement was concluded between the EU and its Member States, on the one part, and the Polish Republic on the other. The first thing to note is that the Agreement is adopted under all three of the treaties founding the European Communities: the European Coal and Steel Treaty, the Euratom Treaty (Article 101(2)) and the EC treaty (Articles 238 and 228(3)(2)). Article 238 EC provides the Community with the power to conclude association agreements. The precise nature of association agreements is not defined or described within the treaty and the structure, scope and content of association agreements varies quite considerably. However, Article 238 does detail certain features common to all association agreements. They involve reciprocity of rights and obligations, common actions and special procedures.

Where a mixed agreement, such as the Europe Agreement, has been concluded the EU and the Member States have an obligation to work together. The ECJ has described this duty of close cooperation as the “requirement of unity in the international representation of the Community” and considers it to be one of the fundamental principles of the external relations of the EU.<sup>2</sup> The extent to which

---

<sup>2</sup> *Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)* [1978] ECR 215 at para 35.

the Member States and the EU observe the duty of close cooperation is discussed in chapter eight.

One of the most interesting aspects to consider in relation to the nature of each of the Europe Agreements is the membership of the Agreement. The Agreements are not block-to-block agreements unlike the Lome Conventions or the agreement on the European Economic Area.<sup>3</sup> The impact this has had upon the negotiation strength of parties is discussed in chapter two.

Although the Agreement is not the product of block-to-block negotiations it is really a multi-lateral rather than a bi-lateral agreement because one “party” to the Agreement is composed of 15 states in addition to the EU.<sup>4</sup>

### *Preamble*

The preamble is more or less identical in all the Agreements and is interesting in two respects. First, it sets the tone and highlights the philosophy underlining much of the Agreement. Secondly, it introduces some of the innovative and important features of the Agreement. The preamble may also be employed to identify the Agreement’s objectives, see chapter three.

The traditional links and common values of the contracting parties are emphasised. As one would expect no attempt is made to define or provide examples of these. Indeed it is interesting to consider whether a strong case could be made for the existence of such bonds between the existing EU membership.

The preamble considers the Agreement to be one of the cornerstones in the creation of “a system of stability based on co-operation”. It must be presumed

---

<sup>3</sup> Lome 1 1976 OJ L25/1; Lome II 1980 OJ L347/1; Lome III 1986 OJ L86/1; Lome IV 1993 OJ L280/26; Agreement on the European Economic Area 1994 OJ L1/1.

<sup>4</sup> Agreements amended to take account of the accession of Austria, Finland and Sweden to the EU in 1995.



that “stability” includes not only economic stability but also wider political and defence issues. In addition, a link is claimed between full implementation of the Agreement and the full implementation of Poland’s technological modernisation.

One of the most significant aspects of the Preamble for Poland is that it recognises that its ultimate goal is full membership of the EU. However, the preamble does not make accession a common goal and creates no legal obligation to admit Poland as a member of the EU.<sup>5</sup>

It is important to emphasise at the outset that the Europe Agreement was not designed to be a pre-accession agreement. This is relevant to the discussion summarised in tables eight to ten which clearly demonstrate how the Europe Agreement favours the EU side. Subsequent events may now lead us to view the Europe Agreement as a pre-accession blueprint for Poland however, when Poland signed the Europe Agreement it did not complete an application form to join a pre-existing club. Whilst it is true that “the EU’s strategy seems to have been to govern through the prospect of membership” the Europe Agreement is essentially an association agreement between Poland, the EU and its Member States.<sup>6</sup> The Europe Agreement has specific and limited objectives and the text reflects the power imbalance discussed in chapter two. However, it is now apparent that during the negotiations for the Europe Agreement and the implementation of the Europe Agreement there was also a set of *sotto voce* negotiations relating to the broader question of accession of Poland to the EU. The precise content of these negotiations cannot be known but it is clear from the discussion in chapter four that the lack of unity within the EU side meant that at times the EU’s agenda was unclear and not so tightly drawn.<sup>7</sup> Once accession negotiations were open to

---

<sup>5</sup> See chapter two.

<sup>6</sup> Lykke Friis, “The End of the Beginning of Eastern Enlargement- Luxembourg Summit and Agenda-setting” European Integration online papers vol.2 (1998) No.7.

<sup>7</sup> In order to build up a detailed and exact picture of agenda setting within the EU side at this time access to minutes of the meetings of the various institutions would be required. These documents are not available to researchers.

Poland this agenda became explicit and so the issue of accession continues to play an important role in shaping the asymmetry of power between the parties. Poland's eagerness to join the EU undermines its ability to negotiate effectively during implementation allowing the EU side to control the pattern and process of implementation.

This chapter clearly illustrates the ability of the EU side to conclude an agreement which protects their objectives in three ways:

1. Through the adoption of provisions permitting the adoption of protectionist measures;
2. Through the adoption of provisions enabling consultation to take place on issues beyond the scope of the Europe Agreement; and
3. Through the adoption of provisions based upon EC law standards.

These provisions are summarised in tables eight to ten below.

### ***General principles***

The provisions contained in the Agreement are designed to be gradually implemented over a period of 10 years. The transitional period began from the date which the Agreement entered into force and is to be divided into two stages each lasting in principle for 5 years although this length may be varied by the Association Council.<sup>8</sup> The two stages do not apply to the provisions on the free movement of goods which are discussed below.

### **b. Political Dialogue and the Institutions of Association**

Political Dialogue must be considered to be the Agreement flagship. It is mentioned both in the Preamble and in Article 1, which details the Agreement

---

<sup>8</sup> Article 6 of the Agreement.



aims, and is devoted an entire Title. This is the first association agreement to include a title on Political Dialogue.

Three broad aims exist. First, to facilitate Poland's full integration "into the community of democratic nations" and consolidate the rapprochement between the EU and Poland. Secondly, to support the political and economic changes in Poland and finally, to contribute to the establishment of new links of solidarity.

Consultation is to take place at the highest possible level between the European Council President, the Commission President and the President of Poland. In addition, talks are to take place at ministerial level within the Association Council and at parliamentary level within the Parliamentary Association Committee. Consultation is not restricted to the EU and Polish institutional framework. Rather the Agreement appears to encourage the establishment of cooperative culture urging that full advantage be made of "all diplomatic channels including the regular briefings by Polish officials in Warsaw, consultations on the occasion of international meetings and contacts between diplomatic representatives in third countries". The provisions on political dialogue have the potential to be very wide ranging and the different levels of interaction in the Agreement are designed only as building blocks to be developed and supplemented. Article 4 provides that the mechanisms and procedures for political dialogue should follow "any another means which would make a useful contribution to consolidating, developing and stepping up this dialogue".

The inclusion of the title on political dialogue does present the EU with a sphere of influence which it does not normally have in external relations agreements. The meetings which take place within the framework of this title are not restricted to the subject matter of the treaty. Discussion at ministerial level may take place within the Association Council on "any matter which the parties might wish to



put to it”.<sup>9</sup> The aims and objectives for the title in no way imply that matters outwith the scope of the Agreement should be excluded from the ambit of political dialogue but rather are couched in the widest possible terms. Political dialogue and cooperation aim to “bring about better mutual understanding and an increasing convergence of positions on international issues”, “enable each party to consider the position and interests of the other in their respective decision-making processes” and to “enhance security and stability in the whole of Europe”.

The limitations of political dialogue have been discussed in chapter four where it was also noted that the title has been overtaken to a significant extent by the creation of the structured relationship. The principal difference between political dialogue and the structured relationship is that the former is contained within a legally binding agreement whereas the latter is part of an autonomous policy adopted by the EU. However in real terms this distinction has little practical import since the provisions on political dialogue do not really create any legally binding obligations on the parties, they are rather provisions aimed at establishing a framework for cooperation.

### *Institutional Framework*<sup>10</sup>

The Agreement has its own institutional framework which is designed to ensure that the Agreement functions as smoothly as possible and facilitates political dialogue. Three institutions are created which are loosely modelled on EU institutions. The most important body is the Association Council which supervises the implementation of the Agreement and can adopt binding decisions

---

<sup>9</sup> Article 3 of the Agreement. The practical significance of this provision is discussed in chapter seven.

<sup>10</sup> The nature and frequency of meetings held by the Europe Agreement institutions is discussed in chapter six.

and non-binding recommendations.<sup>11</sup> It meets at least once a year at ministerial level in order to examine issues arising not only from the Agreement but also from any other “bilateral or international issue of mutual interest”. The Association Council comprises members of the Council of the European Communities and the European Commission on the one part and members of the Polish government on the other. The presidency rotates between Poland and the EU Council.

An Association Committee has been created to assist the Association Council. It may adopt binding decisions where the Council has delegated the power to do so. The Committee is composed of representatives of the members of the EU Council and the European Commission on the one part and representatives of the Polish government, normally at senior civil servant level, on the other.

The final institution is the Association Parliamentary Committee. It consists of members of the European Parliament and the Polish Parliament. It has rather limited powers and may request information relating to the implementation of the Agreement, is to be informed of Association Council decisions and may make recommendations.

Article 105 outlines a dispute resolution mechanism in the case of the failure to reach an agreement between the parties. The arbitration procedure is discussed in detail in chapter seven.

#### **c. Free movement of trade**

This title is one of the central features of the Agreement. It seeks to establish a free trade area, conforming with the relevant provisions of the GATT and WTO, over a transitional period of 10 years. The provisions in the Agreement are not

---

<sup>11</sup> The Association Council may also adopt decisions to resolve disputes referred by either party to the Agreement. (Article 105)  
In addition, it has the power to set up a special committee or body to assist it perform its duties. (Article 107)



designed to be static. They have been adapted to take account of changes, for example, as a result of the GATT Uruguay round. This is significant because the Agreement does not exist in isolation but may be adapted, indeed must adapt, as a result of decisions made outwith its framework. The EU's tariff cuts were accelerated at the Copenhagen and Essen Summits.<sup>12</sup> One of the main features of the provisions is asymmetry: the EU side have agreed to introduce "concessions" more quickly and over a wider range of products than Poland. Ultimately, all parties will have implemented the same standards.

The title is divide up into four chapters: industrial products, agriculture, fisheries and common provisions.

### *Industrial products*

Chapter 1 requires the abolition of customs duties and measures having equivalent effect and quantitative restrictions and measures having equivalent effect which apply in relation to imports obligations for the EU and Poland.<sup>13</sup> The EU is to abolish such tariffs more quickly than Poland. For example, the EU is to ensure that all quantitative restrictions and measures having equivalent effect are abolished from the date of entry into force of the Agreement.<sup>14</sup> Whereas Poland must abolish quantitative restrictions and measure having equivalent effect only in relation to certain products from the date of the entry into force of the Agreement. For other products abolition is to be phased in over a period of 10 years.<sup>15</sup>

---

<sup>12</sup> Protocols to the interim agreement 1994 OJ L 25/1; 1994 OJ L378/1.

<sup>13</sup> Can have a more rapid reduction in tariffs if the general situation permits this.

<sup>14</sup> This is not really a new provision but merely repeats the provisions contained in the first generation agreement.

<sup>15</sup> Article 10 provides that other products will be dealt with in the manner specified in Annex V.



In other respects though, the obligations contained are quite symmetrical. Both parties undertake to abolish measures having equivalent effect to customs duties applying to imports and quantitative restrictions and measures having equivalent effect applying to exports from the date on which the Agreement enters into force. Both also agree to abolish customs duties on exports and measures having equivalent effect by the end of a five year period.

Article 17 is very interesting because it enables agricultural products to be excluded from the provisions of the chapter on industrial products. It provides that the provision of the chapter do not preclude “retention of an agricultural component in the duties applicable to the products listed in Annex VII”.

### *Agriculture*

The provisions on agriculture are much more restrictive than those which apply to industrial products. They fall short of the creation of a free trade area and relate mostly to the abolition of quantitative restrictions in relation to certain products and some reduction in quantitative restrictions and customs duties in relation to others. Measures having equivalent effect to either type of tariff are not mentioned.<sup>16</sup> The Chapter covers trade in “agricultural products”, the relevant products are listed in Chapters 1 to 24 and Annex 1. There is a separate protocol for processed agricultural products.

Once again the changes made in tariffs are gradual, asymmetrical and reciprocal with the EU agreeing to make more extensive concessions more quickly. The title is designed to be a framework provision or building block provision because it provides in Article 20(5) that the Association Council will meet regularly to consider on a product by product basis extending concessions on a reciprocal basis. The experience within the EU has proven that a product by product approach like this is a very protracted means of securing agreement and more

---

<sup>16</sup> The limited scope of the provisions on agriculture is discussed in chapter two. Chapter three discusses the need for reform of the CAP if new states are to join the EU.

recent practice has been to favour the broad brush approach of harmonisation. It must be assumed that the EU is content for the development to take as long as possible since it protects their domestic markets from competing Polish goods.

Article 20(6) is a rather unusual provision. It calls for regular consultation between the parties in the Association Council “on the strategy and practical modalities of their respective policies”. Again this type of consultation must go beyond what is strictly necessary to ensure the smooth functioning and development of the Agreement. It makes reference to Poland’s wish to join the EU and must therefore be assessed in terms of the questions surrounding the reformation of the CAP, should Poland join the EU.

A final point to note is that the provisions of the Agreement may be suspended if imports subject to concessions cause, or are likely to cause, “serious disturbance” on the market. In these circumstances the party may take any “measures it deems necessary”.

### *Fisheries*

The provisions on fisheries are even more limited than those on agriculture. Fishery products originating in the EU and in Poland, covered by Regulation (EEC)No. 3687/91 on the common organisation of the market in the sector of fishery products, are to be covered. The chapter merely provides a consultation mechanism so that parties may conclude “as soon as practicable” negotiations of an agreement. Only then will the product by product discussions begin which are provided for in Article 20(5) of the chapter on agriculture. Given the sensitivity of fisheries industry within the EU it is not very surprising that the fisheries provisions are so limited.



### *Common Provisions*

The final chapter in the title contains provisions which apply to trade in almost all products.<sup>17</sup> Both parties agree not to introduce new or increase existing customs duties, quantitative restrictions and measures having equivalent effect both in relation to imports and exports. This prohibition is not unlimited and it must not restrict “the pursuance of the respective agricultural policies of Poland and the Community or the taking of any measures under such policies”. This opportunity to derogate from the Agreement is very wide and reflects EU sensitivities in the field of agriculture.

Internal fiscal measures applied between the parties should not result in direct or indirect discrimination of the other party’s products.<sup>18</sup> Similarly, parties should not “profit” from the internal taxation system by receiving repayment from the internal taxation in excess of the amount of direct or indirect taxation imposed on them.<sup>19</sup> The parties are free to establish free trade areas or customs unions with others provided that they do not alter the trade arrangements provided in the Agreement.<sup>20</sup> This would appear to be a rather uncontroversial proposition. However, it is combined with a consultation mechanism so that parties may request that consultation takes place within the framework of the Association Council on the establishment of free trade areas or customs unions or, rather more controversially, “on major issues related to their respective trade policy with third countries”.<sup>21</sup> Although the article provides that consultation shall occur where a new Member State joins the EU in order to ensure that “account can be taken of the mutual interests ...stated in the Agreement”, there is no general requirement that consultations requested must relate in some way to concerns surrounding the

---

<sup>17</sup> Except where there is express exception or where Protocols 1 or 2 apply.

<sup>18</sup> Article 26(1).

<sup>19</sup> Article 26(2).

<sup>20</sup> Article 27(1).

<sup>21</sup> Article 27(2).



Europe Agreement. Again this creates a mechanism for the EU to develop an awareness of Poland's foreign trade policy and again provides a forum for it to influence or at least comment upon the development and direction of that policy.

Chapter IV details circumstances in which parties may derogate from the Agreement. Article 28 permits Poland to increase customs duties applied to infant industries or sectors undergoing restructuring or facing serious difficulties, particularly where these difficulties produce important social problems. The degree and duration of any increases is limited.<sup>22</sup>

Articles 29, 30 and 31 apply to both parties and permit them to take "appropriate measures" to protect the domestic economy. Article 29 applies where dumping is taking place in trade with the other party.<sup>23</sup> Article 30 applies where any imported product threatens the stability of the domestic market.<sup>24</sup> Article 31 applies where the application of the Agreement would result in re-export to a third country against which the exporting party maintains quantitative restrictions on exports, export duties or measures having equivalent effect or where it has created or threatens to create a serious shortage of a product essential to the exporting party. In each of these situations the parties must follow the procedure detailed in Article 33 before taking action. It is imperative that they inform the Association Council of all the circumstances as soon as possible in order to find

---

<sup>22</sup> Any increase may not exceed 25% *ad valorem* and may not apply for more than five years unless the Association Council approves an extension.

<sup>23</sup> "Dumping" in Article 29 follows the definition in Article VI of the General Agreement on Tariffs and Trade.

<sup>24</sup> Article 30 provides that "appropriate measures" may be taken where :

"Any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause:

- serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, or

- serious difficulties which could bring about serious deterioration in the economic situation of a region".

a solution which is acceptable to all. Any safeguard measures which are adopted must be the least disruptive to the smooth running of the Agreement and must be immediately notified to the Association Council. In exceptional circumstances a party may take immediate action on condition that the action adheres to the principle of proportionality.

Article 32 appears to be important and probably more so for Poland given the structure of its economy. This provision requires parties progressively to adjust “state monopolies of a commercial character” over a 5 year period to ensure that there is no discrimination regarding the conditions for procurement and marketing of goods between nationals of the contracting parties. The Association Council is to be informed of measures adopted to implement this objective.

Chapter IV permits parties to derogate from the Agreement’s provisions on imports, exports and goods in transit on the grounds of public policy, public morality, public security and so on. The provision is therefore almost identical to Article 36 EC with two notable additions. First, the protection of intellectual property is included. Secondly, the protection of gold and silver.

#### **d. Movement of workers**

The omission of the word “free” from the wording of title IV makes the limitation of the following chapters quite clear. Whatever the provisions achieve it will fall short of the equivalent provisions in the EC treaty which aim to ensure freedom of movement across borders for individual workers and companies subject only to certain limited restrictions. Chapter I deals with the movement of workers. Polish workers are not granted the right to move freely throughout the EU but where a Polish worker is already legally established in a Member State he or she is granted treatment equal to national workers in that state in terms of working conditions, remuneration or dismissal.<sup>25</sup> In this way the Agreement leaves Member States to determine their own immigration and residency policies.

---

<sup>25</sup> Article 37.



Members of the worker's family are not given residency rights under the Agreement and are only covered by the non-discrimination provisions if and when they become workers.<sup>26</sup> The legally resident spouse and children of a worker legally employed in a Member State are granted access to that state's labour markets.<sup>27</sup> Poland also agrees to extend the same treatment to legally resident workers, spouse and children but "subject to the conditions and modalities applicable in that country".

The Agreement aims to establish a framework to co-ordinate social security systems.<sup>28</sup> It is the task of the Association Council to ensure that this is implemented.<sup>29</sup> Article 41 contains provisions which aim to expand the scope of movement of workers provisions. It urges the maintenance and possible expansion of existing bilateral agreements on the employment of workers. The Association Council is to examine the possibility of granting "other improvements". These are limited and envisage access for professional training. Member States are also urged to consider granting work permits to Polish nationals already resident in Member States. Article 41 is a particularly weak provision which has no legal effect and barely leaves open the possibility of co-ordination at EU level. Instead the emphasis is placed firmly upon action by individual Member States. During the second stage of the Agreement the Association Council shall examine ways of improving the movement of Polish workers but this must take into account the employment situation in the Community.<sup>30</sup>

---

<sup>26</sup> In this context the workers family refers to the spouse and children only.

<sup>27</sup> This is not extended to seasonal workers covered by bilateral agreements within the meaning of Article 41.

<sup>28</sup> Article 38.

<sup>29</sup> Article 39. Any procedures adopted must be no less favourable than rights or obligations created by existing agreements between Poland and the Member States.

<sup>30</sup> Article 42.



The final article in the chapter on movement of workers obliges the EU to provide technical assistance for “the establishment of a suitable social security system in Poland”. The article is silent as to who should determine the suitability or otherwise of the system.

#### **e. The Right of Establishment**

Chapter II of Title IV contains the provisions on the right of establishment. The aim of the provisions is to achieve equality in the right for companies and nationals from either contracting party to establish in the other party. The EU agrees that the treatment of Polish companies and nationals establishing and operating in a Member State shall be “no less favourable” than the treatment accorded to companies and nationals from that Member State.<sup>31</sup> This was effective from the entry into force of the Agreement. Poland agrees to accord Member States’ companies and nationals the same treatment through a rolling programme which will be phased in over a ten year period.<sup>32</sup> The equal treatment principle is not extended to the products listed in Annex XIIe. Although Poland has agreed to a gradual introduction of the equal treatment principle in general it has made a significant concession in Article 44(7) to permit Community companies “to acquire, use rent and sell real property”, and as regards natural resources, agricultural land and forestry, the right to lease, where these are directly necessary for the conduct of the economic activities for which they are established. This must be very important for firms seeking to carry out business in Poland but it probably means that Poland runs the risk of having significant sections of its economy owned by foreign companies since it is unlikely that Polish companies will be in as strong a position to acquire property.

The meaning of establishment is defined in Article 44(4). In relation to nationals it covers the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which

---

<sup>31</sup> Article 44(2).

<sup>32</sup> Article 44(1). It is possible to accelerate or prolong the time scale Article 44(5).

they effectively control. In relation to companies it covers the right to take up and pursue economic activities by setting up and managing subsidiaries, branches and agencies. Polish companies and EU companies are those established in accordance with the laws of Poland or the Member State which have registered office, central administration or principle place of business in the territory of Poland or the EU.<sup>33</sup> However should the company have only its registered office in Poland or the EU it must demonstrate a “real and continuous link with the economy” of Poland or one of the Member States.<sup>34</sup>

Derogations from the provision in the chapter are permitted in three ways. The first is contained in Article 47 where parties are free to apply rules which are justified by legal or technical differences between the “migrant” company and the “domestic” company or by “prudential reasons” as regards the financial sector. The difference in treatment is subject to the proportionality principle and must therefore not go beyond what is strictly necessary. The second is contained in Article 50 where Poland is permitted to derogate from its obligations where it has economic concerns.<sup>35</sup> Again the measures taken by Poland are regulated by the proportionality principle. The final route to derogation is contained in Article 53 which has the usual derogation on the grounds of public policy, public security and public health. Unusually it also contains a further restriction so that the establishment provisions will not apply to activities connected, even occasionally, with the exercise of official authority.

---

<sup>33</sup> Article 48.

<sup>34</sup> Jointly owned Polish and EU companies are also covered by the scope of this article by virtue of Article 54.

<sup>35</sup> Poland may derogate if certain industries:

- are undergoing restructuring, or are facing serious difficulties, particularly where these entail serious social problems in Poland, or
- face the elimination or a drastic reduction of the total market share held by Polish companies or nationals in a given sector or industry in Poland, or are
- newly emerging industries in Poland.



The chapter on establishment is much more extensive than the chapter on movement of workers. Key personnel may be employed by the beneficiaries of the right of establishment. Such employees must be employed exclusively by the beneficiary or its subsidiary and the residence and work permits are strictly limited to the period of employment. The key personnel are defined in Article 52 (2) and a cursory glance reveals that only very senior or well qualified people fall within the definition.<sup>36</sup> It must be the case that without this concession to the movement of worker provisions it would be practically very difficult for firms to take advantage of the establishment provisions. The Association Council is to examine which steps are necessary to provide for the mutual recognition of qualifications between the contracting parties. What is interesting is that although the provisions on movement of individuals under the establishment provisions offer the potential to be much more significant than the movement of worker provisions the quality of workers affected is likely to be very high. Both the provisions on key personnel and the mutual recognition of qualifications are addressed only to the best qualified and well educated workers.

#### **f. The Provision of Services**

The third chapter in Title IV deals with the supply of services. The parties have agreed progressively to allow the supply of services into each other's territory and

36

Key personnel are:

- (a) senior managers of an organisation who primarily direct the management of the organization, receiving general supervision or direction principally from the board of directors or shareholders of the business including:
  - directing the organization or a department or sub-division of the organization,
  - supervising and controlling the work of other supervisory, professional or managerial employees,
  - having the authority personally to engage and dismiss or recommend engaging, dismissing or other personnel actions;
- (b) persons employed by an organisation who possess high or uncommon:
  - qualifications referring to a type of work or trade requiring specific technical knowledge,
  - knowledge essential to the organisation's service, research equipment, techniques or management.



the Association Council is to adopt measures to ensure that this takes place.<sup>37</sup> One aspect of this is to permit the movement of key personnel who seek temporary entry into the other state in order to negotiate for the sale of the services or to sell services.<sup>38</sup> There are separate provisions for the supply of transport services where the parties have agreed to unrestricted access to the market on a commercial basis in relation to international maritime transport. Special transport agreements are to be negotiated between the parties on the coordination and liberalisation of air and inland transport.<sup>39</sup> Poland also agrees to adapt its legal, administrative, technical and other rules to fall into line with EC legislation on air and inland transport “in so far as it serves the liberalisation purposes and mutual access to markets of the parties and facilitates the movement of passengers and goods”. Once again we see another example of Poland agreeing to conform to the EU predetermined standard.

The differences between the supply of services generally and the supply of transport services is striking and must surely be explained by the need for a smooth running transport system to ensure the successful movement of goods between the contracting parties.

The final chapter in Title IV deals with general provisions. There are two interesting aspects. First, there is recognition that the Agreement must adapt in line with the WTO and the Agreement has been altered by virtue of decisions in the GATT Uruguay round. The Europe Agreement was negotiated prior to the conclusion of the General Agreement on Trade in Services (GATS). This explains

---

<sup>37</sup> Article 55.

<sup>38</sup> Although where the individual is seeking to sell services this must be done for the service provider and the representative must not be engaged in making direct sales or in supplying services themselves.

<sup>39</sup> Prior to the conclusion of these negotiations the parties agree not to introduce new measures which are more restrictive or discriminatory.

the EU's reluctance to agree to more precise provisions.<sup>40</sup> Secondly, Poland is entitled to exclude EU companies and nationals established in Poland from Polish public aid until the end of the ten year transitional period.<sup>41</sup>

#### **g. Payments, Capital, Competition and State Aids**

Chapter I deals with current payments and movement of capital. In relation to current payments the objective is to ensure that the parties authorise payments on the current account of balance of payments which apply to movements of goods, services or persons under this Agreement. The provisions provide for the adoption of reciprocal obligations but implementation will be a-symmetrical.<sup>42</sup> The provisions on capital aim to ensure that EC rules on the free movement of capital are applied in full and the Association Council is to examine ways of enabling this to take place.<sup>43</sup> Once again these provisions contain provision for derogation and once again there is a connection to something external to the Agreement. Poland is entitled to apply exchange restrictions in circumstances where they would be permitted under International Monetary Fund (IMF) restrictions. Any restriction must be applied in a non-discriminatory manner and should cause the least possible disruption to the Agreement.

Chapter II deals with competition and other economic provisions. Article 63(1)(I) outlines the prohibition against agreements between undertakings, decisions between associations of undertakings and concerted practices between

---

<sup>40</sup> On this point see Marise Cremona "The Movement of Persons, Establishment and Services" in Marc Maresceau (ed) *Enlarging the European Union: Relations Between the EU and Central and Eastern Europe* (Longman, 1997).

<sup>41</sup> This applies to the areas of public education services, health related and social services and cultural services, Article 58(3).

<sup>42</sup> Both parties agree not to introduce any new foreign exchange restrictions on movement of capital and current payments between residents of the Community and Poland or to make existing arrangements more restrictive. This applied to the Member States from the entry into force of the Agreement and will apply to Poland five years thereafter.

<sup>43</sup> The Association Council will begin its examination during the second implementation stage.



undertakings which have as their object or effect the prevention, restriction or distortion of competition. This is broadly equivalent to the prohibition contained in Article 85(1) EC but without the possibility of exemption in Article 85(3). Article 63(1)(ii) provides that “abuse between one or more undertakings in a dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof”. This formulation is found in Article 86 EC. Article 63(1)(iii) contains the prohibition against any public aid “which threatens to distort competition by favouring certain undertakings or the production of certain goods”. Again this formulation is found in the EC treaty.<sup>44</sup> The Agreement contains several provisions relating to public aid and this emphasis is unsurprising given the nature of the Polish economy. Poland is to be classified as an area “where the standard of living is abnormally low or where there is serious unemployment” when assessing the fairness of any public aid granted.<sup>45</sup> The parties have agreed to provide annual reports on the total amount and distribution of aid given and, when requested, to provide information on individual cases of public aid. Certain products are excluded from the scope of the public aid prohibition.

The Association Council has to adopt the necessary rules to implement the competition provisions and to ensure that practices are assessed using the criteria arising from the application of the rules in Articles 85, 86 and 92 EC. Where either party considers a practice incompatible with the prohibitions outlined in Article 63(1) then they must take “appropriate measures” if the Association Council’s implementing measures are not yet in place or do not deal adequately with the situation.

---

<sup>44</sup> Article 90(2) EC.

<sup>45</sup> This classification is derived from Article 92(3) EEC and will apply for the first five years of the Agreement although this time may be extended for a further five years should the Association Council consider it necessary.



Poland has agreed that within five years it will have established protection for intellectual, industrial and commercial property rights “similar to that existing in the Community”. This is interesting because it goes beyond the functioning of the Agreement and instead aims to alter Poland’s domestic laws. The standard which Poland should attain is difficult to discern. Poland is to reach the standard which exists not “under Community law” but rather “in the Community”. Should Poland attempt to gauge a mean standard or would it fulfil its undertaking by reaching the standard which exists in at least one Member State ? It would appear that the standard will be attained in two ways. First, Poland has agreed to accede to the Munich Convention on the Grant of European Patents and to other Conventions. Secondly, Article 68 requires Poland to approximate its intellectual property laws to EC law “as a precondition for Poland’s economic integration into the Community”.

The final Article in the Chapter deals with public contracts and the parties have agreed to award such contracts on the basis of non-discrimination and reciprocity.

#### **h. The Approximation of Legislation**

The approximation of laws arises in Chapter three of the title. It should be born in mind that the approximation does not represent a compromise between the Polish legislation and the EC legislation, rather Poland is required to approximate its laws to the EC laws. Clearly Poland has had no role to play in determining the content, nature or scope of these laws. By Article 68 Poland has agreed to approximate its laws to existing and future EC legislation so in effect it has agreed to adopt unknown legislation and has done so without having the EU agree a date for Polish accession. The approximation of laws is to cover a wide number of areas in particular : customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and

standards, transport and the environment. The EU has agreed to provide Poland with technical assistance to implement the approximation programme.<sup>46</sup>

The White Paper has provided a detailed list of what the Commission considers to be the most important directives required to harmonise to the standards of the single market.<sup>47</sup>

### **i. Economic Cooperation**

This title is a catch all title since it includes provisions which have a direct link to economic cooperation and other provisions where the link to economic cooperation is somewhat tenuous, for example education. Article 71 provides some guiding principles which the title should adhere to. The overarching aim is to contribute to Poland's economic and social development. In addition, it is hoped that policies are "guided by the principle of sustainable environmental and social development". The title aims to ensure that "special attention" is bestowed upon measures which foster cooperation between the CEES.

#### ***Industrial Cooperation***

The first article deals with industrial cooperation.<sup>48</sup> Cooperation is focused upon measures which support the private sector over the public sector and free competition rather than centrally planned economy. The implications are quite clear. The EU wishes to encourage these states to adopt its model of capitalism and is keen to ensure that the CEES do not drift back towards the Communist philosophy. This is clearly related to the EU's objectives for the Europe Agreement, discussed in chapter three.

---

<sup>46</sup> Article 70 provides that this may include, *inter alia*: the exchange of experts; the provision of information; organization of seminars; training activities; and aid for the translation of Community legislation in the relevant sectors.

<sup>47</sup> The relationship between the White Paper and the Europe Agreement is discussed in chapter four.

<sup>48</sup> Article 72.

Article 72(2) states that industrial cooperation initiatives should take account of Polish determined priorities. Article 72 also says that initiatives should seek “in particular to establish a suitable framework for undertakings, to improve management know-how and to promote transparency as regards markets and conditions for undertakings”.

The next article is also concerned with the promotion of the private sector and deals with investment promotion and protection.<sup>49</sup> This article aims to create a climate favourable to private investment through cooperation and focuses in particular upon:

1. The establishment of a legal framework supporting investment;
2. The implementation of transfer capital arrangements;
3. Increasing investment protection;
4. Carrying through deregulation and improving economic infrastructure;  
and
5. Exchanging information on investment opportunities.

It must be assumed that the Member States would see these five features as priorities in order to increase their trading opportunities with the CEES.

Article 74 deals with agro and industrial standards and conformity assessment. Once again Poland has agreed to harmonize its standards and procedures to predetermined Community standards.

---

<sup>49</sup> Article 73.



Article 75 deals with cooperation in science and technology and is aimed at encouraging the parties to work together in a variety of areas such as research and development and training activities. It is the task of the Association Council to determine the procedures which best provide for cooperation.

### *Education and Training*

Education and training is covered in Article 76 and is a surprising inclusion. Education is something which lies at the very heart of a state's identity. The European Court of Justice recognised this in the *Groener* case.<sup>50</sup> Member States are very reluctant to endorse EU "interference" with their education policies and where there is an EU dimension to education it is limited to issues of access, mobility and discrimination. In this context it is therefore striking that an association agreement should contain this provision. Cooperation is aimed at improving the "general level of education and professional level of qualifications in Poland". More specifically in paragraph 4 cooperation is to "assist in developing curricula, elaborating teaching materials and equipping educational institutions". Poland has agreed to promote an EU dimension in its teaching by teaching EU languages and teaching "European studies" whatever that may be. The "Europeanisation" of Polish education is also encouraged by enabling Polish participation in Community education programmes and by concentrating upon the education of "scholars, professionals and public servants to be involved in the process of European integration and cooperation with the Community institutions". It is clear that the Article concentrates more upon education in general than training which could be considered to have a stronger economic dimension.

### *Agriculture and the Agro-industrial Sector*

Article 77 deals with agriculture and the agro-industrial sector. A number of underlying trends may be identified in this provision. First, the emphasis is once

---

<sup>50</sup> C379/78 *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967 where the ECJ upheld an Irish language requirement stating that it was permitted by the "nature of the post".

again upon the development of the private rather than the public sector.<sup>51</sup> Secondly, Poland has agreed to harmonise its standards and legislation in line with pre-existing EC law standards.<sup>52</sup> Finally, the Article requires Poland to subscribe to EU farming and farm management techniques.<sup>53</sup>

### *Energy*

Energy is covered in Article 78. The two guiding principles are free market principles and progressive integration of the Polish and EU markets. Cooperation is to be diverse and wide-reaching and enable the EU to play a direct role in the formulation and planning of energy policy.<sup>54</sup> Environmental considerations are also to be taken into account.<sup>55</sup> There is a separate article for cooperation in the nuclear sector.<sup>56</sup> Here the thrust is somewhat different to the energy article and focuses upon safety issues such as the management of radioactive waste and radiation protection.

### *Environment*

The environment is mentioned on a number of occasions throughout the Agreement and is given a separate title in Article 80. This reflects the importance which at least the Member States and the EU attached to Polish environmental

---

<sup>51</sup> See for example, Article 77(1)(2) which states that cooperation shall endeavour to: “develop private farms and distribution channels, methods of storage, marketing, etc”.

<sup>52</sup> See for example Article 77(1)(8) where cooperation aims to : “develop cooperation on health, animal and plant health, including veterinary legislation and inspection, vegetal and phytosanitary legislation with the aim of bringing about the gradual harmonization with Community standards through the assistance for training and the organization of checks”.

<sup>53</sup> For example by agreeing to “promote complementarity in agriculture”, Article 77(1)(6).

<sup>54</sup> Article 78(2)(3).

<sup>55</sup> For example, Article 78(2)(7) states that cooperation shall focus upon: “The environmental impact of energy production and consumption”.

<sup>56</sup> Article 79.

issues and Article 80 states that the parties have judged “the vital task of combatting the deterioration of the environment ...to be a priority”.

The article contains a long list of onerous objectives such as “combatting regional and transboundary air and water pollution” and “waste reductions”. Five routes of cooperations are identified as the means of attaining these goals:

1. exchanging information;
2. training programmes;
3. Polish approximation its laws to EC law standards;
4. cooperation at regional and national level; and
5. development of strategies, particularly with regard to global and climatic issues.<sup>57</sup>

### *Transport*<sup>58</sup>

Article 81 deals with cooperation in the field of transport. An effective transport system is central to the success of the free movement of goods and movement of persons, services and capital contained elsewhere in the Agreement. Again, Poland agrees to adopt EU standards and to adopt transport policies consistent with Community transport policies.<sup>59</sup>

---

<sup>57</sup> The environment is discussed in chapters four and eight.

<sup>58</sup> PHARE is funding a road assistance improvement programme as part of the TOURIN programme (discussed below in relation to tourism). See TOURIN Newsletter 1/96.

<sup>59</sup> Article 81(1)(3) and Article 81(3)(6).



### *Telecommunications*

Telecommunications is covered in Article 82. Cooperation concentrates upon three main areas: the modernization of Poland's telecommunications; exchanges of information; and adopting European standards. This article appears to be less expansive than the EC telecommunications legislation but it is worth noting that Article 82(2)(3) provides for the "integration of trans-European systems; the *legal* (emphasis added) and regulatory aspects of telecommunications".

### *Banking and Financial Services*

Article 83 deals with banking and other financial services. A common set of rules and standards for accounting and for the supervision and regulation of banking, insurance and financial sectors is to be adopted. The Article does not stipulate what the common standard is or how it should be defined.

### *Monetary Policy*

Monetary policy is covered in Article 84. It states that "at the request of the Polish authorities", the EU will assist in the introduction of full convertibility of the zloty and the gradual approximation to the policies of the European Monetary System.

Article 85 deals with money laundering and the parties have agreed to cooperate to prevent their financial systems being used to launder the proceeds from criminal or drug related activities. Poland has agreed to adopt "suitable standards equivalent to those adopted by the Community and international fora".

### *Regional Development*

Regional development is covered in Article 86. It basically covers cooperation on regional development and land-use planning through the use of, *inter alia*, technical assistance and joint actions.

### *Social Cooperation*

Article 87 on social cooperation deals with three issues. First, improving the level of health and safety. Secondly, employment issues such as the organization of the labour market and job-finding and careers advice services. Finally, social security cooperation. Unlike other areas of the Agreement the social article does not require Poland to harmonise its legislation with that of the EU. The closest it comes to this is in Article 87(1) where it urges the parties to use EU health and safety standards “as a reference”. Similarly, there is no provision for the Association Council to consider introducing new or more advanced measures should future progress make this possible.

### *Tourism*

The Maastricht Treaty introduced restricted tourism to the list of the EU’s activities.<sup>60</sup> It is not surprising therefore that the tourism provisions contained in Article 88 are limited and vague. Cooperation is to “facilitate the tourist trade” and “transfer know-how”.

Tourist projects are funded by PHARE. One example is the TOURIN programme which supports the development of tourism and tourist services in Poland through a range of projects relating to, *inter alia*, marketing, tourism promotion and personnel training.<sup>61</sup>

### *Small and Medium-Sized Enterprises (SMEs)*

The encouragement of the SME is one of the European Commission’s central policies. They are excluded from many aspects of European Competition policy such as the Mergers Regulation. The Europe Agreement in Article 89 sees the continuation of this special treatment and aims to develop and strengthen SMEs and cooperation between SMEs in the EU and Poland.

---

<sup>60</sup> Article 3(t) provides that the activities of the Community shall include: “Measures in the spheres of energy, civil protection and tourism”.

<sup>61</sup> See generally TOURIN Newsletter 1/96.

### *Information and the Audiovisual Media*

Article 90 contains the provisions relating to information and the audiovisual media. Priority is to be given initially to programmes promoting the EU either in the form of basic information on the EU to the general public or special information for specialised audiences. Poland is also invited to participate in EU action programmes.

### *Customs*

Cooperation under Article 91 is aimed at facilitating the Agreement's trade provisions and approximating the Polish system to the EU system. So, in effect the Agreement operates on two levels here: on one level it performs an enabling function and ensures that the necessary practical procedures are in place to fulfil the Agreement's trade goals: on a higher level it ties Poland to predetermined procedures which extend beyond the scope of the trade provisions.

Article 91(2) indicates some of the types of cooperation envisaged such as the exchange of information and the introduction of a single administrative document for the transit systems between the EU and Poland.

### *Statistical Cooperation*

Cooperation under Article 93 aims to develop an efficient statistical system which can plan and monitor "the process of reform" and "to contribute to the development of private enterprise in Poland". In particular, Poland has agreed to harmonise its systems to international and EU standards. The EU has agreed to provide technical assistance "where appropriate".

### *Economics*

Cooperation under Article 93 aims to facilitate economic reform and economic integration in Poland. In particular, it aims to improve the understanding of Polish and EU economies and of devising and implementing economic policy in market economies.



## ***Drugs***

The final article in the title on economic cooperation targets both drug trafficking and the reduction of drug abuse. To this end, technical and administrative assistance will be provided.<sup>62</sup>

## **j. Cultural Cooperation**

The Maastricht Treaty introduced culture to European treaty law.<sup>63</sup> Until this point culture was not really part of European law save for some reference to culture in the jurisprudence of the European Court of Justice.<sup>64</sup> Title VII extends EU and Member State cultural cooperation programmes to Poland. Cooperation may include in particular:

1. translation of literary works;
2. conservation and restoration of historic and cultural monuments and sites;
3. training of persons working in the cultural field; and
4. cultural events with a European character.

## **k. Financial Cooperation**

Financial assistance, covered in Title VIII, is designed to implement the Agreement's objective and takes two forms:

1. grants under the PHARE programme; and
2. loans provided by the European Investment Bank.

---

<sup>62</sup> Article 94(3).

<sup>63</sup> Article 128 EC.

<sup>64</sup> See C379/78 *fn* 50 above.

The parties are to agree upon an “ indicative programme” which will detail the objectives and the areas of the Community’s financial assistance. The Association Council will be informed of this.

Poland may also benefit from temporary financial assistance to support its currency or other economic objectives. The financial assistance is dependent upon two conditions. First, Poland’s adherence to IMF supported programmes. Secondly, Poland’s rapid transition to reliance on finance from private source”. The Association Council will be informed of the conditions attached to any assistance. Financial assistance should be based upon Poland’s need and economic situation and will be coordinated with assistance from other sources such as G-24, IMF and EBRD.<sup>65</sup> It has been noted that the title on financial cooperation falls short of expectations on the Polish side, see chapters one and two.

## **Conclusions**

The Polish Europe Agreement is an extensive document. Excluding protocols, it runs to twenty eight pages, 122 Articles and nine Titles. One of the principal aims for the Agreement is to establish a free trade area based upon precise and reciprocal obligations. A wide range of additional aims may also be ascribed to the Agreement; these are discussed in chapter three.

Similarly, the text also impacts upon the implementation process of the Polish Europe Agreement and the theoretical framework examined in this thesis in a number of ways. First, the precision of the text varies considerably. The provisions on free movement of goods require the parties to attain definite standards within a proscribed timetable. By contrast, the provisions on the supply of services are very vague: the parties merely undertake to “allow progressively the supply of services”, no target or timetable is provided. Similarly the provisions on the approximation of laws do not necessarily oblige Poland to attain

---

<sup>65</sup>

Article 100.

the EC law standards they merely urge Poland to “use its best endeavours” to ensure that future legislation is compatible with EC legislation. There are many provisions which do not contain any attempts to impose obligations upon the parties but which rather aim to establish a framework for future cooperation. These include, *inter alia*, the provisions on culture, education, tourism, social cooperation and the audiovisual media. The Agreement also contains a number of provisions which are open to broad interpretation such as those in Articles 21 and 28 where the parties may adopt “appropriate measures” where the threat to the domestic market may cause “serious disturbances”. The high levels of ambiguity could be problematic for implementation.

Secondly, the Agreement contains a number of provisions which permit the parties to deviate from their obligations. These are described in table eight. The potential for implementation conflict here is compounded due to the ambiguity of some of the provisions, discussed above.

Table Eight: Provisions permitting the adoption of protectionist measures	
1. Agriculture	Article 21- Parties may take “ necessary measures” where agricultural imports cause serious market disturbances.
2. Free movement of goods	Article 28 - Increase customs duties to protect infant industries, sectors undergoing restructuring or facing serious difficulties.  Article 28- Parties may take “appropriate measures” where imports cause/threaten to cause: serious injury to domestic producers or serious disturbances to the economy.
3. Dumping	Article 29- Parties may “take appropriate measures” in accordance with Article VI of the GATT.
4. General prohibition on the grounds of public morality, policy or security etc.	Article 35



Table Eight: Provisions permitting the adoption of protectionist measures	
5. Establishment	Article 50- Poland may derogate if certain industries are undergoing restructuring, facing serious difficulties, face reduction in market share or are newly emerging industries.
6. Current payments	Article 60- Poland may apply exchange restrictions if permitted according to its status under the IMF.
7. Competition provisions	Article 63 - Parties may take “appropriate measures” where: the matter is not adequately addressed by rules on public aid; there is serious prejudice to the party’s interest or material injury to a domestic industry.

Thirdly, the Agreement contains a number of provisions which permit consultation to take place on issues which go beyond the scope of the Europe Agreement. Indeed the wording of some provisions is so wide there is no need to demonstrate any connection to the Europe Agreement. This may cause problems for the implementation process because one of the parties may not wish a particular issue to be discussed. In addition, where an issue is discussed which is not connected to the Agreement there is no framework, other than the purely diplomatic, for resolving any dispute which may arise since there will be no guiding principles arising from the Agreement and no possibility to use the dispute resolution mechanisms, such as arbitration, contained in the Agreement. Table nine details such provisions.

<b>Table Nine: Provisions enabling consultation to take place on issues beyond the scope of the Europe Agreement</b>	
1. Political dialogue	<p>Article 3(1) - Consultations “as appropriate” between the President of the European Council, the President of the Commission and the President of Poland.</p> <p>Article 3(2)- Association Council to have general responsibility for “any matter which the parties might wish to put to it”.</p>
2. Free movement of goods	Article 27(2) - Consultation within the Association Council on agreements establishing a customs unions, free trade area and “on other major issues related to their respective trade policy with third countries”.
3. Institutional provisions	Article 102 - Association Council may examine “any major issue arising within the framework of this Agreement and any other bilateral or international issue of mutual interest”.

Finally, there are many provisions which require Poland either to develop its laws in line with EC law or where there is conflict as to interpretation then interpretation should be in line with EC law. Table ten details these provisions:

<b>Table Ten: Provisions which are based upon EC law standards</b>	
1. Free movement of goods	Article 35 - derogation to the free movement of goods, similar to Article 36 EC.
2. Competition provisions	Article 63(1) - based upon Articles 85,86 and 92 EC.
3. Approximation of laws	Article 68 - Poland to approximate its laws to EC laws.
4. Free movement of capital	Article 61(1) - gradual application of Community rules on free movement of capital.
5. Intellectual and commercial property	Article 66 - Poland to adopt “levels of protection similar to that existing in the Community”.
6. Agro and industrial standards	Article 74(2) - Compliance with EC technical regulations and EC standards.

Table Ten: Provisions which are based upon EC law standards	
7. Education	Article 76(2) - promote teaching of European studies.
8. Agriculture	Article 77 - harmonisation with EC standards.
9. Environment	Article 80(3) - approximations of laws to EC standards.
10. Transport	Article 81(1) - achievement of operating standards "comparable to those in the Community".
11. Telecommunications	Article 82(1) - promote European standards, systems of certification and regulatory approaches.
12. Monetary policy	Article 84 - gradual approximation of Polish policies to those of the European Monetary System.
13. Money laundering	Article 85(2) - establishment of standards equivalent to those adopted by the EU.
14. Social cooperation	Article 87 - EU health and safety standards used as reference.
15. Information and the media	Article 90 - Parties to harmonise policies on regulation of cross-border broadcasting, technical norms and the promotion of European audio-visual technology.
16. Customs	Article 91(1) - Approximation to EU system.
17. Statistical cooperation	Article 92 - harmonise to EU methods, standards and classifications.

Table ten demonstrates that where the wording of the provisions is vague then very often implementation is skewed in favour of the EU sides's objectives where Poland has agreed to conform to a predetermined EU standard or indeed a future EU standards.

The consequences of these observations for both the process of implementation of the Polish Europe Agreement and the theoretical framework examined in this thesis are analysed in chapter eight.



# CHAPTER SIX

## The Polish Europe Agreement: Implementation Structures

### Introduction

This chapter outlines the structures which have evolved to implement the Polish Europe Agreement. Some structures were provided for in the Agreement, others already existed or were modified to meet the demands of the Agreement. The structures take one of four forms: Polish, Joint Polish/EU, EU or Member State. The chapter will describe the complex range of implementation structures which exist and their functions and powers. It will consider the relative importance of each of the structures to the implementation process and the extent to which a hierarchy of implementation structures has evolved. It will also examine the extent to which there is coordination within and between the structures.

### Polish Structures

#### *How is Poland Governed ?*

In order to understand the process which has evolved to implement the Polish Europe Agreement a brief examination of the Polish system of government is necessary.<sup>1</sup> The powers and responsibilities of the institutions ruling Poland are presently governed by an interim constitution, passed on October 17, 1992, referred to as the small constitution.<sup>2</sup> The government and opposition parties agreed upon a draft constitution on 2 April 1997 which then required approval by

---

<sup>1</sup> For a general overview of the main political developments in Poland between 1989 and 1994 see Frances Millard, *The Anatomy of the New Poland* (Edward Elgar, 1994).

<sup>2</sup> The Constitutional Act of 17 October, 1992 on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government with Constitutional Provisions Continued in Force. Dziennik Ustaw, No. 84, item 426 and as further amended by: Dziennik Ustaw of 1995, No.38, item 184; Dziennik Ustaw of 1995, No.150, item 729.

national referendum.<sup>3</sup> The Referendum took place on 25 May 1997. 52 per cent of Poles voted in favour of the new Constitution, 45 per cent voted against.<sup>4</sup> However, the constitutional position was initially unclear because groups opposing the new constitution, principally Solidarity and right-wing groups, had announced plans to challenge the legality of the referendum in court. The protesters claimed that because less than 42 per cent of the electorate actually voted the referendum was invalid. The legal challenge could not succeed as the constitutional position was unequivocal. The law relating to the new constitution is governed by the Constitutional Act of 23 April 1992 on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland.<sup>5</sup> Article 11(1) of the act clearly shows that it is not necessary that a majority of the electorate vote in favour of the new constitution: “The approval of a Constitution by referendum shall have taken place when *the majority of voters participating in the vote* have voted in favour of it”(emphasis added).

It will be seen from the responsibilities and powers discussed below that the Polish system of government is based upon the principle of the separation of powers: legislative power rests largely with the Sejm and the Senate; executive power with the President and the Council of Ministers.<sup>6</sup> Article 10 of the new constitution provides:

“1. the system of government of the Republic of Poland shall be based on the separation of powers and balance of powers between the legislative, executive and judicial powers.

---

<sup>3</sup> Article 1(1) of the Constitutional Act of 23 April 1992 on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland. Dziennik Ustaw, No. 67, item 336 as amended by Dziennik Ustaw of 1994, No.61, item 251. The new constitution entered into force three months after publication in the Official Journal. There is no official English translation available for the new constitution at this date. This chapter uses a translation by Albert Pol and Andrew Caldwell, unpublished.

<sup>4</sup> The Times, 28 May 1997.

<sup>5</sup> Dziennik Ustaw, No. 67, item 336, as amended by Dziennik Ustaw, No.61, item 251.

<sup>6</sup> Judicial power rests with the independent courts: *Sejm of the Republic of Poland*, Chancellory of the Sejm, Interparliamentary Relations Bureau, Warsaw 1996.



2. legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the Judicial power shall be vested in the courts and tribunals.”

The Sejm is the lower house. It is comprised of 460 Deputies who are chosen for a four year term by secret ballot in general, equal, direct and proportional elections.<sup>7</sup> 391 Deputies are elected in multi-member constituencies from constituency lists of candidates, 69 Deputies are elected from national lists of candidates.<sup>8</sup> Each constituency covers the territory of one voivodeship ( region). Between 3 and 17 Deputies may be elected from each constituency and the number is determined by reference to population size.<sup>9</sup> The Senate is composed of 100 Senators, chosen for the term of the Sejm, by secret ballot, in free, general and direct elections.<sup>10</sup> Each constituency elects two Senators, with the exception of Warsaw and Katowice which elect three.<sup>11</sup> The two (or three in the case of the two voivodeships mentioned) candidates receiving the highest number of votes

---

<sup>7</sup> Article 96 of the new constitution.

<sup>8</sup> Article 2 of the Act of 28 May 1993 on Elections to the Sejm of the Republic of Poland, Dziennik Ustaw, No. 45, item 205, as amended by Dziennik Ustaw of 1995, No. 132, item 640.

<sup>9</sup> Article 45 of the Act of 28 May 1993 on Elections to the Sejm of the Republic of Poland, Dziennik Ustaw, No. 45, item 205 as amended by Dziennik Ustaw of 1995, No 132, item 640.

<sup>10</sup> Article 97 of the new constitution.

<sup>11</sup> Article 2 of the Act of 10 May, 1991 on Elections to the Senate of the Republic of Poland, Dziennik Ustaw, No. 54, item 224.



are elected to the Senate.<sup>12</sup> Of the two houses the Sejm is the more powerful; one commentator considers that in the legislative process the Senate “tends simply to rubber stamp the legislation of the lower house”.<sup>13</sup>

The Sejm has four main powers:

- a. to determine the form of government;<sup>14</sup>
- b. to pass statutes;<sup>15</sup>
- c. to appoint officials to number of positions and bodies of state authority;  
and
- d. to supervise the executive authority.

Much of the work of the Sejm is carried out by its twenty five Standing Committees which consider and prepare matters under deliberation in the Sejm and deliver opinions on matters referred by the Sejm or the President.<sup>16</sup>

The Polish President is currently Aleksander Kwasniewski. The President is elected for a term of five years by direct election and has a number of powers.<sup>17</sup> He or she is the “supreme representative of the Republic of Poland and the

---

<sup>12</sup> Article 17 of the Act of May, 1991 on Elections to the Senate of the Republic of Poland, Dziennik Ustaw, No.45, item 205 as amended by Dziennik Ustaw of 1995, No.132, item 640.

<sup>13</sup> *Poland: Country Profile 1996-7* (The Economist Intelligence Unit, 1997).

<sup>14</sup> This is discussed in more detail below.

<sup>15</sup> The legislative process is discussed in more detail below.

<sup>16</sup> Article 18 of the Standing Orders of the Republic of Poland, 1992.

<sup>17</sup> Article 127 of the new constitution.

guarantor of the continuity of state authority”.<sup>18</sup> Secondly, the President is to “ensure the observance of the Constitution, safeguard the sovereignty of the State, the inviolability and integrity of its territory”.<sup>19</sup> The President represents Poland in foreign affairs and may ratify or denounce international agreements.<sup>20</sup>

The President has a number of legislative powers. He or she may issue regulations and issue executive orders in order to implement statutes.<sup>21</sup> The President also has the power to introduce draft statutes, to veto draft statutes and make statutes effective by signing them and ordering their promulgation in the Journal of Laws.<sup>22</sup>

The Council of Ministers is the Polish Government. It is composed of the Prime Minister, as chairperson, the Deputy Prime Minister and Ministers.<sup>23</sup> The Prime Minister is nominated by the President, the former then proposing the composition of the Council of Ministers who are appointed by the President.<sup>24</sup> Within 14 days of appointment to office, the Prime Minister must submit a programme of activity for the Council of Ministers together with a motion of confidence to the Sejm; the vote of confidence requires an absolute majority vote.<sup>25</sup> The Council of Ministers has responsibility for conducting internal affairs, foreign policy and managing governmental administration.<sup>26</sup> There are twelve

---

<sup>18</sup> Article 126(1) of the new constitution.

<sup>19</sup> Article 126(2) of the new constitution.

<sup>20</sup> Article 133(1) of the new constitution.

<sup>21</sup> Article 142(1) of the new constitution.

<sup>22</sup> Article 144 of the new constitution.

<sup>23</sup> Article 147 of the new constitution.

<sup>24</sup> Article 154(1) of the new constitution.

<sup>25</sup> Article 154(2) of the new constitution.

<sup>26</sup> Article 146(1) of the new constitution.

areas specifically mentioned in the new constitution where the Council of Ministers should take policy decisions:

1. the implementation of statutes;
2. issuing regulations;
3. coordinating and supervising the work of organs of state administration;
4. protecting the interests of the State Treasury;
5. adopting the draft state budget;
6. supervising the implementation of the state budget and passing a resolution on the closing of the state's accounts and reporting on the implementation of the budget;
7. ensuring the internal security of the state and public order;
8. ensuring the external security of the state ;
9. exercising general control in the field of relations with other states and international organisations;
10. concluding international agreements requiring ratification as well as denouncing other international agreements;
11. exercising general control in the field of national defence and annually specifying the number of citizens who are required to perform active military service; and



12. determining the organisation and the manner of its own work.<sup>27</sup>

### *The Legislative Procedure*

Four main groups have the right to initiate legislation:

1. Members of the Sejm;
2. The Senate;
3. The President; and
4. The Council of Ministers.<sup>28</sup>

All draft statutes have three readings in the Sejm.<sup>29</sup> Once passed by the Sejm the bill proceeds to the Senate which has thirty days to accept, reject or amend the proposal.<sup>30</sup> If the Senate rejects or amends a statute it may still be deemed accepted unless the Sejm rejects it by absolute majority.<sup>31</sup> The draft becomes law when the President signs the statute no later than twenty one days after its receipt.<sup>32</sup> The legislative process is presented in more detail in diagram two below.

---

<sup>27</sup> Article 146(4) of the new constitution.

<sup>28</sup> Article 118(1) of the new constitution provides that legislation may be proposed by a group of 10,000 citizens who are entitled to vote.

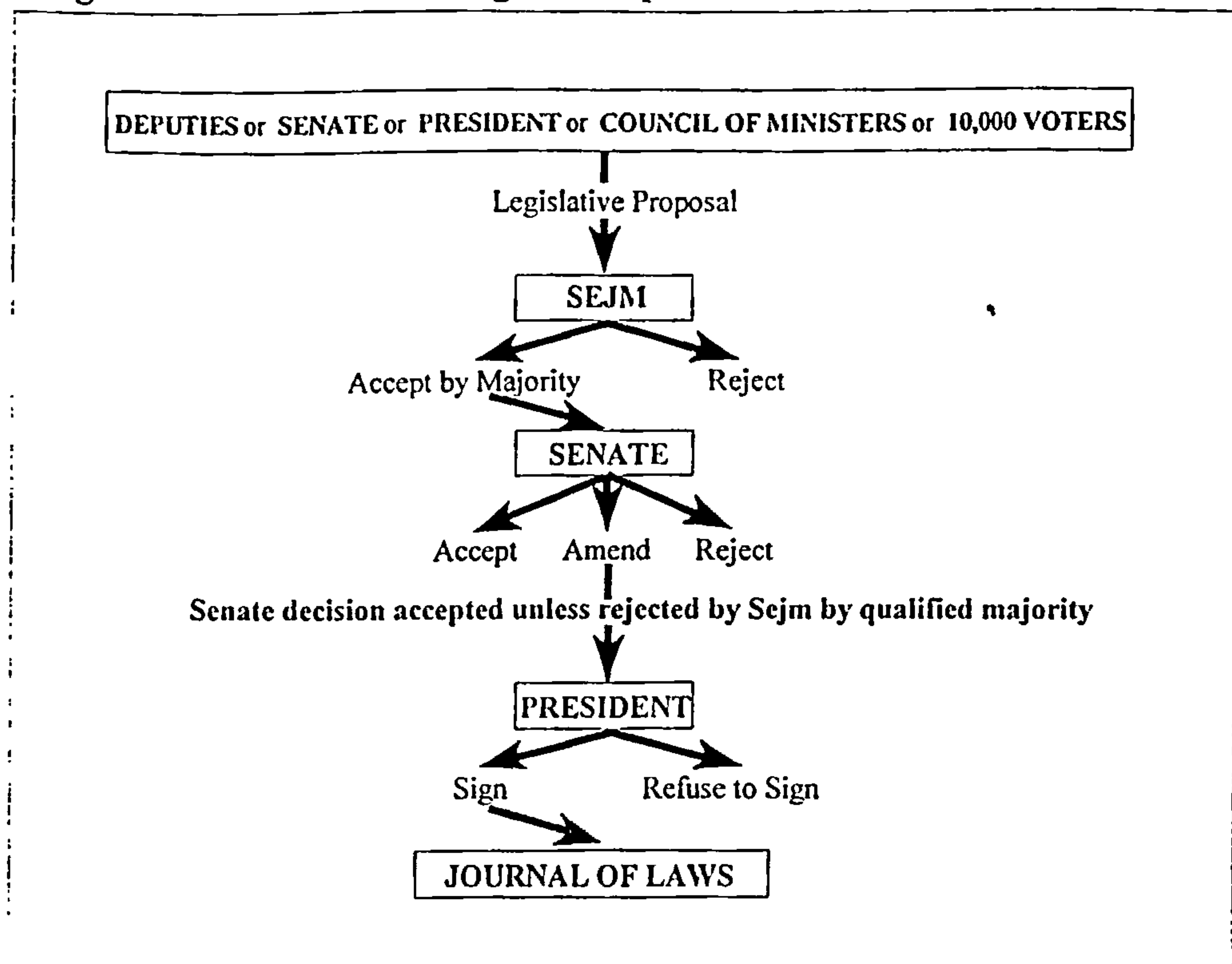
<sup>29</sup> Article 119(1) of the new constitution.

<sup>30</sup> Article 121(2) of the new constitution.

<sup>31</sup> Article 121(3) of the new constitution Article 52 of the Standing Orders of the Sejm of the Republic of Poland, 1992.

<sup>32</sup> Article 122(3) of the new constitution. The President may request that the Constitutional Court rule upon a bill's conformity with the Polish constitution. The President may refuse to sign a bill declared unconstitutional by the court; Article 122(4) of the new constitution. The President must sign a bill if it is adopted by a 3/5 majority at the renewed Sejm reading.

**Diagram Two: The Polish legislative process**



### *Implementation Procedures within Poland*

The implementation of the Agreement has proven to be a complex task. Within Poland a multi-faceted or multi-layered approach has evolved. This chapter aims to explain how the implementation process operates in Poland. It will demonstrate that the procedures are evolving and adjustments are made as experience grows. It is important to recall that the implementation of the Europe Agreements is only one facet of Polish-EU relations. Moves in the direction of accession are on-going and implementation of the Europe Agreement occurs in tandem with work in implementing the *acquis communautaire* in the White Paper, discussed in chapter four.

Chapter eight examines the significance of the complexity of institutional structures. This thesis asserts that institutions matter because lack of a coherent structure may make it more difficult to achieve policy goals. Institutions are important therefore in predicting implementation outcomes. Where there is no clear allocation of responsibility for tasks then it is likely that some issues are left unimplemented.

Discussions on implementation initially focused upon the best way to implement the Europe Agreement. Some commentators and politicians believed that a single legislative act should be used. Others believed that several acts should be used.<sup>33</sup> Given the complexity of the task, the latter option, which emerged as the favoured solution, is the more effective system of implementation. In order to ensure that the objectives and standards contained in the Europe Agreement are effective implementing legislation must be carefully scrutinised. It is important that the Polish legislature, civil service, lawyers and courts understand the relevant concepts as they operate within the *acquis communautaire* and within the Europe Agreement. In addition, it is imperative that the implementing legislation sits comfortably with existing Polish legislation: Wojciechowski calls this “maintaining the continuity and comprehensive nature of legal order”.<sup>34</sup> Using a single piece of legislation to implement the Europe Agreement would be too crude an instrument to reflect the complexities of implementation.

Poland had embarked upon a process of harmonisation to the level of the *acquis communautaire* before the Europe Agreement entered into force on 1 February 1994. A governmental action programme started in 1993 detailing 130 statutes and programmes relating to the Europe Agreement.<sup>35</sup> In 1992 work began on identifying which areas of the Europe Agreement required implementation and which were already part of Polish law. (It should be recalled that the First Generation Agreement had already established standards on the abolition of certain duties). The legal analysis resulted in the publication of a “White Paper” in 1995 designed to provide guidelines and a system of prioritising areas for implementation. It should be noted here that Poland’s approach in the “White Paper” is not merely to ensure implementation of the obligations and standards contained in the Europe Agreement, its intention is to ensure that implementation

---

<sup>33</sup> Jerzy Andrzej Wojciechowski, “The Polish Law and European Union Law. The Process of Harmonisation” (1995) Yearbook of Polish Foreign Policy, 70 at p 71.

<sup>34</sup> Jerzy Andrzej Wojciechowski, *fn* 33 above at p72.

<sup>35</sup> Jerzy Andrzej Wojciechowski, *fn* 33 above at pp70 and 72.



takes place in tandem with adoption of the *acquis communautaire*.

All levels of Polish government are involved in the process of implementation to a greater or lesser extent. The levels may be conveniently divided into three groups: Legislature controlled, Executive controlled and Joint Polish/EU controlled.

*The Legislature: the role of the Sejm and the Senate in implementation*

There are three Sejm committees which deal with relations with the European Union: the European Integration Committee, the Joint Parliamentary Committee (JPC) and, to a lesser extent, the Foreign Affairs Committee. The work of the first two committees is directly related to the implementation of the Europe Agreements.

The European Integration Committee, formerly the Europe Agreement Committee, was established in the autumn of 1992. Although it has no direct legislative role it is an important committee which creates opinions, debates issues of European integration and educates parliamentarians on EU issues. As from 22 May 1997, it has been charged with the task of "assisting in the adaptation of Polish law to European law, European integration and the implementation of the provisions of the Europe Agreement and the adjustment programme".<sup>36</sup> Jan Borkowski, under-secretary to the minister of foreign affairs and former President of the Committee, considers its experience to be extensive and important.<sup>37</sup> He believes that the committee is a vehicle which assists the Sejm prepare for accession to the European Union. The committee attracts influential people, such as former Prime Minister Mrs. Danuta Hubner, who wish to discuss the strategic aspects of the EU policy. The importance of the committee has grown steadily. This may be seen in a number of examples of the committee's

---

<sup>36</sup> Information received 11 August 1997 from Piotr Babinski, Senior Secretary for Foreign Affairs Committee, Sejm.

<sup>37</sup> Interview Jan Borkowski.

work. First, it prepared a project of changes to Sejm regulations connected to the *acquis communautaire*. Secondly, it prepared a report on accession to the EU which provided the basis for a very important debate in the Sejm. Thirdly, each year the Council of Ministers prepares a report on the Polish economy and law. The Committee scrutinises the report in order to check its compatibility with the *acquis communautaire*. Special sub-committees evaluate each section of the report and afterwards present their opinions to a plenary session of the Parliament with special recommendations for the government.

The Foreign Affairs Committee is responsible for “ the foreign policy of the Polish state”.<sup>38</sup>

The Senate has appointed a number of ad hoc committees to deal with legal relations between Poland and the EU. Between April and October 1992 an ad hoc committee worked on this area. This was replaced in January 1993 by the Ad Hoc Committee for European Integration.<sup>39</sup>

The Polish legislative process permits legislation to be introduced using a number of routes (see above). It is important that any new legislation which is introduced does not conflict with provisions of the Europe Agreement. There are proposals to introduce a check to ensure that all Sejm and Senate sponsored bills do not conflict with the Europe Agreement and the *acquis communautaire*. A checking procedure is already operational in relation to government sponsored legislation and is discussed in more detail below.

The Sejm’s committees play a relatively weak role in the implementation process. The majority of power for Polish implementation rests with the Executive.

---

<sup>38</sup> Piotr Babinski, *fn* 36 above.

<sup>39</sup> [Http://www.senat.gov.pl/egi-bin/tr-win?/noty/en/notal1a.html](http://www.senat.gov.pl/egi-bin/tr-win?/noty/en/notal1a.html).

### *The Executive*

The Department of European Integration was the first government department responsible solely for the implementation of the Europe Agreement. It was established by the Polish Council of Ministers in January 1991 and works with the Polish Mission to the EU in Brussels, its principal function is to coordinate legislative reforms relating to implementation working alongside the Ministry for Foreign Affairs.<sup>40</sup>

In spring 1994, at the same time that Poland applied for EU membership, the Prime Minister set up a system so that there would be a small number of people responsible for EU integration within each ministry. The size of these so-called European Integration Units may vary from one to another.<sup>41</sup> One of the members is usually an undersecretary of state. An informal system of contact has grown up between these people and it is considered that this should help develop a coordinated approach to harmonisation.<sup>42</sup>

The following institutions are responsible for the implementation of different aspects of the Europe Agreement: Ministries of Education; Finance; Civil Engineering and Construction; Culture and Art; Communications; Defence; Environment; Industry and Commerce; Agriculture; Home Affairs; Justice; Transport; Foreign Economic Relations; Health; and the Central Planning Office; Anti-monopoly Office; Public Procurement Office; Committee for Scientific

---

<sup>40</sup> Carolyn Brzezinski, "The EC-Poland Association Agreement: Harmonization of an aspiring Member State's Company Law" (1993) 43 Harvard International Law Journal, 105 at p132.

<sup>41</sup> Jan Borkowski, *fn* 37 above.

<sup>42</sup> Jan Borkowski, *fn* 37 above.



Research; Certification Office; Central Office of Measurements; National Atomic Agency; and the Standardisation Committee.

A two tier structure had evolved. One level comprised separate agencies of various levels of standing ranging from Ministries to Agencies. The other level was interdepartmental. The Interdepartmental group for the Programme of Adaption to the Requirements of the Europe Agreement was comprised of representatives from all ministries and central administration offices and was designed to provide a forum for interdepartmental action.

There had been criticisms levelled against the Polish implementation process which related to the coordination between government departments.<sup>43</sup> In August 1994 Poland's Supreme Chamber of Control (NIK) presented a paper to the Sejm Europe Agreement Committee which discussed government activities relating to Polish accession to the EU.<sup>44</sup> The paper was highly critical stating that the central administration was still very poorly prepared in adjusting Poland's economy and legislation to European standards. The NIK considered that the Department of European Integration had "neither power nor means to coordinate, control and monitor the activities of the various institutions which should serve the purpose of European integration". In addition, it found that the unsatisfactory flow of information brought about the danger of "incoherence of Poland's stance in negotiations with the EU partners".

A number of changes has taken place either in response to those criticisms or inevitably as a result of the evolving nature of the process.

---

<sup>43</sup> Brzezinski found a distinct lack of coordination between Polish government departments engaged in the process of drafting legislation designed to implement company legislation. Carolyn Brzezinski, *fn* 40 above at 133.

<sup>44</sup> *Polish Press on the Relations Between the EU and Poland*, August 1994, EC Delegation to Poland.

The Committee on European Integration was established in August 1996 and met for the first time in October of 1996.<sup>45</sup> The Committee is described as “the national administration’s principal authority for planning and co-ordinating policies regarding Poland’s integration with the European Union and the planning and co-ordination of Poland’s adjustment to European standards as well as the co-ordination of the national administrations’ disbursement of incoming foreign aid.”<sup>46</sup> Its membership is drawn from the highest levels of the government. The chairperson is the Prime Minister and the Committee’s day to day activities are managed by a Secretary appointed by the Chairperson; the present secretary is Professor Danuta Hubner, a seasoned and well respected politician. The Committee members are drawn from the ministries dealing with the most important areas of government and include the Ministers of: Foreign Affairs; Internal Affairs and Administration, Economy, Finance, Environmental Protection, Natural Resources and Forestry, Labour and Social Policy, Agriculture and Food, Economy and Justice. A maximum of three additional members may be appointed by the Prime Minister to serve on the Committee providing that their “experiences or posts may be of significance to the discharge of the Committee’s duties”.

The Committee has nine main duties:

1. Co-ordinating existing procedures and developing new procedures for integration with the EU in economic and social terms;
2. Planning and co-ordinating the adaptation of Polish legal institutions and assessing the conformity of draft legislation with EC Law;
3. Co-operating with the European Commission on the implementation of integration programmes;

---

<sup>45</sup> Act of August 1996 on the Committee for European Integration.

<sup>46</sup> Act of August 1996 on the Committee for European Integration.



4. Assessing the progress of adjustment processes;
5. Co-ordinating the procurement and use of foreign aid funds;
6. Assessing the information and human resource costs of integration;
7. Co-operating with local self-government organisations in increasing their involvement in various organisational structures of the European Union;
8. Attending to national defence and security matters in accordance with the competencies prescribed in separate provisions of law;
9. Discharging other duties delegated by the Prime Minister or arising out of separate provisions of law.

The Polish government hopes that this committee will better coordinate the work of the different ministries and will connect these ministries to the general strategic goal of EU membership.<sup>47</sup> The establishment of a committee of this calibre reflects the importance which the Polish government attributes to EU accession.

### *The Polish White Paper on Integration*

As the process for implementation developed it became clear that a more structured approach was desirable. In 1992 the Legal Service Department of the Department for European Integration began work on detailing all areas of Polish law which failed to comply with the Europe Agreement. The resulting White Paper was published in 1995 and detailed the measures which should be adopted as a matter of priority. Necessarily the measures related to the areas of law which Poland deemed to be most important for the economy.<sup>48</sup> Following this the

---

<sup>47</sup> Jan Borkowski, *fn* 37 above.

<sup>48</sup> The rules governing the establishment and functioning of foreign and domestic businesses, the establishment and operation of banks and insurance companies,



Commission published a White Paper in May 1995.<sup>49</sup> The Commission's paper was designed to detail all secondary legislation relating to the Internal Market. It was drawn up, not with the aim of facilitating implementation of the Europe Agreement, but rather to "deepen understanding of the Community's legislative approach by the countries concerned and to facilitate approximation in the pre-accession phase". The Polish government used the Commission White Paper in the preparation of a programme of approximation which details all the legislative measures necessary in order to meet the standards of the *acquis communautaire* relating to the internal market.<sup>50</sup> The legislative programme is contained in a 450 page document planning a structured process of implementation between 1996 and 2002. It provides the Polish legislative proposal, the community directive, any existing Polish legislation, the ministry responsible and the stage which the legislation has reached in the adoption process.<sup>51</sup>

The Polish government's approach to the process of integration has been evolutionary. The latest innovation is the National Strategy for Integration (NSI) adopted by the Polish government on 28 February 1997.<sup>52</sup> Hubner explains that the NSI is designed to meet the demands facing Poland in the period leading up to accession.<sup>53</sup> In particular she stresses three issues which the NSI addresses: the

---

intellectual property rules, customs rules, import quotas, technical standards, regulations governing finance markets, transportation law, telecommunications, contract law, remedies for breach of contract, principles of private international law and civil procedure of arbitration.

<sup>49</sup> "Preparation of the Association Countries of Central and Eastern Europe For Integration into the Internal Market of the Union" COM(95) 163 final.

<sup>50</sup> Jerzy Andrzej Wojciechowski, *fn* 33 above at p 73.

<sup>51</sup> Interview with Marek Tabor.

<sup>52</sup> The National Strategy for Integration is a Polish Government document drawn up by the Office of the Committee for European Integration following a Resolution of the Polish Parliament of March 14 1996. See generally, Reuter News Service- CIS and Eastern Europe, 28 January 1997.

<sup>53</sup> Danuta Hubner, "On National Strategy for Integration" volume 1 (1997) Yearbook of Polish European Studies, 177 at 177.

readiness of the central administration; the adaptation of legal, economic and institutional spheres ; and the preparation of Polish society.

The NSI defines the bodies charged with the implementation of the NSI:

1. The Council of Ministers;
2. The Committee for European Integration;
3. The Foreign Ministry;
4. Other Ministries and central offices;
5. Regional and local authorities;
6. Polish diplomatic missions, particularly in the Member States of the EU and in the states associated with the Union;
7. The Polish Parliament;
8. The Polish President and his Office.

It will be noted that these are broadly the same bodies which were responsible for the implementation of the Europe Agreement and then the White Paper. The Committee for European Integration has the task of co-ordinating the work of these bodies and also the work of non-governmental organisations dealing with harmonisation.

The implementation of the Europe Agreement is a key aspect of the NSI which considers an efficient market economy to be essential if Poland is to participate fully in European integration. The NSI considers that this requires the

implementation of the provisions of the Europe Agreement and the recommendations contained in the Commission's White Paper on the Single Market.

The NSI is divided into nine sections and runs to 53 pages. The introduction provides the background to the NSI and the bodies charged with its implementation. The remainder of the document is then divided into eight parts dealing with general political objectives, the adaptation of the economy, the adaptation of legislation, external affairs, justice and home affairs, training and human resources, information activities and executive summary.

Part II, dealing with the adaptation of legislation, is relevant to the implementation of the Europe Agreement. It outlines the timetable for implementation contained in the Europe Agreement and restates Article 69 of the Europe Agreement which calls for convergence of laws in a range of areas.<sup>54</sup> Sections 3.8 -3.13 of the NSI deal with the methodology of legal adaptation and provide that the Polish Government has overall responsibility for this. There are three main threads to the methodology. First, section 3.9 describes the adaptation programmes drawn up by government departments following the European Commission's White Paper on the Single Market.<sup>55</sup> Second, section 3.11 describes how an "Experts Team on the Harmonisation of Polish Law " consisting of academics, prosecutors, barristers, legal advisers and notaries assists government departments in the adaptation process. Finally, section 3.12 outlines the processes which scrutinise the compatibility of Polish Law with EC Law. The NSI hopes that this approach will ensure that new legislation will not only be of

---

<sup>54</sup> This is discussed in more detail in chapter five above.

<sup>55</sup> The tasks and responsibilities of government departments in this area are defined in Resolution No. 133/95 of the Council of Ministers on the Fulfilment of Obligations Necessary for the Participation in the Single Market.



“high legislative quality and practicality” and crucially that it does not develop separately from “Polish social conditions, or its legal traditions”.<sup>56</sup>

The NSI also covers training in legal issues. Staff in government legal departments and other departments involved in integration were already participating in training on legal issues connected with European integration.<sup>57</sup> The training is to be extended to include more government ministries, judges and prosecutors and legal staff working in regional and local administration.<sup>58</sup> Training programmes are to be co-ordinated by the Committee for European Integration.<sup>59</sup>

The implementation process could be undermined if legislation were enacted which conflicted with the objectives or standards of the Europe Agreement. All government sponsored legislative drafts must contain an “initial opinion” detailing the extent of any non-compliance with the *acquis communautaire*, the proposed solution and when compliance will be achieved. In most cases this will have been formulated by the European Integration unit within the ministry where the bill originated. Since 29 March 1994 the department of European Integration has the right to deliver a “final opinion” on the compatibility of all draft acts with the *acquis communautaire*.<sup>60</sup> This acts as a check on the work of other government ministries.

Two months following the adoption of the NSI, Polish implementation structures appeared to have run into coordination difficulties again. During the citrus fruit

---

<sup>56</sup> Part 3.13 of the National Strategy for Integration.

<sup>57</sup> Part 6.9 of the National Strategy for Integration.

<sup>58</sup> Parts 6.9 and 6.10 of the National Strategy for Integration.

<sup>59</sup> Part 6.15 of the National Strategy for Integration.

<sup>60</sup> Resolution of the Polish Council of Ministers adopted 19 March 1994. See Jerzy Andrzej Wojciechowski, *fn* 33 above at p74.

dispute, discussed in chapter seven, the then Prime Minister, Włodzimierz Cimoszewicz, criticised ministers for failing to respect the coordinating role of the European Integration Committee. The Ministry of Finance was singled out for criticism. The Prime Minister adopted a very tough stance stating that “if there is one more example of neglecting what the law says about the Committee, from whatever official or whatever ministry, then vice-ministers responsible for European integration will be sacked”.<sup>61</sup> It remains to be seen how well the European Integration Committee can coordinate Polish implementation in the future. It is clear however that the scale of the implementation required, combined with the number of departments and agencies to coordinate, make the task a daunting one.

### **Joint Structures**

The Europe Agreement provides for the establishment of three committees: the Association Council; the Association Committee; and the Association Parliamentary Committee (more commonly referred to as the Joint Parliamentary Committee).<sup>62</sup> Of the three committees the details of the workings and deliberations of the Joint Parliamentary Committee are the most open; agenda, papers and minutes are published in the Official Journal in a fairly detailed form. The workings of the other two committees are less public and only bare details are published in the Official Journal. Interviews conducted in Poland and Brussels have assisted in providing a fuller picture of the work of these committees and in addition, Commissioner Hans van den Broek has often chosen to use the press to reveal details of implementation disputes with Poland when this suited the European Commission’s purpose (this is discussed in more detail in chapter seven).

---

<sup>61</sup> The Reuter European Community Report, 29 April 1997.

<sup>62</sup> The institutional provisions are contained in Title IX of the Agreement.

### *The Association Council*

Article 102 of the Europe Agreement provides that the Association Council is charged with supervising the implementation of the Agreement. It is to meet at ministerial level once a year and “when circumstances require”. Its remit is very wide covering: “any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest”. Membership consists of the members of the Council of the European Communities and members of the European Commission on the one hand and members of the government of Poland on the other. The Association Council is presided over by a member of the Council and a member of the Polish government.

Of the three institutions, the Association Council is the most powerful. It may adopt decisions in order to attain the Agreement’s objectives. The Agreement provides that these decisions are binding on the parties to the Agreement who are required to “take the measures necessary to implement the decisions taken”.<sup>63</sup> The Association Council may also draw up decisions and recommendations by agreement between the two parties.<sup>64</sup> In addition, it may establish any special committee or body to assist it carry out its duties.<sup>65</sup>

The Association Council has held four meetings so far: 7 March 1994; 17 July 1995; 16 July 1996; and 20 April 1997. At its first meeting the Association Council adopted its rules of procedure and the rules of procedure for the Association Committee.<sup>66</sup>

---

<sup>63</sup> Article 104 of the Europe Agreement.

<sup>64</sup> Article 104 of the Europe Agreement.

<sup>65</sup> Article 107 of the Europe Agreement.

<sup>66</sup> The Reuter European Community Report, 8 March 1994. The Association Council was required to do this by virtue of Article 103(3) of the Europe Agreement.



### *The Association Committee*

The Association Committee is charged with assisting the Association Council in the performance of its duties.<sup>67</sup> Its membership is drawn from representatives of the members of the Council of Ministers and members of the European Commission on the one hand and representatives of the Polish Government on the other, normally at senior civil service level. The Association Committee is assisted in its work by ten sub-committees and three working groups. There are proposals to replace these sub-committees with fewer multi-disciplinary committees in order to make work on implementation more effective by responding more accurately to the different areas of the Europe Agreement being studied.<sup>68</sup> The Association Council may delegate any of its powers to the Association Committee and where it does so then it acts under the same conditions as the Association Council.<sup>69</sup>

The Association Committee has held six meetings: 23-24 June 1994; 1-2 December 1994; 29-30 June 1995; 18-19 April 1996; 4 March 1997; and 7 March 1998.

### *The Joint Parliamentary Committee*

The Joint Parliamentary Committee (JPC) is designed as a forum for the exchange of views.<sup>70</sup> Its members are drawn from the European Parliament and the Polish Parliament.<sup>71</sup> The Joint Parliamentary Committee does not have the power to adopt binding decisions. It may however make recommendations to the Association Council and may request information relating to the implementation

---

<sup>67</sup> Article 105 of the Europe Agreement.

<sup>68</sup> Marek Tabor, *fn* 51 above.

<sup>69</sup> That is, under the conditions outlined in Article 104 of the Europe Agreement.

<sup>70</sup> Article 108 of the Europe Agreement.

<sup>71</sup> Article 109 of the Europe Agreement.

of the Agreement from the Association Council which it must supply.<sup>72</sup> The Association Council must inform the Joint Parliamentary Committee of its decisions.<sup>73</sup>

The JPC was not the first forum for relations between the European Parliament and the CEES. A decision of the European Parliament of 11 October 1984 provided for a delegation for relations with the countries of Eastern Europe.<sup>74</sup> The delegation never came into existence however, due to the non-recognition of the EEC by the CMEA. A later decision of 21 January 1987 set up a new delegation subject to the proviso that, "no official action will be taken to set up this delegation until the European Community is formally recognised by the countries concerned". The 1987 decision divided the CEES into two groups of ten. Poland belonged to the Eastern Europe Group 1.

The Joint Declaration on Mutual Recognition of 25 June 1988 removed the impediment to relations and between 1988 and 1989 the Eastern Europe Group 1 delegation visited Poland and the Polish delegation visited Strasbourg.

The Joint Parliamentary Committee has held eight meetings: December 1993; March 1994; January 1995; September 1995; January 1996; 9-10 September 1996; 15 April 1997; and 20 January 1998.

Although the terms of the Europe Agreement indicate that the majority of the decision-making power rests with the Association Council, in practical terms experience has shown that it is within the Association Committee and its sub-committees that the really detailed discussions take place.<sup>75</sup> The Association

---

<sup>72</sup> Article 110 of the Europe Agreement.

<sup>73</sup> Article 110 of the Europe Agreement.

<sup>74</sup> See PE 209.033.

<sup>75</sup> Marek Tabor, *fn* 51 above.

Council really only rubber stamps implementation decisions reached by the Association Committee. Meetings of the Association Council only last one hour and of that hour only around ten minutes is given over to trade issues. In these circumstances there is no time for detailed discussion or debate on implementation issues.

## European Structures

### *Directorate General 1A*

Directorate General 1A (DG1A) was established by the Commission in 1993 to reflect the wider dynamics of Common Foreign and Security Policy (CFSP).<sup>76</sup> It has three overall tasks:

1. Relations with the European countries which are not members of the EU, the New Independent States of the Former Soviet Union and with Mongolia;
2. CFSP; and
3. Managing the Commission Delegations and external offices in third states.

It plays a pivotal role in the implementation process since it carries out the work of the Commission side within the Association Committee. In addition, it is responsible for the pre-accession strategy for all CEES and the administration of the PHARE programme.

### *The EU Delegation to Poland*

The EU Delegation to Poland represents the EU. It is staffed by both Commission officials selected by the Commission from among its existing staff and by locally

---

<sup>76</sup> See Dominic Mc Goldrick, *International Relations Law of the European Union* (Longman, 1997) at pp147-148; S. Nuttall, "The European Commission's Internal Arrangements for Foreign Affairs and External Relations" (1995) CFSP Forum 2.



appointed personnel. The delegation receives instructions from and reports directly to the Commission.<sup>77</sup>

The European Commission established a very small Delegation in Poland in 1990. The beginnings were humble to say the least; just one person working from a Warsaw hotel room, not always supported by a secretary.<sup>78</sup> By 1993 the Delegation had moved to offices in the prestigious Aleje Ujazdowskie and the number of staff had grown significantly to 35, 25 of whom are Polish. It has two main functions. First, to oversee the PHARE programme in Poland. Indeed the majority of staff in the Delegation work on PHARE. Secondly, to disseminate information on the EU. This is in line with the Commission's policy in its paper "Towards a Closer Association with the Countries of Central and Eastern Europe" which provides that "real partnership requires popular understanding of the Community and support for its objectives. To this end, information activities should be enhanced." Three staff within the delegation deal with the Europe Agreements on a full time, daily basis.<sup>79</sup>

### *The Technical Assistance Information Exchange Office*

The Technical Assistance Information Exchange Office (TAIEX) was established in Brussels in 1995 following the publication of the White Paper. The office is designed to assist coordination and enhance technical assistance to association countries attempting to implement the *acquis communautaire*. Its mandate has been subsequently extended to assist the CEES prepare for EU membership. To this end, it deals with the entire *acquis*, not just single market legislation.<sup>80</sup>

---

<sup>77</sup> On Commission Delegations generally see, L.J. Brinjhurts, "Permanent Missions of the EC in Third Countries: European Diplomacy in the Making" (1984) LIEI 23.

<sup>78</sup> "Activities of the Commission of the European Communities in Poland 1990-1992" PRESREP.9, Warsaw, March 1993.

<sup>79</sup> Interview with Jan Willem Blankert.

<sup>80</sup> European Dialogue: Jan-Feb 1998, Issue 1: Technical Assistance (European Commission, 1997).

The Office works together with the Commission directorate generals, Member States and the EU Delegations. It has two main ways of working. First, it attempts to provide answers to requests for information by contacting the appropriate person, usually within the Commission. Secondly, it runs various workshops and study visits on topics such as agriculture, general single market legislation, social policy, environment, transport, financial services, competition and customs. In 1997 it offered over 90 workshops. TAIEX was initially offered as a service only to government officials. From 1998 it has been available to members of parliament, the business community, local government and non-governmental organisations. The Commission hope that it will provide a quick and flexible response to queries and requests for advice.<sup>81</sup> Polish experience has found it useful for long-term solutions and training but that it does not really respond well to shorter term and more immediate problems relating to implementation.<sup>82</sup>

### **Member State Structures**

Each of the fifteen Member States is party to the Europe Agreement. Their governments play a very important role in the implementation process. Within the UK government much of this work is carried out by UK Permanent Representation to the EU (UK Rep). The extent to which the governments of the Member States work together with the Commission in implementation is discussed in chapter seven.

### **Conclusions**

The picture of implementation structures which emerges from this chapter is very complex. Table eleven illustrates the range of agencies involved in the implementation process:

---

<sup>81</sup> "Position of the European Union", Third meeting of the Association Council, Brussels 16 July 1996.

<sup>82</sup> Interview with Mr. Macieji Gorka.



Table Eleven: Implementation structures			
Polish Structures	Joint Structures	European Structures	Member State Structures
Legislature Executive Committees	Association Council Association Committee JPC	DG1A EC Delegation TAIEX PHARE	Governments UK Rep

The complexity is compounded because the process of implementation has evolved constantly . Within the European structures the TAIEX Office was established long after the conclusion of the Europe Agreement negotiations and within its short existence its mandate has expanded considerably. The Polish procedures for implementation have developed significantly since the establishment of the Department for European Integration in 1991. Table twelve illustrates some of the main developments adopted by the Polish Executive.

Table Twelve: Evolution of Polish implementation strategy	
1991	Department of European Integration established
1994	European Integration Units established
1995	Polish White Paper
1996	Committee on European Integration established
1997	National Strategy for European Integration adopted

This complex and constantly evolving set of systems has given rise to two sets of difficulties.

The necessarily wide range of agencies involved in the implementation process means that it is very difficult to ensure coordination within one structural group. DG1A must coordinate the Commission response across directorate generals. Member State governments must coordinate across government departments. It is clear that the Polish side have found this type of interdepartmental coordination



particularly difficult at times. The lack of coordination amongst Polish agencies weakens their ability to pursue clear objectives and to resolve problems. Poland must strive to develop a strong Euro technocracy capable of dealing with EU matters, particularly when faced with dealing with the institutional advantages which the EU side has as the Repeat Player in the negotiations.

The second problem which arises relates to ranking and coordination between structures. Conflicts have arisen on implementation issues between Poland and the EU side and also between the European structures and the Member States. These conflicts are discussed in detail in chapter seven.

If it is true, as the new institutionalist suggest, that “institutions matter” then the complexity of these organisations must tell us something about the complexity of the implementation of the Europe Agreement. Table eleven illustrates four groups of structures. Within each of these groups various institutions exist. Each institution plays a part in the implementation process. Table twelve illustrates that within one of the groups, namely Poland, at least five implementing strategies have been adopted in a short, six year period.

Chapter two suggested that as the layers of the institutional structures increased so did the levels of obfuscation. It further contended that this obfuscation directly disadvantaged the weaker party to the Agreement, in this case Poland, because it made the process of negotiating more difficult. This is particularly relevant in the context of a mixed agreement where the non-unitary nature of the EU and the consequent division of competence between the EU and its Member States may not be clear cut and as a consequence the third party to such negotiations may not fully understand the implications of the institutional structure with which it must negotiate.

Chapter eight will consider in more detail the impact of these difficulties upon the implementation process.

# CHAPTER SEVEN

## Implementation Disputes

### Introduction

The implementation of the Polish Europe Agreement has not been without controversy. From the entry into force of the interim agreement disputes relating to its implementations have arisen.

This chapter will examine disputes which have arisen in five sectors: tanneries, oil, steel, cars and citrus fruits. The chapter does not attempt to cover all the disputes which have taken place or which are on-going, instead it focuses upon these five sectors since each demonstrates certain aspects of the implementation process and dispute resolution strategies employed by the parties.

This chapter is largely based on information obtained from original interviews. The commercial nature and the currency of the dispute makes them highly sensitive and access to documentation is very restricted. The details of the interviews conducted are provided in the introduction to this thesis. This chapter also draws upon media reports of implementation disputes. The specialist on-line services, such as Reuters, provide the most accurate and up to date reporting of the implementation disputes. Polish officials also refer to such resources as a way of monitoring disputes.<sup>1</sup>

### The Tanneries Dispute

In the early 1990s Poland was faced with a critical shortage of raw material in the form of skins and hides, the raw material which is transformed into leather, which in turn forms the raw material for clothing, shoes and other consumer goods. The Polish tannery industry is largely located in rural areas which have high

---

<sup>1</sup> Interview with Marek Tabor.

unemployment and the government is keen to protect this type of small industry.<sup>2</sup> To this end, quotas were introduced on the export of hides and skins. The quotas for 1994 and 1995 were set at 1,400 tonnes per year and were increased for 1996 to 3,000 tonnes.

Tanners in the EU complained about the Polish export quotas, claiming that they deprived them of access to raw materials and artificially depressed prices in Poland to as little as 40% of the world price.<sup>3</sup> They argued that this gave Polish producers an unfair advantage because the raw materials represent 50% of the cost of leather goods. The European Confederation of Tanners and Dressers (COTANCE) claimed the quotas would reduce EU employment, transfer productive capacity to the CEES and ultimately weaken all European production since the resulting Polish industry could only operate successfully through artificial protection.<sup>4</sup> COTANCE contended that this would make European production more vulnerable to competition from Asian and Latin American tanners.

The Polish side claimed that the quota was justified under Article 31 of the Europe Agreement since compliance with Articles 13 and 25 of the Agreement would lead to “a serious shortage, or threat thereof, of a product essential to the exporting party”.<sup>5</sup> In such circumstances a party may “take appropriate measures”. Any safeguard measures adopted must, by virtue of Article 33(2), be notified to the Association Council and become subject to periodic consultations with a view to establishing a timetable for their abolition “as soon as circumstances permit”.

---

<sup>2</sup> Interview with Krzysztof Treczynski.

<sup>3</sup> European Report, no. 2216, March 16 1996.

<sup>4</sup> *Fn 3* above.

<sup>5</sup> These articles relate to the abolition of customs duties, quantitative restrictions and measures having equivalent effect.



Article 103 Europe Agreement provides for a two stage dispute resolution procedure. The first stage is political, any dispute is referred to the Association Council which has the power to “settle the dispute by means of a decision”. The second stage is to go to arbitration. Either party may notify the other of the appointment of an arbitrator; the other party should then appoint a second arbitrator within two months. The Association Council appoints a third arbitrator; no timescale for the appointment of the third arbitrator is provided.

Discussions had taken place within the framework of the Association Council for two years without a compromise deal. The decision was reached to take the dispute to arbitration. The EU designated Tan Van-Thin, a senior negotiator for the EU in the GATT Uruguay round, as its arbitrator. Poland had nominated Andrezej Olechowksi, a Polish businessman and former foreign and economic affairs minister. In the end, the third arbiter was not appointed “because the issue had been resolved”.<sup>6</sup>

The Association Council meeting on 16 July 1996 adopted a decision settling the dispute.<sup>7</sup> Decision No 3/96 represents a compromise between the parties. It accepts the Polish contention that the measures adopted were in response to a “critical shortage of raw materials in the form of skins and hides in the Republic of Poland”. However, the essence of the decision is to limit the impact and eventually phase out the export restrictions. Article 1 increased the annual quota for exports from Poland of skins and hides to 10,000 tonnes for 1996, 12,000 tonnes for 1997 and 15,000 tonnes for 1998. All export restrictions relating to skin and hides are to be eliminated by 1 January 1999. Although the decision entered into force on the day of its adoption, the 1996 quota applied with effect from 1 January 1996.<sup>8</sup>

---

<sup>6</sup> Interview with Jan Willem Blankert.

<sup>7</sup> Decision 3/96 of the EC-Poland Association Council OJ 1996 L208/31.

<sup>8</sup> Article 3, Decision 3/96, *fn* 7 above.

This was the first, and to date only, occasion where the arbitration procedure was initiated. It is perhaps curious that it was this dispute which went to arbitration since the dispute had a relatively small impact in terms of overall trade between the parties. As one Polish official stated, “if you look at overall trade figures the tannery industry represents a very small problem; bigger problems have been more easily resolved”.<sup>9</sup> Both the EU and Polish sides agree that the impetus for arbitration and at least part of the reason why the dispute proved to be so intractable was the interests of individual Member States. The Polish diplomatic mission counsellor cited the strong interests of the Italian government and believed that as the dispute progressed the issue became “one of honour”.<sup>10</sup> Other Polish officials believed that it was the Commission which had pushed for arbitration under pressure from “some Member States”.<sup>11</sup> Commission officials were clearly of the view that the reason for arbitration was Member State interests, principally Italy.<sup>12</sup>

On examining the initial text of the Europe Agreement some commentators had expressed concerns about the effectiveness of the arbitration procedure in dispute resolution. Where such procedures had been part of past preferential trade agreements the associated states were reluctant to upset the EU by involving such an “unfriendly means of arbitration”.<sup>13</sup> This would not appear to be the Polish experience. One Commission official felt that Poland benefited from arbitration since they successfully used the procedure to draw out the dispute, gaining

---

<sup>9</sup> Krzysztof Treczynski, *fn* 2 above.

<sup>10</sup> Krzysztof Treczynski, *fn* 2 above.

<sup>11</sup> Marek Tabor, *fn* 1 above.

<sup>12</sup> Jan Willem Blankert, *fn* 6 above.

<sup>13</sup> Lode Van Den Hende, “EU Safeguard Measures Under the Europe Agreement” 140 at pp154-155, in Marc Maresceau (ed) *Enlarging the European Union* (Longman, 1997).



valuable time in which to restructure their industry.<sup>14</sup> Concerns were also expressed that since the Agreement requires the Association Council to act unanimously in the appointment of arbitrators that this could render the procedure unworkable.<sup>15</sup> The tanneries dispute has shown that the arbitration procedure can be an effective means of resolving disputes and that merely initiating the procedure can create the necessary political leverage to broker an agreement. It is clear that the Commission considered the use of the arbitration procedure to be a very effective means of reaching an agreement. One official stated that the leather goods issues had been raised with Poland on a number of occasions without success and that the arbitration process “proved to be a useful stick”.<sup>16</sup> Indeed the Commission expressed the view that it would not rule out employing arbitration in future disputes, especially where strong Member State interests were involved.<sup>17</sup>

### **The Daewoo Dispute**

The car market in Poland has been growing steadily in the 1990s. Economic liberalisation coupled with improving access to consumer credit have assisted the rising demand.<sup>18</sup> In 1993 239,000 new cars were registered, in 1994, 250,000, in 1995, 264,000, and in 1996, 374,000. By 1997 the number of new cars registered had increased to 475,000.<sup>19</sup> This makes Poland the fastest growing car market in Europe.<sup>20</sup>

---

<sup>14</sup> Interview with John Bell.

<sup>15</sup> Lode Van Den Hende, *fn* 13 above at pp154-155.

<sup>16</sup> Jan Willem Blankert, *fn* 6 above.

<sup>17</sup> Jan Willem Blankert, *fn* 6 above.

<sup>18</sup> Financial Times, 30 May 1997.

<sup>19</sup> Financial Times, 23 February 1998.

<sup>20</sup> <http://www.dti.gov.uk/ots/centeuro/poland/automotive.html>.



Daewoo, the South Korean car manufacturer, wished to develop a strong foothold in the developing Polish car market. On 14 November 1995 it signed an agreement in Warsaw ensuring that it would become the second largest car maker in Poland after the Italian company Fiat.<sup>21</sup> The agreement established a joint venture between Daewoo and FSO, the Polish state-owned company manufacturing Polonez cars. Daewoo have a 70% share in the joint venture and are committed to an investment of at least \$1.1bn.<sup>22</sup> The FSO plant's employees received a 15% equity share and the Polish government own the remaining 15%, including a "golden share" permitting it to ensure that Daewoo abides by its investment promises. The FSO employees were also given full employment guarantees for three years and an agreement that Daewoo would honour existing collective agreements at the plant. In return for their significant investment, Daewoo struck a deal with the Polish government enabling them to transport complete cars by sea to Slovenia where they were dismantled into ten parts and then brought to Warsaw by rail. The parts were then reassembled at the FSO plant. The Polish government agreed that Daewoo would pay no duties on such imports.

On the face of it there should be nothing to trouble Poland's EU partners. The EU wishes to encourage foreign direct investment into Poland to assist with the country's economic restructuring. However, competitor manufacturer Fiat quickly made clear their "outrage" at the content of the Daewoo agreement.<sup>23</sup> Foreign-made cars suffer from a 25% tariff disadvantage over locally-built vehicles unless they are imported into Poland in parts and assembled locally. In addition, EU producers may also import a fixed number of cars into Poland without paying

---

<sup>21</sup> Fiat are estimated to have 35% of the Polish car market, Daewoo 25% and Opel 10%. Euro-east 20 January 1998.

<sup>22</sup> Financial Times, 27 October 1995, 3 February 1997. See also, The Warsaw Voice, 3 November 1996.

<sup>23</sup> Financial Times, 3 February 1996

customs duty. In 1996, 38,750 cars could be imported under these terms. Fiat, like Opel and Ford assembles its cars from around 1,000 parts which are imported into Poland in order to claim the tariff exemption.

The EU side, both in interviews and in press reports, was very vague as to which provisions of the Europe Agreement were infringed by the Daewoo agreement. One EU official said that the Commission was “very concerned about the situation given the sensitivity of the car market in the EU”;<sup>24</sup> another that the Commission felt that Daewoo had received “special treatment”. Press reports boldly asserted that the agreement “clearly contravenes the terms of Poland’s pioneering association agreement with the Union” without explaining how this infringement was manifested.<sup>25</sup> There were a number of reports of “privileged treatment” being awarded to Daewoo, affording “back door entry” into the EU.<sup>26</sup> Most reports made general statements about the Daewoo agreement breaching the spirit of the Europe Agreement.

The Commission considered that Poland had incorrectly applied the Tariff Combined Nomenclature and, as a result, was in breach of Article 7(2) of Title III relating to the free movement of goods which requires that “the combined nomenclature of goods shall be applied to the classification of goods in trade between the two parties”.<sup>27</sup> The extent to which this provision may be directly applied to the circumstances of the Daewoo agreement must be questioned. Title III, Chapter IV Europe Agreement outlines the common provisions relating to the free movement of goods. Article 25 deals with the prohibition on any increase in customs duties, quantitative restrictions and measures having equivalent effect to

---

<sup>24</sup> John Bell, *fn* 14 above.

<sup>25</sup> European Voice, 7-13 November 1996.

<sup>26</sup> See, for example, Reuter News Service CIS and Eastern Europe 6 March 1997.

<sup>27</sup> Information received from Stephen Rhodes, Manager, EU enlargement, Central and Eastern Europe Trade Policy Unit, UK Department of Trade and Industry on 3 March 1998.



the two, in trade between the Community and Poland. The Daewoo agreement related to trade between Poland and a non-EU manufacturer and so cannot fall within the scope of Article 25. Article 26 deals with the prohibition on *internal* fiscal measures which may directly or indirectly discriminate against the products of the parties to the Agreement. The Daewoo agreement relates to an *external* fiscal measure, customs duties applied to imports, and so cannot fall within the scope of Article 26. The only provision in Title III which relates to trade between Poland and non-EU states is Article 27 which does not preclude frontier trade arrangements “except in so far as they alter the trade arrangements provided for in this Agreement”. Does the Daewoo agreement “alter the trade arrangements” provided in the Europe Agreement ? The Europe Agreement does not directly deal with such a situation. Indirect support for the use of Article 7(2) may be found in Article 7(1) Europe Agreement which provides for the gradual establishment of a free trade area between the parties in accordance with the provisions of the General Agreement on Tariffs and Trade (GATT). A fundamental aspect to the GATT is the obligation for parties to grant Most Favoured Nation status to each other. In this way the EU side may indeed feel that the Daewoo agreement was discriminatory since the combined nomenclature appears to be applied differently to the Korean company than to EU companies. However, Polish officials contested that there are no special measures for Daewoo and that EU manufacturers such as Mercedes, Renault, Peugeot and Volkswagen had been offered a similar deal, but for various reasons, including a reluctance to commit to the necessary direct investment, the deals had not been finalised.<sup>28</sup>

The lack of certainty as to whether the agreement infringes the Europe Agreement does not necessarily preclude discussion between the parties within the framework of the Europe Agreement. Article 27(2) requires the parties to consult each other “within the Association Council ...where requested on other major issues related to their respective trade policy with third countries”. The Europe



Agreement does not define what constitutes a “major issue” nor does it consider which party may construe an issue to be so important. The wording implies that any party may make such an interpretation since it talks about consultations “between the parties”. In the dispute relating to oil, discussed below, a similar requirement to consult gave rise to difficulties of interpretation. The Polish side appear to have adopted a restrictive approach so that “consultation” requires only that they notify the EU side of their decisions. The EU side has taken a much broader interpretation so that consultation requires discussion between the parties in an attempt to reach a mutually satisfactory agreement. This explains the statements to the press prior to the Association Council meeting in 1997, where the EU side “regretted” Polish non-consultation while the Polish side considered that they had “consulted with the EU all the way, but the Commission has often never responded to our plans”.<sup>29</sup>

The Commission negotiators acknowledged the sensitivity of the dispute. The EU side did not wish to be seen to be blocking foreign investment.<sup>30</sup> Polish officials argued that the continued uncertainty surrounding Daewoo was hindering investment by other potential investors ( in particular Hyundai).<sup>31</sup> The EU countered that frequent changes to import rules was discouraging investment.<sup>32</sup> At the same time the EU side was under pressure from EU manufacturers to protect its interests.

The Daewoo agreement was criticised by Commissioner Hans van den Broek during a visit to Poland in July 1996. He attempted to pressurise the Polish side

---

<sup>29</sup> European Report, no 2220, 30 April 1997.

<sup>30</sup> Jan Willem Blankert, *fn* 6 above.

<sup>31</sup> Hyundai subsequently established a joint venture with a Polish car maker which permits them to assemble cars without paying import tax on imported assembly kits. Ironically, Daewoo have complained about the deal expressing concerns over “any improper inducement of unnecessary over-capacity and over-competition”, see Budapest Business Journal 6 October 1997. See also Central European Times. 12 November 1997.

<sup>32</sup> European Report, no.2229, 4 June 1997.

into a deal by linking the dispute to Polish accession to the EU, stating that it was “regrettable that such trade difficulties should affect relations between the EU and Poland at a time when we are working so closely to prepare for accession. They need to be resolved quickly so that they do not interfere with our preparations for [Poland’s] membership.”<sup>33</sup> Discussions within the Association Committee failed to result in agreement on the Daewoo issue.<sup>34</sup> The agreement was raised again at the Association Council meeting on 30 April 1997. The EU took note of the Polish proposals and said they should be implemented as soon as possible under strict control mechanisms.<sup>35</sup> The EU side said that it would follow the development of the matter very closely and come back to it at a later stage.

Press reports in April 1997 discussed the possibility of referring the dispute to the World Customs Organisation’s (WCO).<sup>36</sup> In the end this was not done but agreement was finally reached by reference to the WCO rules on the Harmonised System of Tariff Classification.<sup>37</sup> Poland agreed to review the mode of importation of components for car assembly by all entities conducting industrial assembly of passenger vehicles in Poland. On this basis, Poland undertook to

---

<sup>33</sup> Financial Times, 17 July 1996.

<sup>34</sup> Reuter European Community Report, 10 March 1997.

<sup>35</sup> RAPID Pres:97/151.

<sup>36</sup> The European, 10 April 1997.

<sup>37</sup> The WCO was established on 15 December 1950 in order to enhance the effectiveness and efficiency of customs administration in the areas of compliance with trade regulation, protection of society and revenue collection, thereby contributing to the economic and social well-being of nations.

The Harmonised Commodity Description and Coding System (known as the Harmonised System) was developed as a multipurpose nomenclature by the WCO for meeting the requirements of customs authorities, statisticians, carriers and producers. It was implemented on 1 January 1988 by an international Convention known as the “International Convention on the Harmonised Commodity Description and Coding System”.

The WCO should not be confused with the World Trade Organisation (WTO), the organisation which succeeded the GATT following the GATT Uruguay round. The WTO has a dispute settlement system with fixed timetables providing a more structured procedure for resolution than previously existed under the GATT.



consult with such producers to ensure that imports are consistent with the relevant definitions and procedures contained in the Harmonised Systems of Tariff Classification.

There is no mention of arbitration by the WCO or reference to its rules in the case of dispute contained in the Europe Agreement. The parties in this instance both agreed to the use of the WCO rules. The fact that resort to this type of external legal framework was necessary supports the contention that the Europe Agreement was not intended to cover this sort of situation. It also highlights the difficulties which arise where the Agreement permits discussion to take place on issues which may not be directly connected to the operation of the Europe Agreement. This is because the Agreement cannot provide either the answer to the problem or a mechanism for resolving the problem. This was identified as a potential problem in chapter five.

It is interesting to note that the Commission is currently involved in a similar dispute involving Daewoo and Ukraine and is considering initiating dispute settlement procedures.<sup>38</sup>

### The Oil Dispute

The Polish oil industry requires significant restructuring. Oil plants are not very technologically advanced, are heavy on energy consumption and tend to be overstaffed. The Polish government wished to introduce a restructuring programme and notified the Commission on October 1995 of their intention.<sup>39</sup> In November 1995 Poland added some additional product groups to the restructuring programme which they also notified to the Commission. The programme was due to take effect from 1 January 1996.

---

<sup>38</sup> IP/98/173.

<sup>39</sup> Marek Tabor, *fn* 1 above.



Poland was confident that it had fulfilled its notification requirements under Article 28 Europe Agreement. Article 28 provides that “Poland shall inform the Association Council of any exceptional measures it intends to take and, at the request of the Community, consultations shall be held in the Association Council on such measures and the sectors to which they apply before they are applied.” In addition, Poland is required to provide the Association Council with “a schedule for the elimination of customs duties”. The Polish side pointed out that the meaning of consultation is not defined within Article 28 nor is there any timetable for consultation.<sup>40</sup>

The Commission adopted a different view. It considered that Poland was not eligible to introduce its restructuring programme because it had failed to follow the procedure contained in the Europe Agreement.<sup>41</sup> The UK government was particularly concerned about the oil industry and took the view that Poland had quite clearly breached the consultation requirements and acknowledged that this interpretation of the legal position was a stricter view than that held by the Commission who, in private at least, was not quite so convinced that the legal argument was cut and dry.<sup>42</sup>

Poland complained that the first half of 1996 was taken up with discussion on the notification and consultation procedure rather than focusing on the substance of the Polish programme for the oil industry.<sup>43</sup>

Another question of interpretation which arose was the interpretation of “restructuring”. Article 28 permits Poland to derogate from the provisions of the Europe Agreement by increasing customs duties, but only in relation to “infant

---

<sup>40</sup> Krzysztof Treczynski, *fn 2 above*

<sup>41</sup> Jan Willem Blankert, *fn 6 above*

<sup>42</sup> Interview with Richard Jones.

<sup>43</sup> Marek Tabor, *fn 1 above*.

industries, or certain sectors undergoing restructuring or facing serious difficulties, particularly where these difficulties produced important social problems.” The EU side contended that the term should be interpreted as it would under EC law.<sup>44</sup>

The Commission has always treated restructuring aid very strictly under EC law because it considers that such aid may distort competition by preventing market forces from eliminating inefficient companies.<sup>45</sup> It is very reluctant to approve such aid and will only do so in exceptional circumstances where there is an acceptable restructuring plan and where it has been demonstrated that the Community interest is best served by keeping the company in business.<sup>46</sup> The EU side attempted to argue that the situation in the Polish oil industry was not as grave as the Polish side had portrayed. In this way they contested that the proposed programme related to modernisation rather than restructuring. The Polish side had a very strong counter-argument. In other parts of the Europe Agreement there is specific reference to the use of the *acquis* as an interpretational standard. For example, Article 63 Europe Agreement which deals with competition provisions provides that any practices contrary to that Article are to be “assessed on the basis of criteria arising from the application of the rules of Articles 85,86 and 92 of the Treaty establishing the European Community.” Moreover, *Opinion 1/91* demonstrates the limits of such interpretational provisions where the ECJ has made it clear that it will interpret international agreements in light of their object and purpose.<sup>47</sup> It is self evident that the Europe Agreement and EC treaty have different objectives and purposes.

---

<sup>44</sup> John Bell and Krzysztof Treczynski, *fn*s 6 and 2 above.

<sup>45</sup> See *Magefesa* OJ 1991 I5/18.

<sup>46</sup> See *Alpha Romeo*, OJ 1989 L394/9.

<sup>47</sup> *Opinion 1/91* [1991] ECR 6079.

The Association Council meeting of July 1996 was rather fraught. Hans van den Broek complained strongly to the press about Polish protectionism.<sup>48</sup> He stated that “the European Union deeply regrets the unilateral actions taken by Poland... and reiterates its opinion that the Polish oil sector cannot be viewed as undergoing restructuring in terms of the (EU’s) criteria.”<sup>49</sup> He made it clear that the EU wished to see a commitment to retail price liberalisation by the end of 1996, a programme for privatisation and modernisation of refineries and a rise in security stocks. He linked these requirements to the success of Poland’s EU membership application.

An experts meeting took place in Poland on 17 and 18 October 1996 after which all sides seemed to be cautiously optimistic that an Agreement had been reached.<sup>50</sup> During the negotiations the Commission had been somewhat surprised. They had anticipated that agreement could have been secured earlier but found that negotiations became protracted by three Member States forcing a stricter agreement.<sup>51</sup> This could explain the frustration experienced by Polish negotiators who found that progress was slow due to the Commission’s lack of power to agree restructuring figures and timetables proposed by the Polish side.<sup>52</sup>

By the next Association Council on 30 April 1997 the tone was more conciliatory, with the parties noting that “significant efforts had been made on both sides to resolve some outstanding and long-running trade difficulties”.<sup>53</sup> They had also managed to improve cooperation and adopt “negotiated

---

<sup>48</sup> Financial Times, 17 July 1996.

<sup>49</sup> Reuter EC Report, 16 July 1996.

<sup>50</sup> Marek Tabor and Jan Borkowski, *fn*s 1 and 28 above.

<sup>51</sup> Jan Willem Blankert, *fn* 6 above.

<sup>52</sup> Marek Tabor, *fn* 1 above.

<sup>53</sup> RAPID 13 May 1997.



solutions”.<sup>54</sup> It was noted that exchanges of letters were being prepared with regard to the Polish oil sector. The Association Council also welcomed the liberalisation of oil prices in February 1997 ahead of the July timetable requested by the EU.<sup>55</sup>

The General Affairs Council meeting in Brussels on 10 November 1997 formally approved Polish plans for the oil sector. The principal features of the agreement were: greater flexibility in the tariff system with a view to complete dismantling on 1 January 2001; a commitment on the Polish side, relating to privatisation programmes and modernisation of refineries, increasing emergency reserves, equal treatment by Polish refineries for all purchasers and the lifting of all quantitative restrictions on the import of petroleum products; and the holding of regular meetings between the two parties to monitor implementation of the various measures.<sup>56</sup>

### The Steel Dispute

The restructuring of the Polish steel industry raises similar issues to oil industry restructuring. Internal Commission analysis demonstrates the sensitivity of steel restructuring in Poland.<sup>57</sup> The steel industry represents 3.1% of total industrial employment with around 90,000 jobs. It is anticipated that the numbers employed in the steel industry will be reduced by around 50% to 45,000 by the year 2002. In Silesia, the steel sector represents 40% of industrial employment. Any job closures would clearly impact upon employment at both the national and regional level.

---

<sup>54</sup> *Fn 53 above.*

<sup>55</sup> *Fn 33 above*

<sup>56</sup> RAPID PRES/97/328 12 November 1997.

<sup>57</sup> European Report, no. 2294, 25 February 1998. See also generally, L Alan Winters, “Liberalization of the European Steel Trade” in *European Union Trade with Eastern Europe*, Riccardo Faini and Richard Portes (editors) (CEPR, 1994) at pp201 at sec.

The Polish government wished to adopt a programme to restructure the steel industry. In 1995 customs duties on steel imports were set at 12%. The EU side considered this level to be protectionist.<sup>58</sup> In January 1996 Poland implemented a 20% reduction in these duties, bringing them down from 12-9%.<sup>59</sup> A further reduction to 6% was later instituted.<sup>60</sup> Duties should be reduced to zero in 1999.<sup>61</sup>

Discussion surrounding the steel industry appeared, at least initially, to have taken place in a much less heated environment than oil restructuring talks. The Polish side developed close contact with the Commission and agreed to give the EU side information discussing progress each step of the way.<sup>62</sup> It is clear that the Commission was satisfied that Poland fully complied with the consultation requirements in this instance.<sup>63</sup> The pay off for the Polish side in working more closely with the Commission was the opportunity to impress upon the EU side both the cost of the restructuring process and the need for EU financial assistance: "Commissioner van den Broek now understands some issues and the Commission can help Poland with different funds for restructuring".<sup>64</sup> Another Polish official considered that the Commission acknowledged that the restructuring programme was necessary and understood that the programme would cause significant social problems.<sup>65</sup>

---

<sup>58</sup> "Europe" No 6626 14 December 1995.

<sup>59</sup> Agence Europe, 18 January 1996.

<sup>60</sup> European Report, no.2288, 4 February 1998.

<sup>61</sup> Financial Times, 25 March 1998.

<sup>62</sup> Jan Borkowski, *fn* 28 above

<sup>63</sup> Jan Willem Blankert, *fn* 6 above.

<sup>64</sup> Jan Borkowski, *fn* 28 above.

<sup>65</sup> Marek Tabor, *fn* 1 above.



The Association Council meeting on 30 April 1997 noted an agreement in principle to a three year extension of the period in which Poland could grant state aids for restructuring purposes under the conditions mentioned in Article 8(4) of Protocol 2 Europe Agreement.<sup>66</sup> The Association Council also stated that it may, taking into account the economic situation in Poland and the implementation of the restructuring of the Polish steel sector between 1996 -1999, decide to further extend that period until 31 December 2001.

A cautionary note was expressed at the 1997 meeting. Whilst the EU was prepared to agree to an extension of the state aid regime under certain conditions it cited steel as an example of a sector which was still not becoming competitive fast enough.<sup>67</sup> This observation was restated in the Commission's Opinion on Poland's application for EU membership where it was noted that problems were "especially severe" in the steel industry.<sup>68</sup> The Commission also highlighted that the regional importance of the steel industry means that the process of restructuring "has painful consequences for those eastern and southern parts of Poland which depend on a few heavy industries".

---

<sup>66</sup> RAPID 13 May 1997. Article 8(4) of Protocol 2 provides:  
The Parties recognise that during the first five years after the entry into force of the Agreement and by derogation to paragraph 1(iii), Poland may exceptionally as regards ECSC steel products, grant public aid for restructuring purposes provided that:

- the restructuring programme is linked to a global rationalisation and reduction of capacity in Poland,
- it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced.

The Association Council shall, taking into account the economic situation of Poland, decide whether the period of five years could be extended.

<sup>67</sup> European Report, no 2230, 30 April 1997.

<sup>68</sup> Commission Opinion on Poland's Application of Membership of the European Union, COM(97) 2002 final 15 July 1997 at p28.



Did closer cooperation over steel restructuring give the EU side access to information which then counted against Poland's application ? This is unlikely to be the case since the questionnaires issued to all applicants required very detailed information on economic restructuring. In any case, once all economic markers were cumulatively assessed the Commission considered that Poland, together with Hungary, came closest to satisfying the economic criteria for EU membership.<sup>69</sup>

More recently it has emerged that it has proved to be more difficult to secure agreement on steel restructuring than had perhaps been hoped in the cautiously optimistic meetings of 1996 and 1997. Polish officials had stressed that the situation was an evolving one where the restructuring process would require constant reform.<sup>70</sup> The Europe Agreement required Poland to cut import duties on steel to 3% at the start of 1998. It has retained duties at 6%. Crisis talks were held at the end of 1997. Poland left these talks with the impression that they could retain the 6% import duties pending the presentation of a restructuring plan for the steel industry.<sup>71</sup> This outline agreement was reached in talks between Hans van den Broek and the Polish Foreign Affairs Minister Bronislaw Gernik. Subsequently, two Member States, Spain and Italy, refused to endorse the agreement. The Commission has been forced to seek a formal mandate from Member States in an attempt to reach a new agreement and has requested the Council to confer powers upon it to revisit the dispute on behalf of all 15 member States with clear instructions and powers. The EU side appears to have given an undertaking not to impose any retaliatory measures against Poland for the decision not to lower import duties.<sup>72</sup>

---

<sup>69</sup> Agenda 2000: For a Stronger and Wider Union COM(97) 2000 final vol 1 p46.

<sup>70</sup> Jan Borkowski, *fn* 28 above.

<sup>71</sup> *Fn* 60 above.

<sup>72</sup> PAP News Wire 4 February 1998.

At the Joint Parliamentary Committee meeting on 20-21 January 1998, Howard Pearce, a senior UK Foreign Office official, expressed concern over the “current disagreements over steel”.<sup>73</sup> Richard Czanecki, the Secretary of State responsible for Poland’s Committee of European Integration, represented the Polish government at the same meeting. He adopted a tough stance saying that Poland’s behaviour over steel was “an expression of our willingness to comply with the rules of the EU game”.<sup>74</sup> He made a clear link with the dispute and Poland’s desire that the Polish Accession Partnership agreement be adapted “in some element to make a better match with short-and medium- term aspects of our new national programme of preparations”.

European Commission experts carried out on-the-spot assessments in the first weeks of 1998 in order to determine capacity cuts of the new restructuring programme. The assessments will be based upon Polish definitions. The EU side expressed concern as to the accuracy of Polish projections in the past and is now insisting upon detailed market analysis and forecasts.<sup>75</sup> The Commission has offered a package of financial and other assistance to Poland in the form of funding studies into the restructuring plan, assistance for technical aspects of privatisation (such as environmental audits) and co-funding for social and regional conversion measures accompanying restructuring. More importantly, it urges the Council to formalise the agreement, reached in principle in 1997, to permit continued state aid for restructuring.

Steel restructuring was discussed at the Association Committee meeting on 4 March 1998. The tone of the meeting was reported to have been “cooperative”, without major differences being aired.<sup>76</sup> Poland is scheduled to present its

---

<sup>73</sup> European Report, no 2285, 24 January 1998.

<sup>74</sup> *Fn* 73 above.

<sup>75</sup> European Report, no 2294, 25 February 1998

<sup>76</sup> European Report, no.2297, 25 March 1998.



midway plan for restructuring in April and a detailed plan by the end of June. It is at this point that the really difficult negotiations will take place. Already some commentators are suggesting that the steel industry has become a testing ground, both of Poland's ability to restructure the more difficult sectors of its economy and of its approach to EU membership.<sup>77</sup>

If the "carrot" approach outlined above does not result in agreement then the Commission has not ruled out the use of arbitration or retaliation measures under the European Agreement.<sup>78</sup>

### **The Citrus Fruit Dispute**

The final dispute considered in this chapter relates to citrus fruit. At the beginning of the 1990s Poland set value-added tax rates (VAT) on imports of citrus fruit at 22%. At this time such fruit was considered to be a luxury commodity.<sup>79</sup> In 1997 two Member States, Spain and Portugal, argued that the rates were discriminatory.

A new negotiating technique in Polish-EU relations was employed by the EU side. Spain argued that unless Poland reduced the rate it would refuse to endorse the common position at the Foreign Affairs Council on 29 April 1997. Without a common position the Association Council scheduled for 30 April could not adopt any binding decisions and the EU side threatened to downgrade the Association Council to an informal meeting. The timing of this Association Council was particularly significant because it would be the last meeting between the parties at this level before the Council would meet in December to decide upon which states would proceed to pre-accession negotiations.

---

<sup>77</sup> Stephan Wagstyl, "Heavy Metal Fights for Status Quo", *Financial Times*, 25 March 1998.

<sup>78</sup> *Fn 75 above.*

<sup>79</sup> Interview with Danuta Hubner, BBC Summary of World Broadcast 1 April 1997



The Polish Prime Minister, Włodzimierz Cimoszewicz, argued that reducing the VAT rate would cost Poland \$65 million in lost revenues and resisted EU pressure until the eleventh hour.<sup>80</sup> On the afternoon of 29 April a senior Polish official confirmed that the Polish cabinet had agreed to reduce VAT to 7% from 1 January 1998, “even although we believe the EU’s insistence is not justified”.<sup>81</sup>

The Polish side strongly disagreed with the EU’s interpretation that its VAT rates were discriminatory and contended that the EU was making selective use of GATT rules and definitions. It is clear that the Polish side feel that they have made a concession to the EU from which they hope to profit in future negotiations. A senior official argued that “while we don’t accept the argument, we are making a gesture and we expect some flexibility in return”.<sup>82</sup> Jarsław Kalinowski, a member of the Polish government, contested that the EU was overly protectionist on agriculture and that Poland should be offered increased access for Polish farm products in return for concessions on citrus fruits.<sup>83</sup>

## Overview

The five disputes discussed above cover a range of issues. Some concern sectors of significant economic importance, such as the oil industry or car manufacturing. Others concern sectors of much less significance in terms of the European economy as a whole, such as tanneries or citrus fruit. Commission officials found that there was no real pattern to the conflicts. One expressed the desire for some sort of early warning system, but states that “it is not possible to see in advance which issues will become problems”.<sup>84</sup> In the five disputes it is, however, possible to identify both common root causes and also common triggers which assisted in

---

<sup>80</sup> Reuters 25 April 1997

<sup>81</sup> European Report, *fn* 29 above. See also RAPID 13 May 1997.

<sup>82</sup> *Fn* 29 above.

<sup>83</sup> *Fn* 29 above.

<sup>84</sup> Jan Willem Blankert, *fn* 6 above.

propelling a minor disagreement into a major trade dispute. Four such categories may be identified:

1. The impact of wider issues;
2. Member State interest;
3. Differences in interpretation; and
4. Playing for long term rules or goals.

Table thirteen summarises the impact of these common roots and common triggers upon the implementation process:

Table Thirteen: Common roots and common triggers					
Dispute	Member States Interest	Difficulties in Interpreting the E.A.	Dispute part of E.A.?	Wider Issues	Playing for long-term rules/gains
Tanneries	Italy			Regional policy	
Daewoo	Italy (but also other E.U. car manufacturers)	Article 27(2), "consultation"	Article 7(2) EA relevant?	Foreign direct investment	Poland - need to encourage foreign direct investment. E.U. - need to protect domestic car industry.
Oil	UK and "three member states"	Article 28, "consultation" and "restructuring"		Economic restructuring	Favourable interpretation of consultation and restructuring
Steel	Germany, Spain and Italy	Was action justified under Article 8(4), Protocol 2		Economic restructuring	Polish desire for E.U. financial support
Citrus	Spain		Selective use of GATT?		Polish desire for pre-accession concessions

## The Impact of Wider Issues

The implementation of the Europe Agreement is taking place in parallel with economic restructuring in Poland. The process of restructuring is necessarily slow and requires know-how and financial support which may not always be available in sufficient quantities. Polish officials stress the links between the social costs of restructuring and the process of implementation <sup>85</sup> One stated that “the elections in 1993 [when a government comprised of former Communists was returned] gave a very clear signal about the nature and the pace of transition in Poland”.<sup>86</sup> The Polish side has learned that the timetable and pace of restructuring is very sensitive and must be accepted by the Polish people. The oil and steel disputes, in particular, have taken place against the backdrop of restructuring and those disputes sharply reflect the need for Poland to balance the impact of its restructuring programmes upon the electorate against its desire fully to implement its obligations under the Europe Agreement.

## Member State Interest

All external relation agreements reflect, to a greater or lesser extent, a tension between the interests of individual Member States and the wider EU interests. It is inevitable that within a mixed agreement, such as the Europe Agreement, “the Member States and the Community will only rarely have exactly the same interests and concerns”.<sup>87</sup> The ECJ has stressed the duty of close cooperation between the Member States and the EU in the negotiation and implementation of mixed agreements. The duty follows from the “requirement of unity in the international representation of the Community”.<sup>88</sup> It requires Member States and the institutions to inform each other of their position, to attempt to reach a common position on matters contained within the mixed agreement and to

---

<sup>85</sup> Interviews with Piotr Babinski and Jan Borkowski.

<sup>86</sup> Jan Borkowski, *fn* 28 above.

<sup>87</sup> I Macleod, I D Hendry A.D. Stephen Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996) at p148.

<sup>88</sup> *Ruling 1/78* at paras 34-36. See also *Opinion 2/91* at para 36.



proceed by common action within the framework of international bodies and conferences.<sup>89</sup> This is also discussed in chapter five.

In each of the five disputes examined Member State interests have played a significant role either in prolonging the dispute or in magnifying the dispute. The tanneries and citrus disputes provide a classic illustration of the interests of one Member State, in protecting its domestic industry, overriding the wider Community interests in ensuring the harmonious development of relations with Poland in order to secure the longer term objective of European integration. In both disputes the overall economic impact was relatively small.

Conflicts may also arise within a mixed agreement because the Commission negotiates on behalf of the EU side. Where the substance of the agreement relates to provisions which are clearly within the Member States' competence the Commission usually obtains a mandate from the Council. On some occasions the mandate may require that any agreement reached by the Commission is subject to approval of the final text by the Member States.<sup>90</sup> A similar split in competence has arisen in relation to implementation negotiations under the Europe Agreement. In both the steel and oil disputes the Commission negotiated on behalf of the EU side. The Commission had reached agreements in principle with Poland which they considered best protected the Community interest. The agreements were then taken back to the Member States. The Commission found that in relation to oil "three Member States" required a stricter deal. In relation to steel, Spain and Italy refused to endorse the Commission's agreement, forcing the Commission to seek a precise negotiating mandate from the EU. Such conflicts within the EU side cause confusion and frustration on the Polish side and undermine the duty of cooperation which should govern mixed agreements. Member States also have different interests which may be affected by Polish accession to the EU. The impact of these interests upon the implementation of the

---

<sup>89</sup> See generally I Macleod, I D Hendry, A.D. Stephen Hyett, *fn* 87 at p148.

<sup>90</sup> See, for example, the agreement on the European Economic Area.

Europe Agreement is discussed in chapter eight which will also consider the limitations of the duty of close cooperation in external relations.

### **Differences in Interpretation**

Differences in interpretation may arise in three ways. First, the parties may disagree as to the meaning of the words contained in the Agreement. In the Daewoo and oil disputes, disagreement arose as to the correct interpretation of “consultation”.<sup>91</sup> Secondly, the parties may disagree as to the conclusion to be drawn when the Agreement is applied to a particular set of facts. In the steel and oil disputes the parties contested whether the economic circumstances in Poland justified the adoption of protectionist measures under the Europe Agreement.<sup>92</sup> Thirdly, the parties may disagree as to whether the Agreement has any application to the issue at all. In both the Daewoo and citrus disputes Poland strongly contested that the dispute did not come within the framework of the Europe Agreement. One UK official admits that the UK often asks the Commission to raise issues not strictly contravening the Europe Agreement but which are more to do with the “spirit of the Agreement”.<sup>93</sup> Whilst the Member States may justify this on the basis that it will assist Poland in the accession process, it does not appear to be justified in terms of the Europe Agreement.

These disputes demonstrate how implementation conflicts may arise where the wording of an external relations agreement is sufficiently vague to enable the parties to adopt conflicting positions in an attempt to protect their own interests.

### **Playing for Long-term Rules or Goals**

The parties to the Polish Europe Agreement have all adopted negotiating positions during the implementation process in an attempt to secure their long

---

<sup>91</sup> Articles 27(2) and 28 Europe Agreement.

<sup>92</sup> Under Article 8(4), Protocol 2 and Article 28 Europe Agreement.

<sup>93</sup> Telephone interview with Stephen Rhodes, *fn* 27 above.



term interests. A number of different examples may be seen. During the oil dispute, one Polish official stated that he believed that the reason why the EU side had adopted a strong stance was to “try to discourage the use of Article 28 in the future”.<sup>94</sup> He estimated that around 15% of Polish exports could make use of Article 28 in the future. The EU could be seen to have two long-term objectives during the oil dispute negotiations. First, to adopt a strong position in order to demonstrate to Poland and the other associated states that they would treat protectionist measures under Article 28 very strictly. Secondly, to ensure that the EC law definition of “restructuring” was adopted despite the lack of reference to the *acquis* as an interpretational guide.

Poland has also attempted to adopt negotiating positions with a view to securing long-term advantages. In the steel dispute Poland hoped that closer cooperation with the EU side would result in improved financial support. In the citrus dispute, Poland anticipated that its “concession” would result in a more favourable pre-accession “package”. Most importantly, in the Daewoo dispute Poland sought to defend its right to encourage foreign direct investment.

On balance, in each of these five disputes at least, whilst it is interesting to note Poland’s attempts to secure long-term gains, the EU side has been much more successful in protecting its long-term interests. The reasons for this are discussed in chapter eight.

### Dispute Resolution Strategies

A variety of dispute resolution strategies were employed during the course of the five disputes. Some strategies followed were expressly provided within the Europe Agreement, for example, the arbitration procedure has been employed on just one occasion, during the tanneries dispute. It appears that merely initiating the procedure enabled the dispute to be resolved in a mutually acceptable way. Other strategies employed have no express mention within the Europe

---

<sup>94</sup> Krzysztof Treczynski, *fn* 2 above.



Agreement, for example, the reference to external standards such as the use of the WCO rules in the Daewoo dispute. Reference was also made to the GATT (now WTO) as an external factor. However, the interesting point to note is that although the Europe Agreement makes reference to the GATT /WTO standards there has been no attempt to invoke the WTO procedures in order to resolve disputes. Whereas the EU-side did threaten the use of the WCO dispute resolution procedures even although this was not expressly provided in the text.

A summary of the main strategies employed is provided in table fourteen below. It is interesting to note that in each of the five disputes a range of strategies has been employed and that different combinations of strategies have been employed in different disputes.

Table Fourteen: Dispute resolution strategies						
Dispute	Institutional Meetings	Visit by the Commissioner	Linked to Accession	Arbitration	Threat to downgrade Association Council	Reference to External Standard
Tanneries	✓			Initiated		
Daewoo	✓	✓	✓			W.C.O.
Oil	✓	✓	✓			
Steel	✓	✓	✓	Not ruled out		
Citrus			✓		✓	GATT

As a general starting point, it is apparent that many of the real implementation decisions take place at the level of the Association Committee, experts meetings or during exchanges between lower-ranking officials.<sup>95</sup> The Association Council

---

<sup>95</sup> Marek Tabor, *fn 1* above.

meets just once a year. Meetings only last for around one hour which provides little opportunity for discussion.

The EU side has attempted to exert psychological pressure upon Poland during the disputes in a number of ways. Firstly, Commissioner Hans van den Broek has adopted a very high profile in some of the Polish implementation disputes. He became personally identified with condemnation of Poland and deliberately made use of the press ensuring that the disputes would achieve maximum publicity. His outspoken and often stinging comments have often surprised Polish officials who feel he has focused upon a small number of disputes without really considering the bigger picture. He has not issued similar statements against the other associated states. Secondly, on a number of occasions the EU side has employed Poland's desire for accession to the EU in an attempt to secure a favourable resolution. Thirdly, as may be clearly seen in table fourteen, where the trade disputes related to sectors which were very important to the EU in overall economic terms (such as cars, steel and oil) the EU side employed a wide range of dispute resolution strategies. Finally, during the citrus dispute the EU side threatened to downgrade the Association Council to an informal meeting as a way of securing a tariff reduction.

It is difficult to assess the impact of such techniques. The EU side employed a wide range of dispute resolution strategies. This ensured that pressure was exerted upon the Polish side from a number of different levels and that pressure was applied both consistently and over a long period. The EU side has not adopted a similar range and intensity of dispute resolution strategies with other associated states. This acknowledges that Poland is perceived to be the "difficult partner".<sup>96</sup> The EU side is keen to send a clear message to the other associated states that it will take a strong stance where implementation of the Europe Agreement is concerned. In addition, the EU side needs to ensure that Poland maintains progress towards economic restructuring. It is aware of the domestic social costs

---

Jan Willem Blankert, *fn* 6 above.



which restructuring programmes bring and is using the carrot of membership to drive the programmes forwards. The Polish side acknowledged both its need for EU membership and the strength of the EU's bargaining positions, "the situation for the Commission is very nice, Poland must wait for a date before starting negotiations and they [the Commission] set the exams".<sup>97</sup>

The use of dispute resolution techniques must also be viewed within the context of EU membership. The implementation of the Europe Agreement is perceived by the EU side as a sort of training for membership.<sup>98</sup> On a number of occasions EU officials have commented that the Polish position adopted during a trade dispute was not the behaviour expected of an EU partner. In this way the EU side is sending a strong message to the Pole about the sort of cooperation required before and after accession to the EU.

## Conclusions

This thesis contests that a tripartite framework based upon a modified Sabatier and Mazmanian framework, power imbalance and institutional considerations may be employed to analyse implementation. This chapter examines a number of disputes and difficulties which have arisen in the course of implementing the Polish Europe Agreement and considers both the roots causes for these disputes and the factors which have played an important role in dispute resolution.

The disputes in this chapter illustrate how difficulties in implementation may be fuelled both by the nature of the text of the Europe Agreement and the power imbalance between the Parties. This chapter demonstrates the implications of some of the themes outlined in chapters two and three, particularly in three ways.

---

<sup>97</sup> Krzysztof Treczynski, *fn* 2 above.

<sup>98</sup> "The Poles have to remember and have to be told in a consistent way that if you want to join you are expected to behave in a certain way", interview with Richard Jones.



First, table thirteen highlights how the power imbalance reflected in the text, which was demonstrated in chapter six, impacts upon the implementation process. It also demonstrates how both sides adopt negotiating strategies with the aim of playing for long-term rules or goals. The adoption and relative success of such strategies reflects the parties' relative positions on Galanter's Repeat-player One-shotter continuum. For example, the EU side wanted to ensure a narrow interpretation of "consultation and restructuring" to reduce the possibility of future disputes in this area. Poland hopes to accede to the EU, therefore it is not a classic one-shotter since Poland hopes to have an on-going relationship with the EU. This relationship and power imbalance is reflected in the disputes which have taken place.

Secondly, table fourteen demonstrates another way in which the text structures the implementing process by providing for the adoption of arbitration through meetings between the institutions or meetings of the institutions, visits by the Commissioner and, as a last resort, initiating the arbitration process. The power imbalance between the Parties also colours the process of dispute resolution. For example, in the citrus dispute the EU side were able to exploit their superior position by securing agreement from Poland after threatening to downgrade the Association Council meeting.

Finally, the non-unitary nature of the EU which was discussed in chapter three is also relevant. The disputes examined in this chapter demonstrate how the sharing of competences in a mixed agreement may impact upon the implementation process. In all five disputes the domestic interests of the Member States played a significant factor in either the creation and or the duration of the dispute. The disputes also demonstrate the importance of institutions to the implementation process. The non-unitary nature of the EU side was identified in chapter two. This was most clearly seen during the steel dispute where the agreement which the Commission had brokered was subsequently overturned by a number of Member States. During the disputes many levels of institutions were involved:

EU institutions such as the Commission; Polish institutions and institutions created by the Europe Agreement itself such as the Association Council. The disputes demonstrate how a complex array of institutions were involved in an attempt to secure implementation.

It would be disingenuous to suggest that the process of implementation of the Polish Europe Agreement has been characterised solely by disputes. The Commission's Agenda 2000 document provides an assessment of Poland's ability to join the EU. Chapter eight assesses the importance of the implementation disputes within the overall implementation process. It also evaluates the relevance of the disputes to an understanding of Sabatier and Mazmanian's implementation framework.

# CHAPTER EIGHT

## Conclusions

### Introduction

This final chapter synthesises the work of the earlier chapters. It begins with an evaluation of the available information on the overall progress made in the implementation of the Europe Agreement. It then evaluates Sabatier and Mazmanian's framework in relation to the analysis and evidence gathered in this thesis. It stresses the need to take full account of the power imbalance between the parties when analysing implementation framework. It concludes by highlighting the issues which have played a crucial role in shaping the implementation of the Europe Agreement.

### Overall Evaluation of Implementation

The Commission's Agenda 2000 documents provide the closest approximation to an overall assessment of Poland's progress on implementation of the Europe Agreement.<sup>1</sup> An Opinion was prepared for each of the applicants, assessing their ability to join the EU by measuring their performance under each of the Copenhagen Council criteria outlined above in chapter four. The Opinions, based upon both factual evidence and predictions based on economic and political criteria, were all delivered at the same time because the Madrid Council had insisted that all the applicants were to be treated equally. None of the applicants was considered to satisfy all of the criteria. However, the Commission considered that Poland, Hungary, Estonia, the Czech republic and Slovenia could reach the necessary standard in "the medium term" (five years) provided "they maintain and strongly sustain their efforts of preparation". An analysis of the Polish opinion is carried out in table fifteen below. The analysis reveals that whilst

---

<sup>1</sup> *Agenda 2000: For a Stronger and Wider Union*, COM(97) 2000 final, 15.07.1997.



progress in certain areas was praised it is clear that other areas, such as the restructuring of the agricultural sector and the enforcement of environmental legislation, would require long-term solutions.

Table Fifteen: Analysis of the Polish Opinion			
Criteria for Membership	Progress Made	Difficulties/Steps Required	Predicted Target Time
Political criteria	<ul style="list-style-type: none"> <li>• Political institutions stable and functioning correctly</li> <li>• Legislative elections free and fair</li> <li>• Fundamental rights mostly in place</li> </ul>	<ul style="list-style-type: none"> <li>• Need to continue to improve judicial system</li> <li>• Need to grant wider press freedom</li> </ul>	Medium term
Economic criteria	<ul style="list-style-type: none"> <li>• Progress made towards a functioning market economy</li> <li>• Economy stabilised</li> <li>• Prices and trade largely liberalised</li> <li>• Growth and investment strong</li> <li>• Foreign direct investment increasing</li> </ul>	<ul style="list-style-type: none"> <li>• Reform of pensions and security systems</li> <li>• Further development of financial services</li> <li>• Further reform of Banking sector</li> <li>• Modernisation of agriculture</li> <li>• Competitiveness of state-owned industries</li> </ul>	Medium term
Internal market	<ul style="list-style-type: none"> <li>• Substantial progress in harmonisation</li> <li>• On course to assume border controls</li> <li>• Good progress in implementing and enforcing anti-trust provisions</li> </ul>	<ul style="list-style-type: none"> <li>• Around half of the acquis is still to be implemented</li> <li>• Improve administrative structure to enhance enforcement</li> <li>• Progress on implementation and enforcement of state aid poor</li> </ul>	Medium term
Innovation	<ul style="list-style-type: none"> <li>• Education and training present no major problems</li> <li>• Research and technical development present no major problems</li> <li>• On course to comply with audio-visual standards</li> </ul>	<ul style="list-style-type: none"> <li>• Greater progress required in advanced communications</li> <li>• Lags behind other applicants in telecommunications infrastructure</li> </ul>	Medium to long term

Table Fifteen: Analysis of the Polish Opinion			
Criteria for Membership	Progress Made	Difficulties/Steps Required	Predicted Target Time
Economic and fiscal affairs	<ul style="list-style-type: none"> <li>• Should be able to participate in the third stage of EMU (non -Euro participant)</li> <li>• On course with direct taxation</li> <li>• On course with statistics requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Ability to participate in Euro is dependent upon the success of structural transformation</li> <li>• Sustained effect required to comply with indirect taxation acquis</li> </ul>	Medium term
Sectoral policies	<ul style="list-style-type: none"> <li>• Private sector on course</li> <li>• Significant progress in harmonising in agriculture</li> <li>• On course with energy legislation</li> <li>• On course in relation to EURATOM</li> <li>• On course with transport sector acquis</li> <li>• On course with Small and Medium Enterprise policy</li> </ul>	<ul style="list-style-type: none"> <li>• Certain sectors, particularly state-owned, require urgent restructuring</li> <li>• Coherent structural and rural development policy</li> <li>• Strengthen administrative structures</li> <li>• Implementation and enforcement of veterinary and phytosanitary requirements</li> <li>• Restructure agro-food sector</li> <li>• Long term solution for Polish agriculture</li> <li>• Further modernisation of fisheries</li> <li>• Energy industry needs to be closely monitored</li> <li>• Resources required for the foundations for Trans European Networks</li> </ul>	Medium to long term
Economic and social cohesion	<ul style="list-style-type: none"> <li>• On course with social acquis</li> <li>• On course with regional policy</li> </ul>	<ul style="list-style-type: none"> <li>• Greater progress in relation to health and safety at work</li> <li>• Administrative and budgetary structures to be established</li> </ul>	Medium term

Table Fifteen: Analysis of the Polish Opinion			
Criteria for Membership	Progress Made	Difficulties/Steps Required	Predicted Target Time
Quality of life and the environment	<ul style="list-style-type: none"> <li>On course for full implementation of environmental acquis</li> </ul>	<ul style="list-style-type: none"> <li>Effective compliance requires increased public and private sector investment</li> <li>Consumer protection insufficient. Substantial effort required</li> </ul>	Long term
Justice and home affairs	<ul style="list-style-type: none"> <li>On course to meet standards</li> </ul>	<ul style="list-style-type: none"> <li>Some problems with drugs, border management migration and transnational crime</li> </ul>	Medium term
External policies	<ul style="list-style-type: none"> <li>On course with trade and international economic relations</li> <li>On course with development</li> <li>On course with customs administration</li> <li>On course with Common Foreign and Security Policy</li> </ul>	<ul style="list-style-type: none"> <li>Need to eliminate existing trade barriers in order to align with the Community trade regime</li> <li>Work required to align project management and computerisation</li> </ul>	Medium term
Financial questions	<ul style="list-style-type: none"> <li>Implementation of Structural funds <i>acquis</i> provides basis for further developments</li> <li>Penalising fraud comparable with Member States' systems</li> </ul>	<ul style="list-style-type: none"> <li>Implementation of financial control needs significant effort</li> </ul>	Medium term
Administrative capacity to apply to the <i>acquis</i>	<ul style="list-style-type: none"> <li>Some reform achieved</li> </ul>	<ul style="list-style-type: none"> <li>Continued return of administrative structures</li> </ul>	Medium term

One of the criteria the Commission employed in its assessment was the candidate's capacity to assume the obligations of membership. This was evaluated according to a number of indicators:



- the obligations set out in the Europe Agreement, particularly those relating to right of establishment, national treatment, free circulation of goods, intellectual property and public procurement;
- implementation of the measures set out in the White Paper<sup>1</sup> as essential for establishing the single market; and
- progressive transposition of the other parts of the *acquis*.<sup>2</sup>

Agenda 2000 does not provide a breakdown on the implementation of the Europe Agreement. It does, however, contain a table illustrating progress in adopting White Paper measures.<sup>3</sup> Since there is a fair degree of overlap between the provisions of the Europe Agreement and the White Paper this give some indication of the overall progress in the implementation of the Europe Agreement. The figures indicate that at the end of June 1997, Poland had made fairly good progress adopting 405 of the 899 directives and regulations contained in the White Paper. However, limited weight may be placed upon these figures. They are based solely upon information provided by the Polish authorities. The Commission has stressed that publishing the table does not indicate that it agrees with this analysis. Moreover, the figures indicate only adopted legislative measures. There is no indication as to how these measures are implemented and monitored in order to ensure their effectiveness.

The Commission found that Poland had implemented “significant elements” of the Europe Agreement provisions and for the most part this was carried out “according to the timetable for implementation set out in it [the Europe Agreement]”. It characterised activity under the Europe Agreement as “intense in all areas of cooperation due to the volume of trade flows and the increasing

---

<sup>2</sup> Commission’s Opinion on Poland’s Application for Membership of the European Union COM(97) 2002 final at p108.

<sup>3</sup> Annex 2 to the Polish opinion. This is contained in Annex 1 to this thesis.

familiarisation”. However, it also stressed that progress made in transposing legislation still required to be supported by “concrete measures of implementation, as well as [the] establishment of an effective administrative underpinning implementation”. It also considered that legislative adaptation was proceeding slowly in the field of technical rules and standards.’

The Commission’s overall assessment, as regards implementation of the Polish Europe Agreement, was positive. It considered that Poland should be in a position fully to participate in the single market in the medium term provided it “continued its efforts on transposition of the *acquis* and intensified work on its implementation”.

Although Polish and EU officials alike described past and future implementation disputes as “inevitable”, such disputes have been a more pronounced feature of Polish-EU relations than EU relations with other CEES. One EU official commented that the “view from Brussels colleagues is that Polish implementation is more difficult in the sense that they are less likely to do as they are told.”<sup>4</sup> This view is echoed in the Polish opinion where the Commission stated that “too many trade disputes have arisen”.<sup>5</sup> Whether such disputes have a long-term impact upon the process of implementation is open to question. Clearly, despite the disputes, the overall evaluation by the Commission was favourable.

### **Applying the Modified Sabatier and Mazmanian Framework**

Chapter three examined Sabatier and Mazmanian’s implementation framework which identifies variables which may affect the implementation process and examines the relative importance of these variables. The modified framework adopted the following variables as relevant to this study:

---

<sup>4</sup> Interview with Jan Willem Blankert

<sup>5</sup> *Fn 2* above at p 108.



Table Six: Modified Sabatier and Mazmanian framework		
A. Tractability of the Problems	B. Coherency of the Structure of the Implementation Process	C. Variables Affecting Implementation which are not Derived from the Agreement
1. Difficulties in handling change 2. Diversity of proscribed behaviour 3. Percentage of population within a political jurisdiction whose behaviour needs to be changed 4. Extent of behaviour required of target groups	1. Precision and clear ranking of the Europe Agreement's objectives 2. Financial resources available to the implementing institutions 3. The extent of hierarchical integration within and among implementing institutions 4. Extent to which decision-making rules of implementing agencies are supportive of the Agreement's objectives	1. Variation over time in social, economic and technological conditions affecting the attainability of the Agreement's objectives 2. The amount and continuity of media attention to the problem addressed by the Agreement 3. Variations over time and jurisdiction in public support for the Agreement's objectives

These variables will now be applied in turn to the experience of the process of implementation of the Polish Europe Agreement to date.

#### A. Tractability of the Problems

##### 1. *Difficulties in handling change*

The need for a causal link between the implementation of the Agreement and the attainment of the Agreement's objectives.

This is very difficult to assess within the instant context because of the wide range of objectives which may be ascribed to the Agreement. Chapter three stressed both the diversity of objectives which may be ascribed to the Agreement and that the perception of successful outcome will alter depending upon which party is making the assessment of success. Moreover, it is difficult to prove a



direct link between a successful outcome and the successful implementation of the Agreement since, as chapter four clearly demonstrated, a complex structure of legally binding and non-legally binding measures regulates behaviour between the parties. This is in addition to other independent variables which may impact upon the objective.

For example, one of the Polish objectives identified in chapter three was to increase exports to the EU. To what extent has the implementation of the trade provisions of the Europe Agreement contributed to any changes in Polish external trade ? It is impossible to provide a definitive answer because it is impossible to attribute any changes in trade patterns to a single root cause.<sup>6</sup> Many other factors such as the performance of the Polish domestic economy and activities on the global market may impact upon trade performance. Analysis of trade performance is further frustrated by the lack of reliable statistical data. Tables sixteen and seventeen (below) provide a widely differing picture of trade between Poland and the EU over a four year period:<sup>7</sup>

Table Sixteen: Polish foreign trade with the EU according to GUS*				
	1990	1991	1992	1993
Exports	5026,2 ECUMn	6481,8 ECUMn	5876,8 ECUMn	7644,1 ECUMn
Imports	3266.2 ECUMn	6044,0 ECUMn	6503,6 ECUMn	9210,0 ECUMn
Trade Balance	+1760,0 ECUMn	+437,8 ECUMn	-626,8 ECUMn	-1565,9 ECUMn

\* GUS is the Polish Central Office of Statistics

<sup>6</sup> See Elizabieta Kawecka-Wyrzykowska, "Poland's Trade Relations with the European Community" (1993) Polish Quarterly of International Affairs 21 at pp21-22.

<sup>7</sup> Tables from Elizabieta Kawecka-Wyrzykowska, "Poland and the European Communities: Impact of the Europe Agreement on the Integration of Poland into the European Economy" Paper no.63, Foreign Trade Research Institute, October 1994.

Table Seventeen: Polish foreign trade with the EU according to EUROSTAT				
	1990	1991	1992	1993
Exports	5156,4 ECUmn	6211,7 ECUmn	7078,5 ECUmn	7566,0 ECUmn
Imports	4393,3 ECUmn	7875,3 ECUmn	8153,3 ECUmn	9872,5 ECUmn
Trade Balance	+763,1 ECUmn	-1663,6 ECUmn	-1074,8 ECUmn	-2306,5 ECUmn

Analysis carried out in 1994 suggested that the implementation of the interim agreement had a disappointing impact upon Polish trade. Although the Agreement provides for asymmetry in favour of Poland, the trade balance figures demonstrated a growing trade deficit in favour of the EU.<sup>8</sup> Commentators noted that other economic factors such as Polish GDP and inflation were equally important in contributing to the trade deficit.

More recently, economic indicators for 1996 show that the EU is Poland's main trading partner, accounting for 66.5% of exports and 63.9% of imports. These figures also indicate a trade balance slightly in favour of Poland.<sup>9</sup> It is impossible directly to attribute this to the progress made in implementing the Europe Agreement trade provisions however. The growth in Polish GDP (from over 3% in 1993 to over 6% in 1997) steadily falling inflation (from 40% in 1993 to 15% in 1998) and falling unemployment figures (from a high of 17% in 1994 to a low of 11% in 1997) all impact upon Polish foreign trade.<sup>10</sup> In these circumstances economists may at best hope to demonstrate the scale of influence exerted by the Agreement.

---

<sup>8</sup> Elizabieta Kawecka-Wyrzykowska, *fn* 7 above at pp41-42.

<sup>9</sup> Figures from Datastream/ICV: OECD; GUS, reported in the Financial Times, 25 March 1998.

<sup>10</sup> Figures from Datastream/ICV, *fn* 9 above.



## ***2. Diversity of proscribed behaviour***

Analysis of the text of the Europe Agreement in chapter five demonstrated that it covered a wide diversity of proscribed behaviour. Sabatier and Mazmanian's framework would suggest that the scope of the Agreement would necessarily make implementation difficult. Chapter six demonstrated how the various implementation tasks have been divided up amongst the implementing institutions and how different implementation strategies have emerged. This has helped to mitigate the problems of the scope of the Agreement to an extent. However, two problems have been created by this division of labour. First, it creates the need for tight coordination between the various implementing institutions and this has not always been the case. Secondly, it creates the danger that certain aspects of the Agreement do not fall clearly within the competence of any implementing agencies and are not implemented. Both of these dangers are discussed in relation to section (B) below.

## ***3. Percentage of population within a political jurisdiction whose behaviour needs to be changed***

The analysis in chapter three indicates that very few constituents of Polish society will remain untouched by the Europe Agreement. However, a ranking of the Agreement objectives has emerged in three ways. First, the interim agreement focused upon the trade provisions of the Agreement. Secondly, as chapter five demonstrated, the Agreement's articles vary in precision and detail. This has meant that implementation has focused upon the more detailed provisions which provide targets and a timetable at the expense of provisions which merely provide for cooperation in the future. Finally, the use of autonomous legal instruments such as the White Paper and the pre-accession strategy have skewed implementation of the Europe Agreement. They have focused attention on the implementation of certain areas of the Agreement which support the pre-accession strategy and also encourage progress towards harmonisation with the *acquis*, by providing a detailed breakdown of Single Market legislation. This focus upon implementation of the trade provisions has limited the percentage of the population whose behaviour needs to change as a result of the Agreement.



What the research has shown is that where compliance with the trade provisions of the Europe Agreement has had a direct, adverse effect upon the Polish workforce then implementation becomes more difficult. This was seen in relation to the disputes with oil and steel restructuring discussed in chapter seven where the social costs of restructuring forced Poland to adopt “protectionist measures”. This may indicate that as the percentage of the population affected by the Agreement increases then there is a corollary increase in difficulty in implementation. However, the crucial issue is not necessarily the percentage of the population affected but how they are affected. What are the social and economic consequences which arise from implementation of the Europe Agreement ? Experience has shown that where the population is affected in an adverse way then it is the degree of adversity which dictates the impact upon the implementation process; the more adverse the impact, the more likely that there is a slowing down in implementation.

#### *4. Extent of behaviour required of target groups*

The analysis of the Commission’s Opinion in Agenda 2000 carried out in table fifteen would tend to support Sabatier and Mazmanian’s contention that the greater the amount of behavioural change required, the more problematic the implementation. Agriculture, the environment and telecommunications were all identified as areas where implementation of the required standard is expected to take place in the long term (ten years) rather than the medium term (five years). In each of these areas Poland faces severe difficulties due to the scale of the problems and the high cost of rectifying the problems arising from the need for new technology for a long term solution.

However, it should be noted that the process of implementation is not yet complete. It is obvious that the more straightforward aspects of the Agreement would be the first to be implemented. This does not necessarily mean that at the end of the ten year period there cannot be successful implementation of the

targets relating to the problem areas identified in Agenda 2000. What it does mean is that implementation will be more difficult to achieve in these areas.

## **B. Coherency of the Structure of the Implementation Process**

### ***1. Precision and clear ranking of the Europe Agreement's objectives***

Chapter three indicated that the Agreement varied significantly in the extent of detail provided. The trade provisions, for example, are much more detailed than other provisions and this is supported by the analysis in chapter five. Taken together with the interim agreement this has helped to ensure that the trade provisions have been implemented ahead of other provisions.<sup>11</sup>

The Commission's White Paper has identified and rectified the vagueness in certain parts of the Europe Agreement, principally Article 68 on the approximation of laws. The table contained in the Polish Opinion clearly demonstrates that Poland has made significant progress in implementing the White Paper. Table fifteen demonstrates that progress is less advanced where the measures to be adopted or the standards to be attained are less precise. This would support Sabatier and Mazmanian's contention that the greater the clarity of a provision, the smoother the implementation is likely to be.

Some of the implementation disputes which were analysed in chapter seven arose in part due to disputes as to the interpretation of the Agreement. In the Daewoo, oil and citrus disputes the parties differed in their interpretation of Agreement articles. This prolonged the dispute and therefore acted as a break on the implementation process. So it may be clearly seen that where an Agreement contains terms which are either vague or undefined, such as "consultation" or "restructuring", then this may hinder the implementation process by causing disagreement between the parties.

---

<sup>11</sup> "People do not really talk about the Europe Agreements any more. They have been taken over by events such as the work on harmonisation of laws and application for membership. What is important are the trade provisions because they provide concrete goals and obligations with a timetable." Interview with Jorgen Mordenstein.



Disputes which arise due to conflict over the meaning of the Agreement's provisions show that the process of interpretation is not linear. This necessarily prolongs the implementation process in the way demonstrated in diagram three:

**Diagram Three: Non-linear implementation**

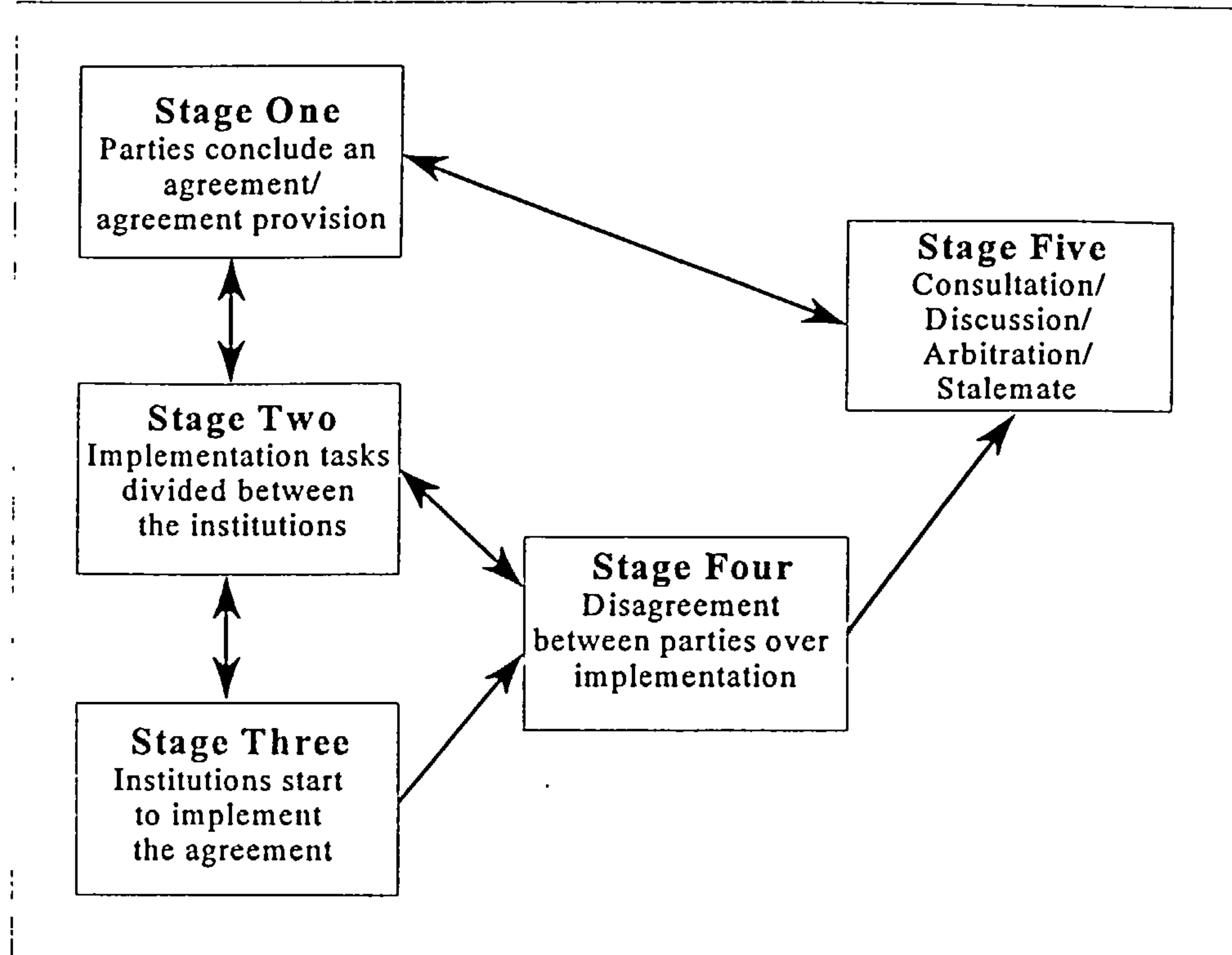


Diagram three illustrates the policy cycle which may take place during implementation. Where implementation is linear then the implementation process will follow stages one to three. However, the need to define or redefine the meaning of certain provisions may emerge during the implementation process. This will require that some or all of the implementation stages, outlined in diagram three, are revisited. Examples may be seen in the steel and oil disputes where the parties disagreed about the meaning of certain Articles in the Europe Agreement (stage four). This meant that the restructuring programme required to implement the Agreement (stage two) could not be devised and implemented (stage three) until the parties reached an agreement on the interpretation of the relevant provisions (stages five and one).



This picture of implementation is further complicated by the fact that stage two in the implementation process may also not be linear. This is discussed in more detail in relation to category (B) (4) below.

## *2. Financial resources available to the implementing institutions*

The Europe Agreement is implemented using finance from a variety of sources: the Polish government, PHARE, EIB loans, EBRD loans and so on. These are discussed in more detail in chapter three. The health of the Polish economy is central in determining the level of finance which the Polish government may make available for implementation and the impact of economic restructuring upon implementation is discussed in relation to category (C) below.

## *3. The extent of hierarchical integration within and among implementing institutions*

The Europe Agreement itself provides only for a limited institutional framework designed to oversee implementation: the Association Council; the Association Committee; and the Joint Parliamentary Committee (JPC).<sup>12</sup> Chapter six demonstrated that although the text of the Agreement indicates that the bulk of the decision-making power rests with the Association Council, in reality the vast majority of the detailed and day-to-day decisions are in fact taken by the Association Committee.

Chapter six also explained that four levels of implementing institutions exist to carry out implementation:

1. Polish structures;
2. Joint Polish/EU structures;

---

<sup>12</sup> The main functions and powers of these committees are discussed in chapters five and six.

3. EU structures; and
4. Member State structures.

These structures, with the exception of the dedicated institutions mentioned above, are not specifically identified with the text of the Agreement so it is important in this implementation study to look beyond the limits of Sabatier and Mazmanian's framework and consider all implementing institutions.

The implementation structures which have evolved present a complex and dynamic picture. Sabatier and Mazmanian stress the importance of hierarchical integration within and among implementing institutions. Chapters six and seven provide examples where integration has broken down, both within and among implementing institutions.

Chapter six demonstrated the different levels of implementing structures which have evolved within Poland. On two occasions the complexity of the structures has given rise to criticism of lack of coordination within the Polish structures. First, in August 1994, Poland's Supreme Chamber of Control presented a paper to the Sejm Europe Agreement Committee which stated that the Department of European Integration had "neither power nor means to coordinate, control and monitor the activities of the various institutions which should serve the purpose of European integration".<sup>13</sup> Secondly, following the citrus dispute in 1997, the Polish Prime Minister publicly chastised his Ministers for failing to respect the coordinating role of the European Integration Committee.

Such slips in coordination within the Polish structure are inevitable. The creation of a democratic process of government within Poland is evolving at the same time as the implementation of the Europe Agreement is taking place. Indeed the Polish

---

<sup>13</sup> *Polish Press on the Relations Between the EU and Poland*, August 1994, EU Delegation to Poland.

Constitution was only adopted in 1997. Moreover, the complexity of the Europe Agreement requires a complex system for implementation. The Polish side have worked hard to correct short comings in their implementation structures and acknowledge that the process is an evolving one.<sup>14</sup> With time a more streamlined system for implementation will inevitably be in place.

Chapter seven demonstrated a lack of coordination between implementing institutions, principally between the EU and Member State structures. The basic problem in a number of disputes was the conflicting objectives of the parties. In the tanneries dispute, for example, Italy was keen to protect the interests of its domestic industry while the Commission was more inclined to consider what was in the best long-term interests for the EU as a whole. In the oil and steel disputes the Commission reached agreement with the Polish side only to have it overturned by Member States. This is discussed in more detail in relation to category (B)(4) below.

All of the implementation disputes discussed in chapter seven demonstrate a lack of integration between the implementing institutions. This may be explained by reference to the competing objectives of the parties to the Agreement identified in chapter three.

#### *4. Extent to which decision-making rules of implementing agencies are supportive of the Agreement's objectives*

Chapter six demonstrated that in addition to a complex system of implementing structures, a complex system of decision-making rules exists. Within the Polish structures a system for checking the compatibility of existing legislation and legislative proposals with the *acquis* has evolved. This should mitigate against the existence or the adoption of legislation which conflicts with the Europe Agreement provisions. Responsibility for the implementation of the Agreement has been divided up amongst the government departments so that those officials

---

<sup>14</sup> Interview with Jan Borkowski.



with relevant expertise may oversee implementation of the appropriate provisions. This system of division has not been without problems though. The Polish governmental structure does not exactly mirror the allocation of DGs within the Commission. This has meant that on some occasions more than one Polish ministry has had responsibility for the implementation of a directive or, alternatively, there is no ministry dealing with a particular directive. This problem arose in relation to the directive on the recognition of professional qualifications. There had been a suggestion that the Ministry of Education should deal with the implementation of the directive but it refused, saying that they lacked the competence to deal with the task.<sup>15</sup>

This shows that within the implementation process outlined in category (B)(2) above, stage two of the process may not always be linear. So that the allocation of implementation tasks may result in overlapping responsibilities or in the failure to allocate responsibilities. In both cases this would require stage two to be revisited.

The lack of coordination between the Member States and the EU structures shows the limitations of one of the decision-making rules which should ensure smooth implementation: the duty of close cooperation, that is the “requirement of unity in the international representation of the Community”.<sup>16</sup> Whilst the ECJ may consider this duty to be one of the fundamental principles of external relations it is apparent that the Member States do not accord it the same respect. In both the oil and steel disputes the Commission had negotiated a compromise deal with Poland which certain Member States later refused to endorse. This highlights two problems for the EU side in mixed agreements. First, the difficulties which arise

---

<sup>15</sup> Interview with Maciej Gorka.

<sup>16</sup> *Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)* [1978] ECR 215 at para 35. This was discussed in chapters two and six.

where the Commission is given a limited or unclear mandate. Secondly, the conflict between the interests of Member States and the interests of the wider EU which have already been discussed at length in this thesis.

These conflicts reinforce the non-unitary nature of the EU discussed in chapter two. The Europe Agreement is a mixed agreement since it includes areas for which the EU has legislative competence, areas for which the Member States have legislative competence and areas where the legislative competence is shared between the EU and its Member States. Chapters two, six and seven examined the implications of the mixed agreement for the process of implementation. Table five demonstrated how the various Parties to the Europe Agreement may have a variety of implementing objectives. It further demonstrated that whilst it is possible for these objectives to overlap, there exists wide scope for conflict where different Parties pursue competing objectives during implementation. With the Polish Europe Agreement the division of competence between the EU and its Member States (ie within the EU side) was sometimes unclear to the Polish negotiators. For example, in the steel dispute the Polish negotiators assumed that the agreement which they had reached with the Commission represented a final deal assuming that the Commission proposals represented the agreed view of all institutions within the EU side. They did not anticipate a review of that agreement by the Member States nor that the Member States could block acceptance of the deal brokered by the Commission.

Moreover, table eleven demonstrates how the conclusion of a mixed agreement generates a very complex institutional structure to oversee that agreement with various institutions representing the interests of the Parties' to the agreement and the many layers of governance which make up each of the Parties. For example, the EU is comprised of a number of institutions each of which have played a role in the negotiation and conclusion of the Europe Agreement.



Although this thesis classified the EU and its institutions as one side the trade disputes in chapter seven demonstrate very clearly the competing interests which exist between EU institutions and both problems identified here have common roots in that they arise in part because of a limited EU foreign policy.<sup>17</sup>

The first problem identified above could be overcome by the Commission requesting a detailed mandate from the Council before embarking upon negotiations with third parties. However, not only would this be a very time-consuming process it may not be popular with the Commission since it may be perceived as undermining its authority to represent the EU side in mixed agreements. Another alternative would be for the EU side to grant the Commission a more open-ended negotiating mandate which would include an undertaking on the part of the Member States to endorse any Agreement reached by the Commission within the terms of that mandate. This would provide the Commission with greater flexibility in negotiations and could be granted more quickly since the level of detail would be limited. Whether the Member States would agree to this type of mandate would doubtless be dependent upon the sensitivity of the sector concerned. At the very least the implementation disputes examined in chapter seven highlight the need for greater use to be made of coordination meetings between the Member States and the Commission to limit the impact of diverging objectives.

### **C. Variables Affecting Implementation which are not Derived from the Agreement**

#### ***1. Variation over time in social, economic and technological conditions affecting the attainability of the Agreement's objectives***

It is apparent that changes in socio-economic conditions in particular have played an important role in the implementation of the Europe Agreement. The oil and steel disputes reflect the Polish government's concerns about the pace of

---

<sup>17</sup> See for example, Christopher Hill "The Capability-Expectations Gap, or Conceptualizing Europe's International Role" (1993) 31 *Journal of Common Market Studies* 305.



implementation and the impact which the required restructuring programmes are having upon the Polish people. This is discussed in more detail in relation to category (C)(3) below.

EU membership has been a constant objective for Poland. This has helped drive the implementation process forward since the progress in implementation is one of the factors relevant to the determination of membership. Chapter seven demonstrated the willingness of the EU side to link progress in implementation to the success of Poland's EU membership application in the Daewoo, oil, steel and citrus disputes. For the EU side implementation has taken place during a time of changing conditions. The focus within the EU has been firmly upon the progress towards the third and final stage of Economic and Monetary Union. Member States have been required to adopt stringent fiscal policies in order to comply with the convergence criteria stipulated in the EC treaty. The security threat from the CEES appears less immediate to the existing Member States; systems of democratic government are now in place in the CEES and Russia is an economically weakened state. Both of these factors may have reduced the urgency to extend EU membership to Poland. In addition, now that the financial costs of enlargement have been made explicit in Agenda 2000 many Member States, particularly those which may lose funding as a result of the CAP and structural funds reforms, may begin to see Poland as a threat to their position within the EU. It will be interesting to monitor the effects of these changes on implementation as the pre-accession phase advances.

## *2. The Amount and Continuity of Media attention to the problem addressed by the Agreement*

The Commission has used the media extensively during implementation to raise the profile of Polish implementation disputes. This enabled the Commission to demonstrate that it would not tolerate deviation from the implementation process by Poland. In addition, by making an example of Poland in this way, the

Commission was sending a clear signal to the other associated states, discouraging them from straying from the implementation process.

### *3. Variations over time and jurisdiction in public support for the Agreement's objectives*

The 1993 Polish legislative elections returned a government drawn from the post-Communist parties. This sent a very clear message to Polish politicians about popular disquiet at the impact of economic reforms and they are now highly sensitised to the need to balance restructuring and the social costs of the process.<sup>18</sup> The impact of this balancing process upon the implementation of the Europe Agreement was clearly seen in the oil and steel disputes where Poland has attempted to slow down the pace of implementation in order to lessen the social costs of restructuring.

#### **Additions to Sabatier and Mazmanian's Framework**

The textual analysis carried out in chapter six illustrated three ways in which the text of the Agreement could influence the implementation process:

1. By including provisions which permit the parties to adopt protectionist measures;
2. By including provisions which permit consultation to take place on issues beyond the scope of the Agreement; and
3. By including provisions which are based upon standards contained in the EC treaty.

The provisions outlined above may affect the implementation process in different ways. Provisions in categories (1) and (2) provide the possibility for conflict to take place between the parties. In both the oil and steel disputes Poland choose

---

<sup>18</sup> Jan Borkowski, *fn* 14 above.



to adopt protectionist measures. Poland chose to deviate from the agreed customs duties on oil, justifying its action under Article 28 Europe Agreement which permits the parties to adopt “appropriate measures” to protect sectors undergoing restructuring. In relation to steel Poland wished to extend the period in which it could grant state aids for restructuring, asserting that this was justified under Article 8(4) of Protocol 2 Europe Agreement. In both disputes the parties disagreed as to whether the adoption of protectionist measures was justified, protracting the dispute and slowing down the implementation process.

Table nine in chapter six provides a summary of provisions which permit consultation to take place on issues beyond the scope of the Europe Agreement. This may create tension between the parties to the Agreement in two ways. First, one of the parties may not wish for consultation to take place. Secondly, if consultation does take place and the issue is not directly covered in the Agreement then the Agreement cannot provide a solution to the issue. In both the Daewoo and citrus disputes the Polish side strongly contested that the issues raised did not fall directly within the framework of the Europe Agreement and at best infringed the “spirit of the Agreement”. In the Daewoo dispute the parties used an external standard, reference to the WCO rules, to reach an agreement after a very protracted dispute. The use of an external standard supports the contention that a solution to the dispute was not available within the framework of the Agreement and so any implementation analysis must take account of the impact of the international economic environment.

One of the most important aspects of the implementation analysis is the extent to which the implementation of the Agreement achieves its objectives. Chapter three delineated the various objectives which may be ascribed to the Agreement by each of the parties to the Agreement. It was noted that whilst these objectives may coincide, it was equally true that the parties had competing objectives. Chapter two employed Galanter’s framework to demonstrate the asymmetry in bargaining power between the parties to the Europe Agreement. The analysis characterises



the EU side as the repeat player, placing it in a stronger negotiating position than Poland. Table ten in chapter six graphically illustrates how the EU side was in a position to use its stronger position to ensure that the Agreement contained provisions which skewed implementation in its favour. The table provides seventeen examples of provisions which are based upon standards contained in the EC treaty. This helps to attain the EU side's objectives since it enables trade with Poland to take place on EU terms and conditions, terms and conditions with which EU companies are already familiar. In general terms it ensures the adoption of EC legislative models and promotes wider EU interests such as foreign policy or environmental goals.

The power imbalance in implementation has been further reinforced in favour of the EU side by the proliferation of autonomous legal measures. PHARE, structured dialogue, the Commission's White Paper, TAIEX, Agenda 2000 and the various summit declarations have all been adopted or modified by the EU side during the course of the implementation of the Europe Agreement. Poland was not a party to these measures and played no real role in shaping their content. Nonetheless the pre-eminence which the Polish side attaches to the implementation of the White Paper and the various pre-accession strategies is self-evident in the Agenda 2000 document.

Galanter's framework helps explain why implementation disputes covered in chapter seven have arisen. It also helps to explain why the parties adopted the positions they did during the course of those disputes. Table four, illustrating the model of the 'ideal type' repeat player and one-shotter, is reproduced below.

<b>Table Four: Model of the 'ideal type' repeat player and one-shotter</b>	
<b>Repeat Player</b>	<b>One-Shotter</b>
Anticipates repeated litigation	Claim large (relative to size)
Low stake in case outcome	Cost large relative to outcome
Resources to pursue long-term goals	Limited resources

The EU side may be characterised as the repeat player in the implementation disputes because it had superior resources to Poland, had relatively lower financial stakes in the outcome of the individual disputes and is involved in on-going implementation not merely with Poland but also with the other associated CEES. Two of Galanter's variables in particular support the idea the EU side has the advantages of the repeat player in any implementation dispute and therefore adopts negotiating positions to protect its status as the more dominant side. The first of these, category (4), provides that:

“Repeat players must establish and maintain credibility as a combatant. His interest is in his ‘bargaining reputation’ which serves as a resource to establish ‘commitment’ to his bargaining positions.”

In the tanneries dispute the Polish side expressed some surprise that a dispute concerning a relatively small economic problem should be the one which was referred to arbitration. Galanter's framework explains the symbolic importance of the trade disputes to the EU side. By adopting an aggressive negotiating stance, the EU side was sending a clear signal not only to Poland, but also to the other associated CEES that it would not tolerate deviation in the implementation of the Europe Agreement. The tough stance in the Daewoo and citrus disputes in particular may also be interpreted as an attempt by the Commission to reassure Member States that it could be trusted to protect their domestic interests whilst at the same time developing relations with the CEES.

The second important variable, category (7), provides that repeat players may play for rules in the litigation itself. Table thirteen in chapter seven highlights the ways in which the parties played for long-term rules or gains during the disputes. This may have been a relevant factor in the oil dispute where the Polish side believed that the EU were keen to ensure that a very restrictive interpretation of “restructuring” was adopted in order to discourage Poland and the other CEES



deviating from the terms of the Agreement by adopting protectionist measures under Article 28.

Galanter's framework explains why the Polish side has often adopted a contentious position during the implementation of the Europe Agreement. Whilst the EU side is clearly stronger, Poland is not the ideal type one-shotter characterised in the table above. This is because Poland is tied to the EU at least for a ten year period under the Europe Agreement and is convinced that its long terms goals are best served by becoming a member of the EU. Poland is therefore attempting to create its own bargaining reputation as described by Galanter. In addition, Poland has also attempted to use the implementation disputes to play for long-term rules or gains. In the steel dispute Poland hoped that working more cooperatively with the EU would ensure greater financial support for its restructuring programme. In the Daewoo dispute Poland sought to protect existing and future foreign direct investment. Finally, in the citrus dispute Poland hoped that conceding to EU demands would secure favourable pre-accession terms.

The power imbalance in favour of Poland helps to explain why, despite Polish attempts to adopt strong negotiating positions and despite the often superior strength of Polish legal arguments, disputes have been resolved on terms which are on the whole more favourable to the EU side than the Polish side. It is for this reason that the issue of relative power should be central to any implementation analysis dealing with external relations agreements.

Consideration should also be given to the role of the institutions in the policy-making process and in implementing the Agreement in the following ways:

1. The interplay between the institutions in a complex environment;



2. The overlap between the institutions involved in policy making and implementation (for example the overlap between the functions and powers of the Commission and the Member States in a mixed agreement);
3. The non-linear nature of implementation as demonstrated in diagram three; and
4. The way in which the text itself requires interplay between policy and implementation (for example, the role of the Association Council in interpreting the terms of the Agreement)

The factors outlined above support Sabatier and Mazmanian's contention that not only is policy implementation not linear but also that the institutions which are charged with the task of implementation must be supportive of the agreement's objectives if the implementation is to be successful. This thesis demonstrates that in certain circumstances such support is lacking and this leads to implementation difficulties.

The above analysis supports the incorporation of additions to the modified Sabatier and Mazmanian framework. It is submitted that these additional variables would be equally relevant to implementation studies concerning other mixed agreements.<sup>19</sup> The additional variables are represented in table eighteen:

---

<sup>19</sup>

The additions to the modified framework are in italics.

Table Eighteen: The modified and expanded implementation framework			
A. Tractability of the Problems	B. Coherency of the Structure of the Implementation Process	C. Variables Affecting Implementation which are not Derived from the Agreement	D. <i>Power Imbalance between the Parties to the Agreement</i>
<ol style="list-style-type: none"> <li>1. Difficulties in handling change</li> <li>2. Diversity of proscribed behaviour</li> <li>3. Percentage of population within a political jurisdiction whose behaviour needs to be changed</li> <li>4. Extent of behaviour required of target groups</li> </ol>	<ol style="list-style-type: none"> <li>1. Precision and clear ranking of the Europe Agreement's objectives</li> <li>2. Financial resources available to the implementing institutions</li> <li>3. The extent of hierarchical integration within and among implementing institutions</li> <li>4. Extent to which decision-making rules of implementing agencies are supportive of the Agreement's objectives, <i>particularly the extent to which the duty of close cooperation mitigates the effects of the non-unitary nature of the EU-side.</i></li> <li>5. <i>Extent to which the Agreement includes provisions which permit the parties to adopt protectionist measures</i></li> <li>6. <i>Extent to which the Agreement includes provisions which permit consultation to take place on issues beyond the scope of the Agreement.</i></li> </ol>	<ol style="list-style-type: none"> <li>1. Variation over time in social, economic <i>(including the international economic environment)</i> and technological conditions affecting the attainability of the Agreement's objectives</li> <li>2. The amount and continuity of media attention to the problem addressed by the Agreement</li> <li>3. Variations over time and jurisdiction in public support for the Agreement's objectives</li> </ol>	<ol style="list-style-type: none"> <li>1. <i>Extent to which the Agreement contains provisions which favour the objectives of one party over those of another</i></li> <li>2. <i>Extent to which the dominance of one party is reinforced by external factors such as the adoption of autonomous legal measures</i></li> </ol>

## Conclusions

The implementation analysis in this thesis provides an indication of the progress made in the implementation of the Polish Europe Agreement in the four years following its entry into force. During this period many changes have taken place in Polish-EU relations. Poland formally applied for EU membership in April 1994. The Commission adopted the White Paper on the Single Market in May 1995 and the Agenda 2000 document on enlargement of the EU in July 1997. The Luxembourg European Council approved the Agenda 2000 proposals and pre-accession talks with Poland began formally on 30 March 1998. As this thesis has demonstrated, these developments have played a significant role in shaping the pace and nature of the process of implementation of the Polish Europe Agreement.

The modified and expanded framework which has evolved from the analysis in this thesis indicates a number of variables which have impinged upon the implementation of the Europe Agreement. These variables may be divided into four broad categories:

1. The tractability of the problems;
2. The coherency of the structure of the implementation process;
3. Non-agreement variables; and
4. The power imbalance between the parties to the Agreement.

This thesis has demonstrated that a tripartite framework based upon a modified Sabatier and Mazmanian framework, power imbalance and institutional considerations helps to explain why progress in the implementation of the Agreement has proceeded more quickly in some areas than in others. It assists in



an understanding of why implementation disputes arise. It also provides an explanation as to why particular dispute resolution strategies are adopted by the parties during implementation disputes.

The analysis in this thesis has demonstrated the need for future implementation studies of mixed agreements to take account of the framework variables highlighted in table eighteen. In addition, future research should take particular account of the following features which have become apparent during the course of this analysis:

1. Studies must take account of all implementing agencies and not merely those identified in the Agreement between the parties;
2. The implementation process may not be linear;
3. The duty of close cooperation is limited;
4. The context within which implementation takes place is constantly evolving;
5. Implementation structures may be necessarily complex and may evolve;
6. The impression of whether the Agreement has been successfully implemented will vary depending upon which party carries out the assessment;
7. Further studies are required to consider the impact of any implemented measures in order to attain a true picture of the effectiveness of the Agreement.

The Polish Europe Agreement still has six years to run. Thus far implementation has progressed despite the difficulties indicated by the analysis in this thesis and the sometimes acrimonious disputes which have taken place. The implementation process to date has contributed a great deal to our understanding of Polish-EU relations in particular and to our understanding of the implementation of mixed agreements in general.

It is just possible that the implementation process reflects the vitality of relations between the parties. Poland is a newly independent state and is very sensitive to any attempts to dictate or control policy. At the same time, Poland is becoming increasingly aware of the trend towards globalization and the concomitant need for compromise which this entails. It is this shifting balance between the need to be strong, or the friend of a strong person, which is given expression in the implementation of the Polish Europe Agreement.

For Poland the ultimate measure of the success of the implementation process will be whether they become members of the EU. Only at that point may it truly reflect upon its implementation strategy and determine whether its approach was effective.

# **Annex One**

## **Single Market: White Paper Measures**



Annex One: Single Market - White Paper Measures						
White Paper Chapters		Directives		Regulations		Total
		Stage I	Stage II/III	Stage I	Stage II/III	
1. Free movement of Capital	Poland Number	3 3	1 1	0 0*	0 0	4 4
2. FM and safety of industrial products	Poland Number	27 56	77 104	3 4	0 1	107 165
3. Competition	Poland Number	2 3	0 0	1 1	0 0	3 4
4. Social policy and action	Poland Number	7 12	11 15	0 0	0 2	18 29
5. Agriculture	Poland Number	75 93	30 46	25 62	0 2	130 203
6. Transport	Poland Number	18 19	7 15	6 8	2 13	33 55
7. Audiovisual	Poland Number	1 1	0 0	0 0	0 0	1 1
8. Environment	Poland Number	9 31	2 7	4 7	0 0	15 45
9. Telecommunications	Poland Number	7 9	2 7	0 0	0 0	9 16
10. Direct taxation	Poland Number	2 2	1 2	0 0	0 0	3 4
11. Free movement of goods	Poland Number	0 0	0 0	0 0	0 0	0 0
12. Public procurement	Poland Number	5 5	1 1	0 0	0 0	6 6
13. Financial services	Poland Number	10 13	7 8	0 0	0 0	17 21
14. Protection of personal data	Poland Number	0 0	0 2	0 0	0 0	0 2
15. Company law	Poland Number	2 2	3 3	0 0	0 1	5 6
16. Accountancy	Poland Number	3 3	2 2	0 0	0 0	5 5
17. Civil law	Poland Number	0 1	1 1	0 0	0 0	1 2
18. Mutual recognition of prof. qual.	Poland Number	0 2	6 16	0 0	0 0	6 18
19. Intellectual property	Poland Number	5 5	3 3	0 0	0 3	8 11

Annex One: Single Market - White Paper Measures						
White Paper Chapters		Directives		Regulations		Total
		Stage I	Stage II/III	Stage I	Stage II/III	
20. Energy	Poland Number	7 10	0 2	0 3	0 0	7 15
21. Customs law	Poland Number	0 2	0 1	13 14	0 184	13 201
22. Indirect taxation	Poland Number	9 15	0 54	0 0	0 6	9 75
23. Consumer protection	Poland Number	5 8	0 3	0 0	0 0	5 11
<b>TOTAL</b>	Poland Number	<b>197</b> <b>295</b>	<b>154</b> <b>293</b>	<b>52</b> <b>99</b>	<b>2</b> <b>212</b>	<b>405</b> <b>899</b>

Number means the number of White Paper measures to be adopted.

# Bibliography



## Bibliography

Addo, "A Critical Analysis of Perennial International Economic Law Problems of EEC-ACP Relations" (1990) GerYIL 33

Kenneth Armstrong and Simon Bulmer, *The Governance of the European Market* (Manchester University Press, 1998)

Peter Balazs, "The Globalization of Eastern European Enlargement of the European Union: Symptoms and Consequences" in Marc Maresceau (ed), *The Political and Legal Framework of Relations Between the European Community and Eastern Europe* (Martinus Nijhof, 1989)

Eugene Bardach, *The Implementation Game* (MIT Press, 1977)

Richard Behar, "Towards a New Federal Europe" (1992) New Law Journal 664

Paul Berman, "The Study of Macro- and Micro-Implementation" (1978) 26 Public Policy 157

L J Brinjhurts, "Permanent Mission of the EC in Third Countries: European Diplomacy in the Making" (1984) LIEI 23

A. Brown, "Notification: Whether to Submit to the Flawed Sysytem" (1992) 17 ELT 323

Carolyn Brzezinski, "The EC-Poland Association Agreement: Harmonisation of an aspiring Member State's Company Law" (1993) 43 Harvard International Law Journal 105

Laura Cram, *Polic-making in the EU: Conceptual Lenses and the Integration Process* (Routledge, 1997)

Marise Cremona, "The Movement of Persons, Establishment and Services" in Marc Maresceau (ed), *The Political and Legal Framework of Relations Between the European Community and Eastern Europe* (Martinus Nijhof, 1989)

Wladyslaw Czaplinski, "International Law and Polish Municipal Law: A Case Study" (1995) 8 Hague Yearbook of International Law 31.

A Dashwood, "The Limits of European Community Powers" (1996) 21 ELRev 113

Norman Davies, *Europe: A History* (Oxford University Press, 1996)

Norman Davies, *The Heart of Europe: A Short History of Poland* (Oxford University Press, 1986)

Pal Dunay, Tomas Kende and Timas Szucs, "The Integration of Central and Eastern Europe into the Common and Foreign and Security Policy of the European Fifteen", in Marc Maresceau (ed), *The Political and Legal Framework of Relations Between the European Community and Eastern Europe* (Martinus Nijhof, 1989)

The Economist Intelligence Unit, "Country Profile 1996-97:Poland"

Andrew Evans, "Voluntary Harmonisation in Integration Between the European Community and Eastern Europe" (1997) 22 ELRev 210

Lykke Friis, "The End of the Beginning of Eastern Enlargement- Luxembourg Summit and Agenda-setting" (1998) European Intergration Online Papers vol12 no7

Marc Galanter, "The Architecture of the Legal System" in *Law and Society* C M Campbell and Paul Wiles (editors) (Martin Robertson and Co, 1979)

Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1974) 9 *Law and Society* 95

Joanne Gowa, *Allies, Adversaries and International Trade* (Princeton, NJ, 1994)

Joseph Grieco, *Cooperation Among Nations: Europe, America and Non-Tariff Barriers to Trade* (Othaca, NY, 1990)

Groux and Manin, *the European Communities in the International Order* (European perspectives, 1985)

Andrzej Haramowicz and Jaroslaw Pietras, "State and Prospects of Poland's Relations with the EU" (1994) *Polish Quarterly of International Affairs* 59

Jacqueline Hayden, *Poles Apart: Solidarity and the New Poland* (Irish Academic Oress, 1994)

Dan Horowitz, "The EC-Central/East European Relations: New Principles for a New Era" (1990) *CMLRev* 259

Tamara Hervey, *European Social Law and Policy* (Longman, 1998)

Christopher Hill, "The Capability -Expectations Gaps, or Conceptualizing Europe's International Role" (1993) 31 *Journal of Common Market Studies* 305



Danuta Hubner, "On National Strategy for Integration" (1997) 1 Yearbook of Polish European Studies 177

Elizabieta Kawecka-Wrzykoska and Jozef Mislá, "Sensitive Products in Poland's Exports; Access to the EC Market Under the Europe Agreement" Paper no.42 Foreign Trade Research Institute, 1993, Warsaw

Elizabieta Kawecka-Wrzykoska "Poland and the European Communities: Impact of The Europe Agreement on the Integration of Poland into the European Economy" Paper no.42 Foreign Trade Research Institute, 1993, Warsaw

Heinz Kramer, "The European Community response to the New 'Eastern Europe'" (1993) Journal of Common Market Studies 213

Lasok and Bridge, *law and the Institutions of the European Union* (Butterworths, 1994, 5th edition)

Leopold, "External Relations Power of the EEC in Theory and Practice" 9(1997) 26 ACLQ 54

Peter Ludlow, "Recasting the European Political System 1950-1996" (1996) CEPS Review

I Macleod, ID Hendry and Stephen Hyett, *The External Relations of the European Communities* (clarendon Press, 1996)

Marc Maresceau, "A General Survey of the Current Legal Framework of Trade Relations Between the European Community and Eastern Europe" in Marc Maresceau (ed), *The Political and Legal Framework of Relations Between the European Community and Eastern Europe* (Martinus Nijhof, 1989)

- John Maslen, "the European Community's Relations with the State-Trading Countries: 1981-1983" 9(1983) Yearbook of European Law
- John Maslen, "The European Community's Relations with the State-Trading Countries: 1984-86" 1986 Yearbook of European Law
- Daniel Mazmanian and Paul Sabatier, *Effective Policy Implementation* (Lexington, 1983)
- Dominic Mc Goldrick, *Internationald Relatiosn of The European Union* (Longman, 1997)
- Jerzy Menkes, "Evolution of the Europe Agreement and Changes in Poland-EU Relations" (1995) Polish Quarterly of International Affairs 81
- Ndrew A Michta, "Democratic Consolidation in Poland after 1989", in *The Consolidation of Democracy in East-Central Europe*, Karen Daisha and Bruce Parrot (editors) (Cambridge University Press, 1997)
- Frances Millard, *The Anatomy of the New Poland* 9edgar Elgar Publishing Limited, 1994)
- Alan S Milward, "Conlcuopm: The Value of Histroy" in Milward et al, *the Frontier of National Sovereignty: History and Theory 1945-1992* (London, 1993)
- Andrew Moravcsik, *The Choice for Europe* (UCL, 1999)
- John F Nash Jnr, *Essays on Game Theory*, (Edward Elgar, 1996)
- J Nash, "The Bargaining Problem" (1950) Econometrica 155

- J Nash, "Non-Cooperative Games" (1951) *Annual of Mathematics* 286
- J Nash, "Two-person Cooperative Games" (1953) *Econometrica* 128
- N Neuwal, "Joint Participation in International Treaties and the Exercise of Powers by the EEC and its Member States: Mixed Agreements" (1991) 28 *CMLRev* 717
- S. Nuttall, "The European Commission's Internal Arrangements for Foreign Affairs and External Relations" (1995) *CFSP Forum* 2
- D O'Keeffe and H G Schermers (eds), *Mixed Agreements* (Kluwer, 1983)
- M Osborne and A Rubenstein, *Bargaining and Markets* (San Diego Academic Press, 1990)
- M Osborne and A Rubenstein, *A Course in Game Theory* (MIT Press: 1994)
- P Pescatore, "The Doctrine of Direct Effect: An infant Disease of Community Law" 9(1983) *ELRev* 153
- John Pinder, *the European Community and Eastern Europe* (Pinter Publishing, 1991)
- Eugeniusz Piontek, "Europe Agreement EEC-Poland (Legal Concept of a Scheme)" (1991-1992) *Polish Yearbook of international Law* 133
- Lynn E Ramsey, "The Implications of the Europe Agreement for an Expanded European Union" (1995) 44 *ICLQ* 161



Lynn E Ramsey, "Towards a Wider European Union: A commentary on the Possible Accession of Poland and Hungary to the European Union" 91995) European Public Law 189

Joanna Regulska, "Democratic Elections and Political Restructuring in Poland 1989-91" in *The New Political Geography of Eastern Europe*, John O'Loughlin and Herman van der Wusten (eds) (Belhaven Press, 1993)

Martin Rein and Francine Rabinovits, *Implementation: A Theoretical Perspective* (Cambridge, Mass: Joint Centre for Urban Studies, March 1997)

Ilona Romiszewska, "The European Communities and the Central and East European Countries: from Aloofness through Cooperation to Association and Membership ?" (1992) Polish Western Affairs 61

Mark Salter and Gordon McLachlin, *Poland: The Historical Framework* (Rough Guides, 1996)

Pawel Sameki, "The Necessary Changes in PHARE" paper delivered at the round table conference "Callander for Europe" International Vienna Council, Trieste, 29 February 1996

Jacek Saryusz-Wolski, "The Reintegration of the 'Old Continent': Avoiding the Costs of the 'Half-Europe'" in Simon Bulmer and Andrew Scott (eds), *Economic and Political Integration in Europe: Internal Dynamics and Global Context*

Sidentopf and Ziller (editors), *Making European Policies Work: the Implementation of Community Legislation in the Member States*, 2 volumes (1998)

- K R Simmons, "The Evolution of External Relations Law of the European Economic Community" (1979) 28 ICLQ 644
- Shaw and Moore (eds), *New Legal Dynamics of the European Union* (OUP, 1995)
- Ewa Skrzydło-Telford, "Polish Practice in International Law" (1995-96) 12 Polish Yearbook of International Law 31
- Francis Snyder, "The Effectiveness of European Community Law: Institutions Processes, Tools and Techniques" in T Daintith (ed) *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (J Wiley, 1996)
- Stanisław Soltysinski, "Agreement on Association of Poland with the European Communities (Legal and Economic Issues)" (1991-1992) Polish Yearbook of International Law
- Rebata Starwaska, "Poland's Association with the EEC" (1992) Polish Western Affairs 77
- Marek Tabor, "Dynamika i Uwarunkowania Procesu Negocjacji Układu Europejskiego" in *Polka w Procesie Integracji Współnotami Europejskimi* (Wydawnictwo Naukowe, 1994)
- Dian Thomson, "Relations Between the EC and Eastern Europe" (1990) European Access 34
- C W A Timmermans and E L M Volker, *Divisions of Power Between the European Community and their Member States in the Field of External Relations* (Kluwer, 1981)

A G Toth, *Oxford Encyclopaedia of European Community Law* (OUP, 1990)

Lod Van Den Hende and Carl Van Horn, "The Policy Implementation Process: A Conceptual Framework" (1975) 6 *Administration and Society* 445

ELM Volker and CWA Timmermans, *The Division of power Between the Communities and their Member States in the Field of External Relations* (Kluwer, 1981)

Helen Wallace and William Wallace, *Policy Making in the European Union* (Oxford University Press, 1996, 3rd edition)

J Weiler, "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle" in O'Keefe and Schermers (eds), *Mixed Agreements* (Kluwer, 1993)

A Winters, "The Association Process: Making it Work for Europe" in *Material Konferencji EWG Poswieconej umowom Europejskim*, Brussels 27 February 1992

L A Winters, "Liberalization of the European Steel Trade" in *European Union Trade with Eastern Europe*, Riccardo Fainin and Richard Portes (eds) (CEPR, 1994)

Jerzy Andrzej Wojciechowski, "The Polish Law and European Union Law: The Process of Harmonisation" (1995) *Yearbook of Polish Foreign Policy* 70

Adam Zamoyski, *The Polish Way* (John Murray, 1987)