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THE LIMITS OF INTEGRATION: EASTERN EUROPE AND THE EUROPEAN COMMUNITIES

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1. Introduction

Four years into the transition to capitalism, the dramatic financial and legal programmes of “market reform” which flooded East and Central Europe after the fall of the Berlin Wall are coming in for critical assessment.¹ The report card for the loose partnership of international advisers, private investors, public institutions and banks with once enthusiastic local reformers, who have aggressively pursued “a market economy” by experimenting with, among other things, shock therapy, mass privatization and deregulation, is, at best, ambiguous. Not surprisingly, the transition to the market has been uncertain and halting throughout the East, and all agree that it will take longer and involve more political risks than had been anticipated.² Yet whether successful or not, this is a dramatic story – small teams of economists rearranging international finance, local institutions and legal culture. Even criticism carries the urgency of choice – a different policy, different advisers and the transition might yet be “successful.”

The drama of this economic and financial story has been matched by

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1. See e.g. J.A. Kregel and E. Matzner, *The Market Shock: An Agenda for The Socio-Economic Reconstruction of Central and Eastern Europe* (1992); D. Stark, “Path Dependency and Privatization in East-Central Europe”, 6 (1992) *E. Eur. Pol. & Soc.*, 17. See also O.J. Blanchard, R. Dornbusch, P.R. Krumhan, R. Layard and L.M. Summers, *Reform in Eastern Europe*, (1991), 31–58.

2. See “Towards a Closer Association with the Countries of Central & Eastern Europe”, Communication by the Commission to the Council of 26 April 1993, p. 2.

a broader geopolitical narrative. How would West and East respond to the end of the Cold War? Four years ago, this seemed a matter for statecraft: men like Gorbachev, Kohl, Bush, and Delors were making heroic decisions about the general shape of post-Communist Europe: a "common house," "concentric circles," and so forth. Geopolitics remains with us, chastened and refracted into nuanced and technical choices about aid levels and into editorial page polemics about American "engagement," or "isolation," European "identity" and "responsibility," etc.

These dramas have somewhat obscured the simultaneous institutionalization of relations between the countries of the old Soviet bloc and the institutions of Western European integration. This story has been more benign, continuous and unprogrammable, an affair more of habit than choice. It has been the work of experts and bureaucrats and has often been thought simply to track the natural evolution of economic reform: political integration follows economic development. The European Communities will welcome the nations of East and Central Europe to "partnership," "association," and perhaps "membership" as they develop successful market economies and resolve any remaining political instability.

This article concerns the pattern given these institutional relations by decisions taken over the past four years in Brussels. It is an update, if you will, on the consolidation of a troubling style of relations between the European Communities and its Eastern neighbours.³ This style is discernible in the details of trade initiatives and legal negotiations rather than in the drama of geopolitical negotiation or programmes of economic reform. Our contention is that these bureaucratic initiatives, apparently adjustments to the market and to political realities, have an uncanny mind and strategy of their own.

2. A transitional dilemma

The EC has been viewed and views itself as the key external player in the political and economic restructuring programmes of Eastern

3. See Kennedy and Webb, "Integration: Eastern Europe and the European Economic Communities", 28 *Col. J. of Transn. L.* (1990), 633.

Europe. On a superficial level, the EC's role appears benign, its efforts focused on transferring its technical expertise, gained in the construction of the EC's internal market, and sharing the collective financial resources of its Members. The EC's technocratic, as opposed to political, and supranationalist, as opposed to nationalist, approaches to governing contribute to this impression. The EC has nevertheless moved with deliberate speed to set the agenda for relations between East and West Europe, to administer aid, negotiate trade and aid agreements, act as technical assistant, mentor, perhaps even trustee, for these emerging nations.

And it has not been a disinterested trusteeship. The fabric of relations being woven between East and West is first visible in the collision between the demands of trusteeship and the EC's own internal agenda: *its* timetable for integration, *its* trade needs, *its* perceived financial limits and absorptive capacity, in short, *its* model of the possible. This is more than a matter of reluctantly lifted trade barriers, or a "new protectionism." The result has been acceptance, on both sides, of what have come to be seen as "realities" framing the whole complex of issues between East and West Europe. For example, that there can be no discussion of membership in the EC until after the resolution of the EC's internal struggle over the Maastricht Treaty for European Union (Maastricht Treaty) and clarification of its relations with members of the European Free Trade Association (EFTA). That the block to membership is the East's ability to withstand Western competition, rather than the West's ability to absorb Eastern steel, textiles, agricultural products, wage rates, migration or development costs. Or, that while East/Central European nations wait in line, the EC will approach their development as is its custom in relating to third countries: one by one, on a case by case basis, using a combination of trade and aid rather than the complement of "cohesion" policies available to underdeveloped markets within the EC, offering its legislation wholesale for adoption without input into its formulation, insisting on convertible capital but not free movement of workers, and so on.

More importantly, perhaps, developments within and outside the EC have been treated as only tangentially related, responsive to altogether different sorts of policy. Internal matters have an immediate political

life of their own, full of integrated choices and opportunities. Here the full range of macro and micro management, public/private partnership, industrial policy and redistributive tools is available. Although political responsibility is often deferred to the Member States, the EC increasingly acts as a responsible market manager and policy maker, buffeted by political interests local and global.

By contrast, relations with the East have followed the logic of local development, for which political responsibility must rest with local leadership. The EC's contribution has been technical and responsive, rather than innovative, and built on a narrow range of policy options familiar from international trade and development. At best, the EC has offered policies developed at home for adoption in the East. Most importantly, the EC is able to fully displace political responsibility outside, onto the East and Central Europeans. In this rather passive vision, even were there the desire to engage, the EC must rather accept the "challenge" of patience, technical advising and extension of trade and aid as the Eastern European countries struggle to satisfy the various "conditions" attached to full integration with the West.

The East's initial response must have been gratifying. Poland volunteered as an economic laboratory, swallowing the bitter medicine of shock therapy amid promises of a quick road to a convertible currency, stock markets and the other trappings of prosperous market economies. The former Czechoslovakia's voucher privatization scheme purports to blaze a shortcut to a market economy, while the more methodical Hungary has emphasized case-by-case negotiations with big Western companies to transform its industrial and service base.

The East's orthodox enthusiasm for the market reflected in these policies has waned and matured a bit over time, perhaps as economic theory gets its due from political and social reality. Just as importantly, Eastern Europeans, who initially embraced EC membership as a panacea for many of their problems, have gradually come to acknowledge, not only that membership is not necessarily being offered any time soon, but that there are enduring barriers to the deepening of ties with the EC which may not have been easily discernible from the ambitious end of the Cold War rhetoric heard from the West. This creates a dilemma for which no coherent response is so far perceptible. If

it fails to accept and rely on the advice, aid, economic policies, regulations and investment offered by the EC, an Eastern European country may effectively condemn itself to remain indefinitely in the no person's land of transition to a market economy. By accepting these things, on the other hand, with all of the caveats and conditions imposed by the EC, an Eastern European country narrows the options and tools available to it in carrying out this transition with none of the firm commitments that the EC has granted in the past to existing and future members, such as Greece, Portugal, Spain and the former East Germany. Put another way, the EC's internal agenda, together with the increasing hegemony of its policies and regulations in the greater Europe, have come to dominate over competing considerations of Eastern European political and economic development in shaping EC-Eastern European relations.

3. EC-Eastern European relations: From COMECON to Association

The EC's relations with Eastern Europe can be divided into three essential phases:

- an initial phase in which there are limited bilateral or multilateral links between the EC and its Member States and the Council for Mutual Economic Assistance (COMECON) and its members, with the EC applying a technical set of rules for state-trading countries devised under the Common Commercial Policy (CCP);
- a second phase, in which the EC takes the lead in orchestrating the Western response to the fall of the Soviet bloc and completes the “normalization” of trade relations; and
- the current phase, in which the EC, challenged by internal conflicts and a debate over enlargement, manages “association” relationships with Hungary, Poland, the Czech Republic, the Slovak Republic,⁴

4. The EC initially signed an Association Agreement with the Czech and Slovak Republic and is now in the process of negotiating a replacement with each country individually.

Bulgaria and Romania (the Association Countries), which are designed gradually to deepen economic, legal and institutional links.

3.1 *Phases one and two: The normalization of trade relations*

The most striking consequence of the EC's determination to approach post-Cold War relations with the East within its traditional external affairs framework is the consistency of its policies, if not always its methods, with initiatives prior to the fall of the Soviet bloc and with the EC's trade and aid initiatives with respect to other developing third countries. There was, prior to 1988, virtually no institutional framework for trade relations between the EC and Eastern European countries (other than common GATT membership in the cases of Hungary, Poland, Czechoslovakia and Romania), as the EC refused on both legal and political grounds to negotiate trade matters with COMECON.⁵ In building the tools for implementation of the CCP, the EC adopted into Community legislation the various quantitative restrictions imposed by the Member States on imports from state-trading countries. Through methodical application of its powers under the CCP, the EC managed gradually to reduce these restrictions over time, although a significant number remained in place in 1988.

This unilateral approach to trade was discarded in the late 1980s in favour of bilateral trade agreements as the Soviet bloc countries agreed to deal directly with the EC on trade matters. Between late 1988 and early 1990, the EC entered into trade agreements with Hungary, Poland, Czechoslovakia, East Germany, Bulgaria, Romania and the Soviet Union.⁶ These agreements established a framework for negotiations on agricultural trade, a commitment to commercial cooperation and a

5. The exceptions were Romania, which signed a so-called "first generation" trade agreement with the EC in 1980, which provided for the gradual reduction (without a specific timetable) of the quantitative restrictions permitted at the time of Romania's accession to the GATT (Council Regulation 3338/80, O.J. 1980, L 352/1), and East Germany, which enjoyed a special trade status pursuant to West Germany's "Basic Law", which was recognized in the Protocol Relating to German Internal Trade and Connected Problems to the Treaty of Rome.

6. See Kennedy and Webb, *supra* note 2, at 642-647.

timetable for the elimination of quantitative restrictions imposed by the EC on industrial products.

The rapid disintegration of the Soviet bloc mooted these arrangements even before they were ratified, as relations with the newly emerging democracies surged to the top of the EC's external affairs agenda. Under the leadership of the EC Commission, the OECD adopted the Poland/Hungary Assistance for Economic Restructuring (PHARE) Programme in July 1989. The cornerstone achievement of the PHARE programme was to eliminate quantitative restrictions on industrial imports to the EC from, in a first phase, Poland and Hungary and later all Eastern European countries (other than the Soviet Union). The EC's PHARE package, supplemented by similar and generally more modest initiatives by other OECD members, further included shipments of EC agricultural products, currency support funds, loans and grants for infrastructure projects and technical assistance in a variety of areas, including agriculture, banking, education, vocational training and privatization. During this period, the EC also led the establishment of the European Bank for Reconstruction and Development, which now provides a source of funds for equity investments and loans for public and private sector projects.⁷

Although the EC thus responded quickly to the developments in Eastern Europe, the key word was "normalizing" not innovating. Trade and political relations were placed on the same footing as those with other unstable and impoverished third countries. Despite the early rhetoric, the limits of what the EC was prepared to do for Eastern Europe appeared quickly.

3.2 *Phase three: Integration and its limits*

3.2.1 *Overview*

As the architect and principal protagonist of the West's response to the changes in Eastern Europe, the EC has successfully used a combination

7. For the PHARE programme, see e.g. Sarat, "L'Assistance de la Communauté à la Pologne et à la Hongrie", 333 RMC (1990), 14 and Kennedy and Webb, *supra* note 2, at 648–652.

of aid packages, influence obtained through the "advice-giving" process and pure economic muscle, to define the scope and speed of political and economic relations with the countries of Central and Eastern Europe in a manner consistent with its own internal priorities. In an odd reversal of Cold War/Marshall Plan priorities, the EC's relations with the East (initially in the context of the PHARE programme and now pursuant to the Association Agreements described below) have been driven by its determination that nothing should disrupt the satisfactory resolution of an internal EC debate over "deepening versus widening," which preserves both the accomplishments to date of the single market and Brussels' future vision for the Communities.⁸ At the same time, Brussels has insisted that legal and economic integration between the EC and the members of EFTA come before East/West integration, and the EC is currently engaged in accession discussions with four EFTA countries.

Recent events in the EC have intensified the "deepening versus widening" debate and opened up new areas of conflict. The ratification process for the Treaty on European Union signed at Maastricht in December 1991, became a forum for Europeans to reconsider integration in the West.⁹ EC unity has been further challenged by the successive

8. The Community vision of Brussels is of course quite controversial among the Member States, which explains, e.g. the Commission's recent embrace of the principle of "subsidiarity," a mechanism for EC deference to the institutions of the Member States (see e.g. Editorial Comment, "Subsidiarity: Backing the right horse?", 30 *CML Rev.* 241-245), and the reluctance of the EC to accept the possibility of "opting out" (in theory less drastic than "two speed Europe"), such as in the case of Britain's approval of the Maastricht Treaty minus the Social Chapter, and the recent concessions made to Denmark which led to a "Yes" vote on Maastricht in a second referendum.

9. Anti-Maastricht sentiment, most evident in Denmark and France, which held referenda on the subject, and Great Britain, has been expressed by persons from diverse parts of the ideological spectrum whose concerns about the nature of the Maastricht Treaty and the EC in general are by no means uniform. Similarly, even scholars generally supportive of developments in EC unity have expressed concern that the EC's drive for completion of the single market may have obscured broader questions of democratic legitimacy and cultural diversity. See e.g. Weiler, "The Transformation of Europe", 100 *Yale L. J.* (1991) 2403, 2474-2483.

As the EC Member States have been made aware in the wake of the debate over Maastricht, we believe that the Eastern European countries need to be sensitive of the political implications of EC integration. The EC's bias toward "government by experts" may be particularly ill-suited for developing democracies which need to cultivate the same strong constituencies and politically responsive institutions that the EC-style of govern-

failures of the ERM fixed parities to protect the weaker European currencies and by the inability of the EC to find a coherent policy for avoiding a prolonged civil war in Yugoslavia. Finally, the EC's approach to Eastern Europe is also influenced by the not fully anticipated economic impact of Germany taking on the burden of integrating with the former East Germany as well as other internal and external demands on the financial resources of the EC and its Member States.¹⁰

Under the prevailing priorities, relations with the East have become very much "separate track," isolated from "internal" EC policy-making. EC initiatives were drawn from the familiar portfolios of the trade and development experts. Indeed, the EC has largely followed its original blueprint of relatively modest aid, technical assistance, the gradual implementation of a customs union with protection in the sensitive sectors and non-binding efforts at coordinating policies in non-trade areas (which, ominously enough, recalls the thirty years of the EC's association with Turkey). The intense process of legal and, increasingly political and economic, integration practiced among the EC Member States and now the EFTA countries is reduced to an afterthought in relations with the East. Bureaucratic experts are sent to Eastern Europe to export EC solutions and legislation after they have been hammered out at home, and Eastern European government officials are invited as "observers" to various commissions and standards bodies.

For their part, the Association Countries have been most vocal on the issue of access to the EC market for their products and in seeking (unsuccessfully) to get the EC to commit itself to a timetable for their eventual membership. Significantly, however, in the negotiations regarding the association pacts discussed below, each country endorsed the EC's country-by-country approach and chose not to press any comprehen-

ing is designed to avoid. This is particularly disturbing in that the Association Countries are being asked to accept legislation adopted by institutions in which they do not participate, whose legitimacy is now subject to challenges by the nations which created them.

10. Greece, Portugal, Spain, Ireland and Southern Italy are the greatest beneficiaries of EC cohesion funds for underdeveloped regions. One of the attractions of the EEA or of accession of EFTA countries to the EC is that they will be required to contribute to this financial burden.

sive alternatives to the EC's proposals regarding institutional aspects or the terms, scope and timing of the non-trade provisions.

Together these conditions have made successful East/West integration ever more distant – precisely as it is becoming recognized that transition to a successful market system is *least* likely to succeed in the context of national autonomy within the bracing architecture of the international free trade system, and most likely under politically integrated “internal” market conditions.

3.2.2 *The Association Agreements*

Once the demise of the Soviet bloc was assured, the EC responded to the growing rumblings about EC membership by announcing that the “special” relationship between Western and Eastern Europe (excluding the republics of the former Soviet Union) would be assured through association agreements pursuant to Article 235 of the Treaty of Rome. The Association Agreements, finalized with Hungary, Poland and the Czech and Slovak Federal Republic at the end of 1991 and in 1992 with Bulgaria and Romania,¹¹ owe much both in scope and content to the EC's thirty-year old association arrangement with Turkey (the Turkey agreement).¹² Like the Turkey agreement (and, for that matter, virtually all of the EC's agreements with European countries, most notably the far-reaching EC-EFTA accord signed in December 1991), the Association Agreements are inspired by and, indeed, systematically incorporate provisions from the Treaty of Rome.

The details of the Association Agreements, including the differences among the individual agreements with each country, have been treated in detail elsewhere.¹³ Our focus here is on the following four key

11. Final ratification of all the agreements is still pending. The association relationship is being carried out prior to ratification pursuant to interim agreements.

12. The EC-Turkey Association Agreement was signed in 1963, although a 1970 Protocol contains detailed provisions for its implementation. Council Decision 64/372 and Council Regulation 2760/72, reprinted in 3 COLLECTION OF AGREEMENTS CONCLUDED BY THE EEC 541–683 (1978). It is worth pointing out that the EC's association agreement with Greece did promptly lead to Greek membership in the EC. See Kennedy and Webb, *supra* note 2, at 664–65.

13. See e.g. Benyon, “Les ‘accords européens’ avec la Hongrie, la Pologne et la Tchécoslovaquie”, 2 *Revue du Marché Unique Européen* (1992), 25; Bustin, Sussman, Tokarczyk and Strasser, “EC association agreements: time to renegotiate?” *Int'l Fin. L. Rev.* (Oct. 1992), 26; Lucron, “Contenu et Portée des Accords Entre la Communauté et la Hongrie, la Pologne et la Tchécoslovaquie”, 357 *RMC* (1992), 287.

aspects,¹⁴ all of which are equally present in the Turkey agreement and illustrate the EC's strategy of managing the integration process:

- First, one of the dominant themes of the agreements is that the various stages of integration are “conditional” on the associate's continued progress in political and market reform. Conditionality is used as a “carrot and a stick”; serving the twin aims of preserving the EC's flexibility and providing it with a basis to influence internal policy. Turkey has consistently failed to meet the EC's conditions in both the economic and political spheres, with the result that the relationship has failed to mature notwithstanding that, unlike the Association Agreements, the Turkey agreement expressly contemplates consideration of Turkey's accession after a specified period.¹⁵
- Second, the trade provisions of the Association Agreements maintain significant and potentially long-term barriers to trade between the EC and the Association Countries, particularly in “sensitive” sectors (such as coal, steel, textiles and agriculture). Significantly, trade in the sensitive sectors remains, after thirty years, a top issue on the EC-Turkey agenda.
- Third, the institutional links created by the Association Agreements, which are identical to the EC-Turkey arrangement, are relatively weak when compared, for example, to the European Economic Area (EEA) accord negotiated with the EFTA countries or even the EC's arrangements with the sixty-eight signatories to the Lomé Convention, the EC's most comprehensive regime of preferential trade and aid to developing countries.
- Fourth, the Association Agreements make only a small step in the complex process of the legal and political integration required for EC

14. Another aspect of the Association Agreements which reflects the EC's priorities is aid. The aid provisions of the Association Agreements are somewhat different from prior association agreements in that they make permanent the previously existing PHARE programme. Assuming they continue to comply with the conditionality requirements for association status, the Association Countries can rely on a steady source of technical assistance and aid for infrastructure projects. The commitment of resources in the PHARE programme, however, is much more limited than what the EC provides to new members both during and after the accession process.

15. Turkey has also been handicapped by its long-standing feud with Greece.

membership and, equally importantly, contemplate virtually no role for the Association Countries in the elaboration of future policies. The strikingly similar provisions of the EC-Turkey agreement have had little discernible impact on relations between the two parties.

3.2.2.1 Conditionality. The EC has imposed conditions at every stage of its relations with the Association Countries. PHARE was offered first to Poland and Hungary and later to the other countries as they showed a sufficient level of commitment to the market and democracy. The EC made conclusion of the Association Agreements conditional on progress in the Association Countries on political and economic reform. Finally, the Association Agreements themselves explicitly provide that progress on the association relationship will depend in part on progress of the Association Countries in developing a market economy.

Consistent with this overall approach, the EC originally wanted the Association Agreements to make no reference to future EC membership of the Association Countries. After lengthy negotiations, the EC agreed that the Agreements could acknowledge the aspirations of the Association Countries for membership on the basis of integration achieved under the Association Agreements.

With this express ambiguity in the Preamble of the Association Agreements in mind, the Association Countries have apprehensively observed the depending and widening dance among the EC institutions, the Member States and the EFTA countries. They are well aware that the Commission refused in 1990 to recommend that the EC begin accession negotiations with Turkey notwithstanding that the Turkey Agreement contemplates Turkey's membership in much stronger language than the Association Agreements. Putting aside their previous individual approach to the EC, in October 1992, Hungary, Poland and the CSFR sought to rekindle the issue by formally requesting, in a joint petition expressly excluding Bulgaria and Romania, that accession negotiations begin with each of them by 1996, in anticipation of membership no later than 2000.¹⁶

In preparation for the Edinburgh Summit in December 1992, the EC

16. See *Agence Europe, Europe Documents* No. 1802, 8 Oct. 1992.

Commission responded to the criticism implicit in the joint petition, as well as the criticism from various sources of the trade, institutional and legal provisions of the Association Agreements, by “accepting” the membership applications from the three countries without establishing any timetable for accession and acknowledging the need to “strengthen” the association relationship through a process of “gradual integration” of the three countries into the EC. Significantly, rather than agreeing that the conditions for accession have been satisfied, the Commission gave new meaning to its policy of conditionality by detailing the following list of accession conditions:

- the capacity of the Association Country to adopt the *acquis communautaire*;
- the stability of institutions in the Association Country guaranteeing democracy, the rule of law, human rights and respect for minorities;
- the existence of a functioning market economy; and
- the ability to cope with competitive pressures and market forces within the EC and the capacity of the EC to absorb new members.

To put it mildly, the EC has left itself a significant degree of flexibility in determining when and if the Association Countries and, indeed, by virtue of the fourth condition, the EC itself are prepared for full integration. In an April 1993 Communication to the Council, the EC Commission attempted to make a political break from the EC’s past discouragement of the pretensions to membership of the Association Countries, but without abandoning or even softening the fundamental terms of conditionality. In urging the Council to “confirm in a clear political message” the Community’s ultimate commitment to the accession of the Association Countries, the Commission repeated each of the “Edinburgh conditions,” including the EC’s capacity to absorb new members.¹⁷

17. The Commission’s Communication is, by Community standards, a relatively straightforward document. It acknowledges the deficiencies of the Association Agreements in respect of trade, and also that the political aspects of EC-Eastern European relations treat the Association Countries as outsiders. The accompanying Communication to the Commission from Commissioners Brittan and van den Broek further identifies the risk that the Association Countries “will inevitably remain [as producers] of labour intensive, low value-added basic goods”.

Up to now, the Association Countries have reacted to the conditions imposed by the EC by arguing that the conditions have been satisfied such that they are entitled to move to the next stage. As the EC's conditionality policy became more familiar, and the difficult process of catching up and keeping apace with the complex EC legislative agenda loomed, doubts among the Association Countries as to the wisdom of betting so heavily on EC integration began to surface, although no alternative approach was articulated. Rightly or wrongly, the Association Countries now appear prepared to await the reaction of the Council to the Commission's initiatives before exploring alternatives.

3.2.2.2 Trade and the free movement of goods. The greatest immediate impact the Association Agreements will have is that on in trade. Like the Turkey Agreement, the Association Agreements generally provide for the elimination of quantitative restrictions and asymmetrical reductions in tariffs. However, also reminiscent of the Turkey Agreement, the EC insisted on substantial protection in the sensitive sectors through the maintenance of quotas and tariffs.

Just as importantly, the EC retains full freedom to initiate anti-dumping proceedings with respect to imports from the Association Countries after consultation with the exporting country. And there are a number of recent examples which indicate that the EC will not be reluctant to defend EC producers against low-cost imports from the Association Countries.¹⁸ Furthermore, much of the EC's recent progress on facilitating internal trade as well as trade with the EFTA countries has been on eliminating trade barriers other than quantitative restrictions, tariffs and discriminatory taxes, through the harmonization of quality, safety and other rules, which is applicable in the Association

18. See e.g. Regulation 3296/92 (EEC), O.J. 1992, L 328/15 (anti-dumping duties on certain imports from various Eastern European countries, which notes the increase in exports to the Community since 1988); O.J. 1993, C 121/4 (a European Coal and Steel Consultative Committee Resolution recommending surveillance on steel imports from Eastern Europe). In a positive development, the Association Countries are no longer considered state-trading countries for purposes of the EC's external trade policy. Regulation 517/92, O.J. 1992, L 56/1, and Regulation 1013/93 O.J. 1993, L 103/1. Accordingly, the EC Commission can no longer ignore prices in these countries for purposes of determining "normal value" in anti-dumping proceedings as they can for state-trading countries. See e.g. Kennedy and Webb, *supra* note 2 at 641-42.

Agreements only through the general provisions of the agreements calling for legislative harmonization.¹⁹ In sum, while the Association Agreements promise a free trade area, they are at least initially an only extension, admittedly beyond the requirements of GATT, of the progress made in reducing barriers to Eastern European imports since the adoption of the CCP.

The EC has been severely criticized for the trade restrictions preserved in the Association Agreements, for example by Jacques Attali, former President of the EBRD. In response, the EC announced its intention to reduce the trade barriers in the sensitive sectors. Much to the astonishment of the Association Countries, however, in 1992 and early 1993, the EC in fact reduced steel and automobile quotas, strengthened tariff restrictions on other sensitive products and banned meat and dairy imports, alleging health concerns. Many Member States were simply not prepared for free trade with the basement of the common European house. The Commission's May 1993 proposals would accelerate the reduction in tariffs and other trade restrictions contained in the Association Agreements, although, at the time of this article, it was by no means clear that there would be sufficient support from the Member States to carry this out.

The ongoing issues of market access in the relationship between the EC and Eastern Europe have a number of implications for the Association Countries. A significant portion of the products currently manufactured in the Association Countries which are capable of export to the West are subject to restrictions under the Association Agreements. The Association Countries therefore continue to expend considerable political capital on trade issues, which might have been used elsewhere were the trade issues resolved more favourably in the Association Agreements. In doing so, the Association Countries remain squarely on the EC's external affairs agenda, which is shaped by a variety of internal political considerations over which they have no influence.

19. Similar to Art. 36 EEC, the Association Agreements explicitly permit import restrictions based on public policy, health, security, etc., unless they operate as a means of "arbitrary discrimination or disguised restriction on trade". However, without the detailed legislation which has made free movement of goods a reality within the EC, the impact of this provision may be limited.

The Association Countries also view the relatively low cost of labour in their region as their chief competitive advantage over developed country producers and as a means of attracting strategic foreign investors for their enterprises. The EC's trade restrictions, as well as the threat of anti-dumping duties for low-cost goods significantly undermines this potential.

Whether or not the trade rules ultimately permit the Association Countries to become favoured low-cost producers for the EC market, the form and content of trade relations between the EC and the Association Countries is disturbing. With so little emphasis in the relationship on the development and diversification of the economies of the Association Countries and on regulatory and institutional integration, the danger of increasing dependency of the developing Association Countries on the developed EC is apparent. Access to the EC markets may be structured to encourage the development in Eastern Europe of industrial tasks no longer compatible with the highly developed economies of the EC, whether because of environmental or health and safety concerns or the lack of technological or commercial sophistication.²⁰ This phenomenon has to some extent characterized North-South relations within the EC, but with the substantial difference that the less developed regions of the EC are the targets of significant EC aid programmes and are protected by the EC's regulatory agenda. On the other hand, the EC trade restrictions, together with the slow reconstruction of trade among Eastern European countries,²¹ are a major threat to the economic restructuring efforts of the Association Countries.

3.2.2.3 *Institutions.* The institutional provisions of the Association Agreements represent a deepening of links over the previously existing trade and cooperation agreements, but fall far short of making the Association Countries EC "insiders." Like the Turkey Agreement, they provide for a single joint institution known as the Association Coun-

20. Cf. note 17 and accompanying text.

21. The Association Countries have made halting efforts to establish trade links among themselves, but with little enthusiasm for an EC-level of political and institutional integration.

cil.²² The Association Council, composed of ministerial level representatives, is to be assisted by an Association Committee, made up of civil servants from the government of the relevant Association Country and the EC Council and Commission. The remaining institutional provisions of the accords essentially “normalize” political consultation between the EC and the Association Countries.²³ When contrasted, for example, with the breadth of institutions and specific grants of authority contained in the EFTA agreements²⁴ the Association Council’s largely undefined mandate and limited authority is indicative of just how far outside the EC’s inner circle the Association Countries lie.²⁵

The simple institutional structure of the Association Agreements is in a sense appropriate given that, in contrast, for example, to the EEA agreement, the Association Agreements provide little more than the basic elements for building ties between the EC and the Association Countries. In Brussels, however, the agendas of countless internal and external constituencies and institutions vie for the attention of the EC Council and Commission. The level of institutional integration con-

22. As in the Turkey Agreement, there is also a general provision for contacts between the EC Parliament and the Parliaments of each Association Country.

23. See e.g. Art. 3, which contemplates “consultations as appropriate ... at the highest political level.”

24. The EEA accord would establish a Council (responsible for laying down general guidelines and giving the political impetus to implementation of the accord), a Joint Committee (responsible for day-to-day implementation and revising the accord on the basis of new EC legislation), a Joint Parliamentary Committee and a Court. The accord also provides that the EC Commission will have authority over EC-EFTA competition matters, while a newly-established EFTA Surveillance Authority would handle competition matters where at least 33% of the EEA turnover of the companies involved was in the EFTA countries. The EEA Agreement therefore reflects a high level of institutional integration, noticeably balanced in favour of EC authority:

The institutional frameworks set up under the EEA have the effect of giving the EC a disproportionate role in EEA affairs. Not only would the EC institutions maintain full jurisdiction in relation to matters concerning EC territory, but new legislation would be developed largely by the EC institutions (albeit with consultation with the EFTA countries) and would then be proposed for adoption under the EEA agreement (Sussman and Webb, “A Blueprint for European Economic Integration”, (1991) *Int’l Fin. L. Rev.* 24, 26). Given this state of affairs, it is not surprising that most of the EFTA countries do not view the EEA as a viable alternative to EC membership.

25. Even the Lomé Convention, the EC’s preferential trade arrangement with sixty-eight developing African, Caribbean and Pacific countries, has arguably fostered stronger institutional contacts than the Association Agreements are likely to in their current form. See e.g. Lucron, “Méditerranée, Lomé: Des Politiques Globales?”, 318 *RMC* (1988) 321, 322.

tained in the Association Agreements may simultaneously indicate and dictate the portion of the EC's institutional priority which will be given to the Association Countries and their advocates within the EC itself.²⁶

3.2.2.4 Legal and Regulatory Integration. The Association Agreements incorporate or otherwise refer to the full range of the freedoms and common policies found in the Treaty of Rome, including the free movement of goods,²⁷ the right of establishment, the freedom to provide cross-border services, the free movement of workers, competition policy (including state aids), tax discrimination and non-discrimination by state monopolies. For the most part, beyond stating the principles themselves, the Association Agreements provide limited guidance as to how these rules, which have been the subject of years of judicial and legislative effort at the EC, will be implemented.

Most notably, in contrast to the recent EC-EFTA accord,²⁸ the Association Agreements do not incorporate any of the *acquis communautaire*, the vast body of EC legislation implementing the principles of the Treaty. Instead, the Association Agreements state simply:

The Contracting Parties recognize that a major precondition for [the Association Country's] integration into the Community is the approximation of that country's existing and future legislation to that of the Community. [The Association Country] shall act to ensure that future legislation is compatible with Community legislation as far as possible.

Thus, while, the brush of the Association Agreements touches virtually

26. The EC Commission has proposed permitting participation by the Association Countries in Council and Commission meetings (without the right to vote) in connection with specific EC policies unless a majority of Member States decide otherwise. As part of its May 1993 initiative, the Commission also proposed that the institutional provisions of the Association Agreements be strengthened through systematic meetings and consultations at both ministerial and working group levels. In contrast to the EEA accord, the proposals do not call for consultation with the Association Countries with respect to new legislation.

27. See note 19 *supra* and accompanying text.

28. The acceptance of the *acquis communautaire* by the EFTA countries (albeit with a variety of derogations and transitional periods), and the EC-EFTA institutions created to make this acceptance a reality with respect to existing and, ostensibly future, legislation, are the key distinguishing features which make the EEA agreement the EC's most comprehensive agreement with third countries.

every chapter of the Treaty of Rome, there is no timetable, nor really any explicit priority, for the legal and regulatory harmonization process. In light of the limited impact of similar provisions under the Turkey Agreement, the importance that these provisions will play in EC-Eastern European relations over the near term is unknown. Although there was early enthusiasm for relatively wholesale legislative importation – e.g. on intellectual property – this seems to have waned as the advantages of legislative differentiation and the obstacles to membership have become clear.

Competition Rules. In the case of the competition provisions under the Association Agreements, which track Articles 85 and 86 EEC, each Association Council is supposed to establish rules for their implementation by 1 March 1995.²⁹ The EC has already been active in providing advice to the Association Countries on competition policy, which is reflected in the similarity, at least on their face, between the competition rules of the EC and the Association countries. In many respects, moreover, coordination of enforcement of competition policies in the Association Countries on the basis of EC rules is in the EC's interest. The EC has already been faced with the problem of the extraterritorial application of its competition rules to privatization and other transactions in the Association Countries and EC companies may be served by strong enforcement of competition rules in the Association countries, particularly in the areas of state aids, government monopolies and abuses of dominant position.³⁰ The work of the Association Council in this area may provide insight into the Association Agreements as a whole because, for the EC to effectively coordinate the application of competition rules with the Association Countries, including taking into account the special circumstances of their developing economies, will require a significant level of political coordination and institutional respect which has by no means been demonstrated so far.

Right of Establishment. The Association Agreements provide that the EC is required to grant the right of establishment to nationals of

29. The EEA accord goes, of course, much further both in establishing competition rules and the procedures and institutions for their implementation.

30. With the possible exception of EC companies fortunate enough to acquire dominant positions through the privatization process.

Hungary, Poland and the CSFR immediately, while those countries are required to phase in the right over a 5–10 year period with respect to EC nationals. In fact, of course, the EC right of establishment, particularly in regulated sectors like banking and insurance, is the subject of detailed EC legislation (part of the *acquis communautaire*), which is not applicable under the Association Agreements.

Cross-Border Services. The Association Agreements are even less explicit with respect to cross-border services and the free movement of workers. Both of these areas have been among the most difficult to achieve of the *acquis communautaire* because they require the harmonization of complex bodies of regulatory law and speak directly to a unified Europe for companies, consumers and workers with all the accompanying economic and psychological risks. The less explicit provisions of the Association Agreements regarding cross-border services as compared to establishment can be attributed in part to two factors. First, the EC is itself still struggling with harmonizing the legislation of its Member States in this area and with implementing the harmonized rules. Second, these services, and the accompanying regulatory regimes, are not fully developed in the Association States. More fundamentally, the Association Agreements simply do not contemplate the level of political coordination and institutional sophistication that would be required to implement the freedom to provide cross-border services in a meaningful way.

Free Movement of Workers. The free movement of workers chapter of the Association Agreements adopts the principle of non-discrimination and in essence guarantees workers legally employed on the territory of the other contracting party access to social security and other social welfare protection on an equal basis with citizens of the contracting party. The Association Agreements encourage, but do not require, EC Member States to permit workers from Association Countries to work on their territories and require the Association Council after ten years to “examine further ways of improving the movement of workers, taking into account, *inter alia*, the social and economic situation” in the relevant Association Country and the EC. The EC Court of Justice has held that a more explicit provision of the Turkey Agreement, which required the Association Council to establish rules re-

garding the free movement of workers between the twelfth and twenty-second years did not have direct effect in the Member States and required further action by the Association Council, for which presumably the Court of Justice would not be prepared to fashion a remedy.³¹ Thus, although a strong commitment from the EC on accepting workers from Association Countries may have been politically valuable to the countries during their economic restructuring, the EC, which has not hesitated in expressing its fears about an influx of immigrants from the East, made clear that this privilege was only available to Members.

The Association Agreements overall encourage the Association Countries to adopt EC legislation without creating any framework or obvious incentive for doing so. In some areas, the Association Countries have passed legislation very close, at least in words, to EC legislation.³² These efforts, while significant, do not constitute a coherent and bilateral commitment to coordinate legal and regulatory policies and institutions. This perhaps represents the worst of both worlds: the Association Countries cede a level of independence at a crucial time in their democratic reform and economic restructuring programmes and receive little that is tangible in return.

4. Conclusion

The EC's approach to the Association Countries has so far been relatively clear. For developing third country neighbours, the Association Countries enjoy a relatively privileged status when compared, for example, to Turkey or the countries of North Africa. On the other hand, the process of integration is gradual and subject to ongoing and changing terms of conditionality, which include internal developments in the EC. It is too early to tell whether the Commission's April 1993 proposals regarding trade and EC membership will or are even intended to lead to a fundamental shift in the timing and depth of the integration process. It must be doubted, however, that the EC can easily reverse the

31. Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

32. Passing legislation and interpreting and enforcing it are very different matters. So far, the impact of the new regulations in the Association Countries is hard to assess.

limits it originally imposed on relations with the East given the demands and controversies it faces in carrying out its internal agenda.

With this in mind, how do the Association Countries react to the EC? Eastern European attitudes towards the EC have remained largely consistent since the transition from communist leadership occurred. From the beginning, Hungary, Poland and CSFR have each pressed for increased trade with and aid from the EC as well as EC membership at the earliest possible date. Just as importantly, in contrast to some EFTA countries whose complex response to integration with the EC has been developed over many years of internal political debate, each country has largely accepted the EC's framework for institutional relations. Further, the adoption of EC legislation has generally been viewed as a necessary precondition to EC accession and the creation of a market economy with little discussion of the relationship between integration with the EC and internal microeconomic reform or of the compatibility of the legislation with development objectives. Aside from membership, the Association Countries have said little about institutional links with the EC and, the recent free trade pact between Hungary, Poland and the CSFR notwithstanding, each other. Doubts about this focus on integration with the EC on the EC's terms have been most pronounced recently, in part in response to the EC's repeated emphasis on conditionality, but more directly as a result of steel and automobile quotas and anti-dumping duties on exports to the EC.

Characteristic of the East's approach to relations with the EC, the economic reform and privatization policies of Eastern European countries, developed with substantial assistance from ubiquitous Western advisers, reflect a somewhat idealized and artificial construct of a Western market economy. When contrasted with the more sophisticated, and generally more interventionist, policies of the EC and its Member States, there is a danger in the uncritical adoption of the *acquis communautaire*, particularly where it is not linked to substantial transfers of resources from the EC countries or meaningful participation in the EC legislative and political process. More broadly, the Association Countries have been discouraged from pursuing the range of economic, industrial and regulatory policies which might be available for achieving their democratic reform and development objectives.

We do not believe, moreover, that the EC is justified in using any deviance from its design for Eastern European development in delaying further integration with the Association Countries. It is precisely by imposing rigid criteria under which the EC is willing (when ready) to pursue integration with the Association Countries that the Association Countries are forced to choose between, on the one hand, the hope (but not the promise) of EC integration and, eventually, membership and, on the other hand, flexibility in developing strategies and policies. Our judgment is that resolving, rather than acquiescing in, this dilemma deserves greater attention from both West and East.