

A Critical Review of Market Access in Central and Eastern Europe: the European Community's Role

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ARTICLE

A CRITICAL REVIEW OF MARKET ACCESS IN CENTRAL AND EASTERN EUROPE: THE EUROPEAN COMMUNITY'S ROLE

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I. INTRODUCTION**

Relations between the European Community (EC or Community)

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** Mr. Marko researched and wrote this article while in Europe and obtained

and the states that once comprised the Council for Mutual Economic Assistance (CMEA) have changed substantially since the 1960s.¹ While EC-CMEA relations had progressed from a relationship of hostility and distrust to a relationship of mutual respect and freer trade,² the events of the last three years have made that beneficial evolution irrelevant. The brushfire of revolt that blazed through the Eastern European landscape in the autumn of 1989 ended an era. The crumbling of the Berlin Wall and the downfall of the Communist regimes that had tyrannized Eastern and Central Europe for fifty years produced upheaval that staggered the globe. Consequently, even the most basic premises and policies undergirding Community-Soviet Bloc relations became obsolete and demanded change.³ As a result, there was an awakening to the notion that if democratization and market economies were to take root in Eastern and Central Europe, the West would have to undertake costly efforts.⁴

New assumptions brought forth a new regime of legal, administrative, and financial initiatives to link former adversaries.⁵ This article reviews and analyzes one part of the constellation of Community programs and arrangements: trade with Central and Eastern Europe. First, as a background, this article reviews the Community's trading

some of the information contained herein while working on his L.L.M. degree.

1. For a review of relations between the CMEA and the Community prior to the fall of communism in Eastern Europe see generally THE POLITICAL AND LEGAL FRAMEWORK OF TRADE RELATIONS BETWEEN THE EUROPEAN COMMUNITY AND EASTERN EUROPE (Mark Maresceau, ed. 1989) [hereinafter TRADE RELATIONS].

2. CMEA foreign policy had taken a dramatic shift by 1988 as evidenced by a report on the signing of the Joint Declaration on the *Establishment of Official Relations between the European Economic Community and the Council for Mutual Economic Assistance*:

Normalization of relations opens the way to increased trade and greater contact with a group, which had long chosen to ignore the existence of the Community. This development is part of the broader process of improving East-West relations witnessed in recent years, reflecting a more open and more realistic external policy on the part of the Eastern European countries and real efforts to reform the economic management system.

BULL. EUR. COMM. (Commission), No. 6, 1988, at 13-14; see also Joint Declaration, Council Decision 88/345/EEC, 1990 O.J. EUR. COMM. (L 157) 35.

3. See GILES MERRITT, EASTERN EUROPE AND THE USSR: THE CHALLENGE OF FREEDOM 13 (1991).

4. JOZEF M. VAN BRABANT, REMAKING EASTERN EUROPE: ON THE POLITICAL ECONOMY OF TRANSITION 85 (1990).

5. See David Kennedy & David E. Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 COLUM. J. TRANSNAT'L L. 633, 633 (1990). The most notable non-EC Western states involved with the Community's efforts in Eastern Europe are Japan and the United States.

regime, which is articulated through the General Agreement on Tariffs and Trade (GATT). Second, this article provides an analysis of the elimination and suspension of the various quantitative restrictions historically imposed against the former Communist Bloc. Third, this article examines the Generalized System of Preferences, the Community's scheme for providing favorable trade to developing countries, as it applies to Central and Eastern Europe. Fourth, this article reviews the Community's trade and association agreements with the East Bloc, beginning with the early sectoral arrangements and culminating in the current generation of Europe Agreements.

This article does not attempt to cover all of the nations that comprised the now defunct East Bloc, but instead focuses on Albania, Bulgaria, Czechoslovakia, Hungary, Poland, and Romania. Nations not covered include the Commonwealth of Independent States (former USSR or CIS), the former German Democratic Republic (GDR), Yugoslavia, and the Baltic republics (Latvia, Lithuania, and Estonia). There are several reasons for omitting a discussion of these nations. For example, with respect to the CIS, there was no substantial coordinated assistance until 1992.⁶ Furthermore, the inclusion of the CIS would be unwieldy as it is comprised of a dozen countries—not one. Thus, a discussion of the CIS would best be treated as an article unto itself. This article does not analyze the former GDR because there was no evolution in coordinated assistance after the GDR became part of the Federal Republic of Germany (FRG) and the European Community.⁷ Yugoslavia is not included because of two reasons. Most importantly, Yugoslavia no longer exists as a nation-state. Consequently, the Community now recognizes the independence of the several republics that once were part of Yugoslavia and the EC member states no longer have diplomatic relations with the former Belgrade-based federal government.⁸ Coordinated assistance to the area is no longer available and there is no timetable for its return. Furthermore, Yugoslavia has never been considered part of the Soviet Bloc states, which are the focus of this paper. Finally, this article does not include the Baltics because,

6. Actually, the Community took its first financing decisions with regard to the former USSR on December 11, 1991. However, all the projects funded were for 1992. This represented the first coordinated Western financial assistance to this region. Press Release, E.C. TECHNICAL ASSISTANCE TO THE USSR: 1991 PROGRAMME, at 1, (EC—DG 1—TACIS) (December 11, 1991).

7. See generally Jochen A. Frowein, *Current Developments: The Reunification of Germany*, 86 AM. J. INT'L L. 152, 152-156 (1992).

8. A. Riding, *EC Member States Will Recall Ambassadors to Belgrade*, INT'L HERALD TRIB., Mar. 12, 1992, at 1.

until recently, they were treated as part of the CIS and were not included in what has become known as Central and Eastern European coordinated assistance. Again, these states are better analyzed in a different article.

II. MARKET ACCESS

The European Community's approach to trade with Eastern and Central Europe has recently focused on facilitating the growth of free market economies. The cornerstone of this approach has been the elimination of commercial and legal barriers to the importation of goods into the Community. This article identifies and analyzes the steps taken by the Community towards opening markets to the East since the break up of the former Soviet Bloc.

A. Background

Before understanding the trade relationship that has recently unfolded between the Community and its Eastern partners, it is important to understand the legal foundation of that relationship. The starting point is the Treaty of Rome.⁹ Article 113 of the Treaty¹⁰ grants the Community exclusive authority to establish a Common Commercial Policy.¹¹ Under this policy, the member states cannot independently impose tariffs or quantitative restrictions on foreign products.¹² As such, the Community customarily imposes trade restrictions.

While the EC decides the Common Commercial Policy, it is articulated through GATT.¹³ The Common Commercial Policy must, therefore, be compatible with GATT.¹⁴ The general rule of GATT is

9. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25 1957, art. 113, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC TREATY].

10. *Id.*

11. The relevant portion provides:

[T]he common commercial policy shall be 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 liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

Id.

12. Kennedy & Webb, *supra* note 5, at 638.

13. General Agreement on Tariffs and Trade, *opened for signature* 30 Oct. 1947, 61 Stat. (5), (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

14. The European Community is not, as such, a contracting party to the GATT. But it speaks for its member states, which are all signatories. The transfer of jurisdic-

that signatory states are granted "most favored nation" (MFN) trading status.¹⁵ Thus, with regard to any custom duties, the method of imposing those duties, and the rules of import and export, "any advantage, favor, privilege or immunity" given to any contracting party must be given to all contracting parties.¹⁶ This policy prevents trade discrimination by GATT members against each other. It favors development of trade and leads to suspension or reduction of tariffs and non-tariffs barriers (e.g., quantitative restrictions).

Of all Central and Eastern Europe's former Communist countries, only Czechoslovakia is an original contracting party. Over time, however, Poland (1967), Romania (1971), and Hungary (1973) acceded to the agreement.¹⁷ Albania and Bulgaria¹⁸ are not yet contracting parties.

Non-GATT members are not eligible as a matter of right to the benefits of the agreement and must fend for themselves in the world of international trade.¹⁹ Although Poland, Romania, and Hungary acceded to the GATT, the Community did not extend the basic GATT advantages to them. Their protocols of accession to the GATT included language that permits them to be treated in such a way that they effectively fall outside the GATT framework.²⁰ Meanwhile, states that had not signed onto the GATT at all received only those trade opportunities that the Community was willing to extend. As such, both GATT and non-GATT Eastern and Central European countries had been treated essentially the same.²¹

However, the recent political and economic developments in Eastern and Central Europe have resulted in a new approach to trade be-

tion for its members is grounded in the common commercial policy. Article 115 of the Treaty gives the EC the authority to negotiate trade agreements with third countries on behalf of the member states. EEC TREATY, *supra* note 9, art. 115.

15. *Id.*

16. GATT, *supra* note 13, art. 1(1).

17. Guy L. de Lacharrière, *The Legal Framework for International Trade, in TRADE POLICIES FOR A BETTER FUTURE* 108 (Martinus Nijhoff Publishers ed., 1987).

18. Bulgaria has been an observer at GATT meetings since 1967 and petitioned for full membership in 1986. VAN BRABANT, *supra* note 4, at 95.

19. Kennedy & Webb, *supra* note 5, at 639.

20. See GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 46-52 [hereinafter B.I.S.D.] (15th Supp. 1968) (Hungary); B.I.S.D. at 5-10 (18th Supp. 1972) (Romania); B.I.S.D. at 3-8 (20th Supp. 1974) (Poland). Article 4 of each protocol of accession includes language that allows another contracting party to derogate from MFN treatment.

21. "In the case of Czechoslovakia, who is an original signatory, there is no such explicit legal foundation for the imposition of quantitative restrictions." Kennedy & Webb, *supra* note 5, at 641.

tween the former Communist states and their Community counterparts. More favorable trade treatment has placed many of the former members of the Council for Mutual Economic Assistance²² within the GATT framework. Thus, understanding some basic rules of GATT is essential to this discussion.

As indicated above, MFN status normally governs relations under the GATT; however, there are exceptions. First, the GATT allows certain identified developing countries to be treated more favorably than even the most favored nations.²³ This preferential status is called the "generalized system of preferences" (GSP), and is designed to assist the poorer nations of the world—the lesser developed countries of the third world.²⁴

Second, the GATT permits derogations from MFN with regard to state-trading countries (e.g., the former East Bloc).²⁵ These planned economies centrally determine costs and prices, provide artificially low foreign exchange rates, establish foreign trade monopolies, impose burdensome import authorization schemes, and conduct other forms of trade discrimination. The non-tariff barriers are permitted to ameliorate the inherent unfairness of these mechanisms.

Third, the GATT allows for free trade agreements or "interim-agreements" setting up timetables for tariff elimination and economic integration.²⁶ Members of these trade agreements are exempt from the MFN provision that requires a member state to provide the same free trade conditions to all GATT parties.²⁷ This provision reflects the GATT's recognition that closer integration of economies through trade agreements is consistent with the overall goal of unfettered trade.²⁸

22. See *supra* notes 1-2 and accompanying text.

23. Kennedy & Webb, *supra* note 5, at 638.

24. *Generalized System of Preferences*, GATT Doc. L/3545 (June 25, 1971), reprinted in B.I.S.D., *supra* note 20.

25. GATT, *supra* note 13, art. XVII.

26. *Id.* art. XXIV.

27. *Id.* preamble. One could argue that this is repugnant to the GATT; how could the MFN clause operate with such a huge exception? However, these deviations are permitted on the theory that while free trade agreements are discriminatory against those who are not participating in the free trade area, they are consistent with the ultimate goal of the GATT—the eventual elimination of trade barriers.

28. Members of the GATT have resolved to meet their "objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." *Id.*

B. *Quantitative Restrictions*

The Community traditionally applies two types of quantitative restrictions: non-specific quantitative restrictions and specific quantitative restrictions.

The Community's non-specific quantitative restrictions are set forth in Council Regulation 288/82 which was promulgated in 1982.²⁹ These restrictions can apply to any country, regardless of the political economy of origin—whether state-trade or free market. Council Regulation 288/82 functions in two ways. To begin with, the regulation enumerates a list of products which are prohibited from entering the Community's economic space.³⁰ Generally, specific member states imposed these restrictions prior to their entry into the EC.³¹ These restrictions were "grandfathered" into the common trade policy and the Council eventually will eliminate them.³² The Council Regulation also creates a flexible scheme for imposing future restrictions. The Commission limits access to the EC market when "a product is imported into the Community in such greatly increased quantities and/or such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products"³³ These limitations have a three month life span, absent subsequent action by the Council.³⁴

There is no list of countries whose products are automatically blocked. There is, however, an annex (annex I) to the regulation that lists certain products which are either partially restricted or barred. This list applies to a country, a group of countries, or a geographical zone, depending on the specific restriction.³⁵ Furthermore, when protective measures are imposed pursuant to the regulation, they can be country specific. For example, there has been a Community sensitivity towards Japanese cars and the Community has traditionally imposed limitations on their imports.³⁶ Alternatively, the EC might impose a Community-wide quota. This, however, is unlikely outside highly sensi-

29. Council Regulation 288/82, 1982 O.J. (L 35) 1.

30. *Id.*

31. *Id.*

32. Kennedy & Webb, *supra* note 5, at 639.

33. Council Regulation 288/82, *supra* note 29, art. 15(6).

34. If the Commission fails to submit the proposal to the Council the member state(s) may continue to restrict imports on an interim basis or in compliance with a bilateral agreement with the affected third country. *Id.* art. 17.

35. *Id.* annex I.

36. Kennedy & Webb, *supra* note 5, at 639 n.19.

tive sectors, such as steel and textiles.³⁷

The Community's specific quantitative restrictions originate from Council Regulations 1765/82 and 3420/83.³⁸ Specific quantitative restrictions function differently than the non-specific type. Most significantly, specific quantitative restrictions apply only to state-traders—in other words, the former East Bloc.³⁹ These restrictions stem from a historical intolerance towards products from planned economies. This general intolerance is grounded not in an outright rejection of state-run economies, but in the nature of the Community, which is only suited to trade in which costs and prices are determined by purely market situations. Brussels, thus, historically allowed its member states to restrict significantly imports from these state traders.

Another difference is that specific quantitative restrictions are far more limiting than non-specific restrictions. A non-specific quantitative restriction starts from the premise that all imports are allowed and then sets-off those products that are to be restricted—a positive liberalization scheme. By contrast, a specific quantitative restriction starts from the premise that all products from state-trading countries are excluded and then identifies what products are allowed into the Community and in what amount—a negative liberalization scheme.

The negative liberalization scheme allows for the imposition of a relatively large number of specific quantitative restrictions.⁴⁰ The list of products is exhaustive. It includes virtually every type of product that is currently produced by the Community, from iron to baby garments.⁴¹ The scheme reflects the notion that products from the East Bloc, regardless of the sector from which they come, are damaging to the Community's own producers. Obviously, the specific quantitative scheme is significantly more hostile to free trade than its non-specific counterpart.

The downfall of the East Bloc communist regimes brought the downfall of quantitative restrictions imposed against these countries. There are three council regulations that codify this trade liberaliza-

37. *Id.* at 640.

38. Council Regulation 1765/82, 1982 O.J. (L 195) 1; Council Regulation 3420/83, 1983 O.J. (L 346) 6.

39. The Community has never defined "state-trading countries," but has identified the CMEA (save Cuba), Albania, North Korea, and China as state-trading countries. See Council Regulation 3420/83, *supra* note 38, at 6; Council Regulation 1765/82 *supra* note 38, at 1.

40. Council Regulation 3420/83, *supra* note 38, at 6.

41. *Id.* annex II.

tion.⁴³ The first two were adopted in November and December 1989.⁴³ These regulations involved only Poland and Hungary because they were the only two countries that were part of the PHARE⁴⁴ aid program at that time. The regulations themselves permanently abolished specific quantitative restrictions and suspended non-specific quantitative restrictions against Polish and Hungarian imports.⁴⁵ However, in September 1990, Council Regulation 2727/90 subsequently replaced those two regulations.⁴⁶ Council Regulation 2727/90 extended the same liberalizations granted to Poland and Hungary to most of their Eastern and Central European partners. The only restrictions that remain are on products reserved from Regulation 288/82, as well as on textiles and steel—specific sectors that the Community traditionally protects.⁴⁷ In theory at least, the EC could partially or completely revoke its suspension of non-specific quantitative restrictions. That is unlikely to occur, as such revocation would contradict the Community's goal of transforming the former East Bloc.

Interestingly, the elimination of specific qualitative restrictions forced the suspension of non-specific quantitative restrictions. Because non-specific quantitative restrictions are applicable to any nation, when the Community abolished Council Regulations 1765/82 and 3420/83 (state-trading restrictions) the Central and Eastern European states

42. Council Regulation 3381/89, 1989 O.J. (L 326) 6; Council Regulation 3691/89, 1989 O.J. (L 362) 1.

43. *Id.*

44. PHARE is a Community-coordinated aid programme designed to provide assistance to the former Communist countries of Central and Eastern Europe. The Community provides aid for critical sectors of the economy like agriculture, industry, investment, energy, training, environmental protection, and trade and services. Council Regulation 3906/89, art. 3(1) 1989 O.J. (L 375). Essentially, this is accomplished by providing funds and technical assistance to the Central and Eastern Europeans for specific projects. See Commission, *PHARE: Assistance for Economic Restructuring in the Countries of Central and Eastern Europe — An Operational Guide* 10 (Commission Document, Catalogue No. CC-71-91-493-EN-C) (1992).

45. It should be noted that the relaxation of non-quantitative restrictions did not apply to Spain and Portugal. Their respective protocols of accession into the EC required that they not be placed in a position where any other country gains greater trade advantages with the Community. Thus, special care was taken to protect the two Iberian states. Otherwise, the liberalization of non-specific quotas would have placed Poland and Hungary (and eventually all the Central and Eastern Europeans) in a better trading position than Spain and Portugal. Mark Maresceau, *The European Community and Eastern Europe and the USSR, in THE EXTERNAL RELATIONS OF THE EC: THE INTERNATIONAL RESPONSE* 14 (J. Redmond ed., 1991).

46. Council Regulation 2727/90, 1990 O.J. (L 262) 11.

47. Council Regulation 288/82, *supra* note 29, annex I; Council Regulation 2727/90, *supra* note 46, at 12.

were automatically shifted over to Council Regulation 288/82. This shift compelled the Community to suspend the application of 288/82 to the former Communist states. Otherwise, these states would have been subject to non-specific restrictions, which would have been contrary to the policy of providing immediate market access for the East Bloc.

As a result, the Eastern and Central European states are actually in a better position than most of the Community's other global trading partners.⁴⁸ This result raises the question of whether the new arrangement is inconsistent with the GATT. If the former East Bloc Countries are given greater access to the Community's market than other GATT members, such a result would appear to be a violation of the MFN clause which provides that no GATT member be treated differently from any other GATT member.⁴⁹

C. *The Generalized System of Preferences*

One of the most useful tools in helping development is preferential trade arrangements. These arrangements are critical as a commercial policy solution to the seemingly intractable problem of economic development for the poorest countries of the world. The willingness of the EC (or of any developed economy) to grant the former Communist Bloc preferential trading arrangements suggests the universal value of developing the under-developed.⁵⁰

The Community's policy of granting trade preferences is most closely linked to the group of third world countries which were former colonies of the member states. These states are known as the "African, Caribbean, and Pacific" countries (ACP). ACP countries benefit from highly preferential arrangements for duty-free importation into the Community.⁵¹

48. See *infra* note 51 and accompanying text (ACP states have most favorable position).

49. See GATT, *supra* note 13, art. I.

50. KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 54 (1970).

51. Through the Lomé Convention, a bilateral agreement between the EC and the ACP, the Community set up along side a commercial, industrial, agricultural, and financial regime, a system of product preferences for the ACP countries when exporting to the Community. The Convention is really a series of time-bound agreements, the most recent of which binds the two parties from 1990 to 2000. The most recent Lomé agreement maintains previous preferences and improves them, creating broader, quota-free access to the Community for almost all ACP products. See Commission, *Lomé IV (1990-2000): Background, Innovations, Improvements* (Commission of the European Communities, Directorate-General for Information, Communication and Culture) (DE 64 Catalogue No. CC-AM-90-064-EN-C) (March 1990).

What has become known as the generalized system of preferences or "GSP" is a less advantageous scheme than what is granted to the ACP. Nevertheless, it remains far reaching. The Community preference program provides for some duty-free imports and some reduced-duty imports for approximately 130 countries. These advantages are manifested in the Community through non-discriminatory tariff preferences for the import of manufactured and semi-manufactured products, as well as for agricultural products.⁵²

The Community has enlarged the GSP to include all of the countries of Eastern and Central Europe currently eligible for aid under the PHARE program. The advantages cover all major sectors of trade. At first, the Community offered GSP for only industrial and agricultural goods and included only Poland, Hungary, and Romania.⁵³ Romania had been a beneficiary of the GSP regime for several years previously.⁵⁴ However, by 1990 the Community had extended the program to include the other PHARE countries and incorporated certain other agricultural and industrial advantages, and some textile preferences.⁵⁵

There are several aspects to the GSP and its application to the East Bloc that should be noted. First, all GSP concessions are voluntary and unilaterally revocable by the Community. In fact, the Community see the concessions as temporary and non-binding, and will withdraw them when the unfavorable conditions that spawned them subside.⁵⁶ This puts the Community in a unique position. If it becomes dissatisfied with the pace or flavor of change within the East Bloc, it

52. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 299 (1990). GSP is a GATT-authorized general trade preference system for all developing countries. It is available to any country that designates itself as a "developing country." But it is the developed countries that have the final say on which of the "developing countries" are included in its preference scheme. Frieder Roessler, *The Scope, Limits and Function of the GATT Legal System*, in TRADE POLICIES FOR A BETTER FUTURE, *supra* note 17, at 72, 81.

53. Council Regulation 3896/89, 1989 O.J. (L 383) 1 (industrial); Council Regulation 3899/89, 1989 O.J. (L 383) 125 (agricultural). Yugoslavia was also included as a developed country eligible for GSP, but any substantial discussion of Yugoslavia is beyond the scope of this article.

54. See Council Regulation 3338/80, art. 7, 1990 O.J. (L 352) (EC-Romania Agreement).

55. Council Regulation 3831/90, 1990 O.J. (L 370) 1 (industrial); Council Regulation 3832/90, 1990 O.J. (L 370) 39 (textiles); Council Regulation 3833/90, 1990 O.J. (L 370) 86 (agricultural); Council Regulation 3834/90, 1990 O.J. (L 370) 121 (agricultural levies within fixed quotas).

56. See, e.g., Council Regulation 3899/89, *supra* note 53, at 125 (preamble): "[T]he temporary and non-binding nature of the system of generalized preferences means that the offer may be withdrawn wholly or in part at a later stage . . ." *Id.*

can use the GSP as a both a carrot and a stick. This is analogous to the power that the International Monetary Fund (IMF) has when deciding whether to award advanced credit to countries wanting to borrow money: the countries will get credit only if they submit to the austerity obligations designed by the IMF.⁵⁷ Although the Community has not resorted to these tactics thus far, the potential for this sort of manipulation does exist.

Second, it is not clear whether the GSP is tailored narrowly enough for the unique situation in Eastern and Central Europe. As previously noted, the system was originally geared towards the least developed countries.⁵⁸ These are countries that have per capita Gross Domestic Product's substantially lower than that of the Eastern and Central European nations.⁵⁹ Roads are not a luxury in Czechoslovakia; they are in El Salvador.

Furthermore, the Community has a unique relationship with the bulk of GSP participants—the relationship that exists between former colonials and former colonies.⁶⁰ For decades many EC members⁶¹ established and maintained cultural, religious, political, linguistic, and economic links with many third and fourth world countries. Even after removal of the chains of colonial rule, ties between the two groups remain. Also fueling the GSP is the feeling of obligation owed by the former colonials—a special responsibility towards their developing kin.⁶²

Neither of these conditions (poverty or former colonial status) exists in the former Communist Bloc. Yet, the Community has extended GSP to cover Eastern and Central Europe. The fact that GSP is not closely fitted to the Eastern and Central European states might mean that they are not receiving the proper trade prescription for their unique crises. Ironically, many in the Community made the same argument against a proposal that institutes a "Marshall Plan" type program in Eastern and Central Europe. Critics suggested that the Marshall-type Plan should not be slavishly followed in the same fashion as originally designed.⁶³ In the same spirit, there should be a new program specifically designed for the needs of the former Communist countries.

57. See generally JOHN H. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 848-56 (1986).

58. See *supra* note 49 and accompanying text.

59. See Maresceau, *supra* note 45, at 16-17.

60. MATHIJSEN, *supra* note 52, at 296.

61. *E.g.*, Belgium, France, Italy, the Netherlands, Denmark, and the U.K.

62. MATHIJSEN, *supra* note 52, at 296.

63. MERRITT, *supra* note 3, at 241.

The Eastern and Central European states are not at the same level of development as the impoverished third world. They are second world nations and should receive second world treatment.

Furthermore, extension of GSP to Eastern and Central Europe should not be allowed to marginalize the poorest countries in their trading with the EC—economically or philosophically. The Community's consumer market is large, but limited. If GSP is granted to the closer, more economically powerful East Bloc, they will be in a position of exploiting Western markets faster and more thoroughly than the Africans, Asians, and others. This will undoubtedly affect the standard of living of the poorest and weakest nations.⁶⁴ Economics is a zero sum game, where every widget imported into the EC from Eastern or Central Europe is at the expense of a widget supplier from an extremely poor country. From a philosophical perspective, by granting these advantages eastward, the focus of GSP is obscured along with the professed reason for the program. Gone are the obligations owed to the historically oppressed. Gone are the obligations owed by the very rich to the very poor.

Admittedly, there are reasons for favoring at least a temporary extension of the GSP program to the Central and Eastern Europeans. The Community has a substantial security interest in maintaining stability in the East. For at least an interim period, GSP would be beneficial for the Eastern and Central European states. Crisis in the East may produce crisis for the Community. While the Central and Eastern European nations are not likely ever to become a military threat (absent a return to the Cold War), there is the threat of massive economic and social chaos. Collapse in the East would likely cause an exodus of hundreds of thousands, or even millions, of immigrants. If law and order break down, multitudes of people will pour into the West in search of jobs, education, housing, and stability.⁶⁵ Such an immigration would present an unacceptable risk to any country.

Another reason for favoring a temporary extension of the GSP program is that the Community has narrowly tailored trade arrangements with three of the most important Eastern and Central European states and is negotiating agreements with the others. These are known as trade and association agreements.

64. Abdulai, *The Opening of the East and its Implications for the South*, 6 WEST-OST J. 1, 2 (1990).

65. Romana Sandurska, *Reshaping Europe — Or 'How to Keep Poor Cousins in (Their) Home': A Comment on the Transformation of Europe*, 100 YALE L.J. 2501, 2503 (1991).

D. Trade and Association Agreements

The pinnacle of the trade rapprochement between East and West Europe is the adoption of the trade portions of the association agreements signed between the EC and the nations of Poland, Hungary, and Czechoslovakia. These sweeping trade pacts are revolutionary in their depth, as well as their direction. However, they are also a continuation of a policy of trade liberalization started in the early 1960s;⁶⁶ a relationship that has unfailingly moved forward over the last thirty years. In order to understand fully the significance of the association agreements, it is necessary to trace the events leading up to the accords.⁶⁷

1. Background

The EC's history of trade with Eastern and Central Europe can be divided into three periods: minimal trade, the normalization of trade, and association agreements.

a. Minimal Trade—The 1960s and 1970s

As far back as the mid-1960s there were trade arrangements between the EC members and CMEA members.⁶⁸ Although they were basic and mostly technical, these trade arrangements represented the first contact between the Community's membership and the East Bloc since the start of the Cold War. This contact was significant in light of the hostile relations between the Community and the Communist world.⁶⁹

66. The fact that these negotiations appear erratic could be explained by the inability of the EC-CMEA to negotiate a formal agreement, given that the CMEA did not have the legal capacity to negotiate and conclude a trade agreement on the behalf its members. See generally Theodor Schweisfurth, *The Treaty-Making Capacity of the CMEA in Light of a Framework Agreement Between the EEC and the CMEA*, 22 COMMON MKT. L. REV. 615 (1985).

67. The review of the quantitative restrictions and the GSP section of this paper might give the impression that relations with the Eastern and Central Europeans took a new course only after the revolutions of 1989. However, there existed a move to relax trade well before the revolutions. See *supra* note 2 and accompanying text.

68. Between 1965-1969 the Common Market concluded various technical arrangements, mostly concerning agricultural exports. Kazimierz Gryzbowski, Note, *Current Development: The Council for Mutual Economic Assistance and the European Community*, 84 AM. J. INT'L L. 284, 288 (1990).

69. The second edition of the Soviet *Handbook on International Economic Organizations* described the European Community as a "governmental-monopolistic union organized to establish a Common Market . . . to conduct a joint economic and social policy to create a military-economic foundation for the aggressive North Atlantic

Throughout the 1970s there were attempts by both the EC and the CMEA to open closed trade and communications doors.⁷⁰ The two institutions had great difficulty reaching an accord.⁷¹ The lack of an agreement was underscored by their refusals to recognize each others' authority to negotiate and conclude on behalf of their constituent memberships.⁷² However, the EC was able to produce bilateral trade agreements with several Eastern and Central European States. These agreements concerned a variety of products including textiles, steel, sheep, and goat meat.⁷³ Nevertheless, there were no formal trade links between the EC and the CMEA or its members. Only sectoral agreements existed and these involved minimal trade amounts.⁷⁴

b. Normalization of Trade—The 1980s

It was not until 1980, when Romania broke ranks with its CMEA comrades and engaged in a new and aggressive phase of trade relations with the Community, that there was progress towards real trade cooperation. This second stage was an attempt at normalizing relations between the two trading blocs.⁷⁵ It produced *bona fide* trade agreements, unlike the technical or very basic sectoral agreements of the past. Previous efforts had been frustrated by the hostile relationship between the two groups. The new agreements, in contrast, were designed to facilitate the type of trade one would expect between regional partners sharing common values and histories.

The second generation quickly produced two bilateral agreements: one between the EC and Czechoslovakia and the other between the EC and Romania.⁷⁶ The agreements dealt only with industrial products and did not contain a steadfast commitment to remove the bulk of quantitative restrictions erected against the state-trading CMEA mem-

Treaty Organization." HANDBOOK ON INTERNATIONAL ECONOMIC ORGANIZATIONS 240 (2d ed. 1962) (in Russian), cited in Gryzbowski, *supra* note 68, at 285.

70. See generally TRADE RELATIONS, *supra* note 1.

71. While some accords had been signed between Eastern and Central Europe and the EC, there were no official relations between the CMEA and the EC until the 1988 Joint Declaration. See *supra* note 2 and accompanying text.

72. KEESING'S CONTEMPORARY ARCHIVES 27, 570, cited in *id.*

73. EC Commentaries, *Trade Relations Eastern Europe* 2 (Sept. 3, 1992) (Coopers & Lybrand) [hereinafter EC Commentaries].

74. Actual trade was very small. The EC's total trade with the seven CMEA members in 1987 totalled 43.700 million ECU. In that same year the Community's total trade with Switzerland was a modest 59.400 million ECU. Kennedy & Webb, *supra* note 5, at 635-36.

75. *Id.* at 636.

76. *Id.* at 643-44.

bers.⁷⁷ In 1981, the Community adopted the EC-Romania Agreement⁷⁸ in which the Community reduced the quantitative restrictions on Romanian products allowed under Romania's Protocol of Accession to GATT. The agreement also eliminated some of the quotas on "priority products" immediately, reduced some others more gradually, and set up a joint committee for negotiating future reductions.⁷⁹ As consideration, the Romanians agreed to allow greater imports from the EC under the same conditions as all GATT contracting parties and to deliver their products at "market-related prices," so as to soften the impact of state-produced goods.⁸⁰ What the agreement did not do was completely eliminate the Community's discriminatory quantitative restrictions, nor did it produce a commitment by the EC to negotiate a broader commercial cooperation agreement.⁸¹

The Czechoslovakia-EC agreement was substantially the same as the document negotiated with Romania.⁸² These two agreements were seen as appetizers. By 1984, both Czechoslovakia and Hungary expressed their intentions to expand the scope of their existing agreements.⁸³ In 1988, the Community negotiated and signed broader trade, commercial, and economic cooperation agreements, which brought forth a series of relatively far reaching accords as will be discussed in the next section. Relations between the EC and the CMEA were finally formalized via a joint declaration endorsing cooperation in areas of mutual competence.⁸⁴

77. *Id.*

78. Council Regulation 3338/80, *supra* note 54, at 1.

79. *See id.* at 1-7.

80. *Id.* at 6; Kennedy & Webb, *supra* note 5, at 644.

81. These short-falls in the EC-Romania Agreement can be attributed to three factors. First, the Romanians' aggressive export policy and curbs on internal consumption produced consistent trade surpluses to the disadvantage of the Community. Andreas H. Leskovsek, *U.S.-Romanian Trade: Foreign Debt, Trade Barriers, and Future Problems and Prospects*, 21 *LAW & POL'Y INT'L BUS.* 71, 77-79 (1989). Second, the Community placed the Ceausescu regime's human rights policy under greater scrutiny. The Community refused to reward a communist torture state with any broad-spectrum economic relationship. Kennedy & Webb, *supra* note 5, at 644-45. Third, there were still negotiations underway on an attempt to achieve an EC-CMEA accord. This probably slowed the development of national level (bilateral or multilateral) agreements. *See* U.S. International Trade Commission, *INT'L ECON. REV.* 6 (June 1989).

82. The most important exception is that only the Romanian accord extended GSP as part of the agreement. It was the first time this was granted to a CMEA member.

83. EC Commentaries, *supra* note 73 at 2.1.

84. Council Decision 88/345/EEC, 1988 O.J. (L 157) 34-35; *see supra* note 2 and accompanying text.

By October 1990, more than a year after the first Communist governments were toppled, the last of these newest agreements was signed between the Community and Romania, joining those already arrived at with Hungary, Czechoslovakia, Poland, the former GDR, the former USSR, and Bulgaria.⁸⁵ This brought an end to the second phase in EC-CMEA development, finally permitting an opportunity for full trade to develop between these nations.

The agreements of the second period are important in that they opened the door for harmonious trade, producing a commitment by both sides for commercial cooperation. But there are two other advantages that deserve mention. First, the agreements established a timetable for the elimination of quantitative restriction on exports to the Community. Second, the agreements created a framework for trade negotiations in sensitive areas like agriculture.⁸⁶

c. Association Agreements—The 1990s

The dramatic changes in Central and Eastern Europe, coupled with the mutual desire of all parties to further the evolving relationships, produced the current generation of association agreements.⁸⁷ These association agreements are known as "Europe Agreements." Three have already been concluded with Poland, Hungary and Czechoslovakia.

The Europe Agreements are characterized as "mixed agreements." Mixed agreements are accords the Council of Ministers (on behalf of the EC), the member states of the EC (on its own behalf) and the respective East Bloc partner must sign.⁸⁸ Signatures from the individual member states are required because the Community can only sign on behalf of the Community in areas in which the Community has competence. The Community is competent to represent the member

85. EC Commentaries, *supra* note 73, at 2.2.

86. Kennedy & Webb, *supra* note 5, at 645.

87. The actual impetus for the agreements emerged from the European Council meeting of the 8th and 9th of December 1989, where the member states concluded that the Community should consider forms of association with the then still crumbling East Bloc. This consideration was suggested as part of the overall scheme for political and economic stability. See COM (90) 398 (Commission guidelines for future association agreements).

88. "They [the association agreements] are all based on Article 238 of the Treaty." MATHJSEN, *supra* note 52, at 293. The relevant portion reads: "The Community may conclude with a third country, a union of States, or an international organization agreements creating an association embodying reciprocal rights and obligations, common action and special procedure." EEC TREATY, *supra* note 9, art. 238.

states only on issues of commercial policy.⁸⁹ As discussed below, the Europe Agreements go beyond commercial policy, and thus, the member states must sign and ratify portions of the accord.

Because of the length of time it takes for all of the relevant parties to ratify a mixed accord, the Community now expedites implementation of the commercial portions of trade agreements. This process was accomplished through the adoption of supplementary "interim agreements" that took effect March 1, 1992. An interim agreement is nothing more than a portion of the Europe Agreement, covering those areas in which the Community is competent to act without ratification by each EC member state. It prevents the non-trade related portions of the greater agreement from delaying implementation of the critically important commercial aspects of the treaty.

2. Content and Substance

The current trade agreements are distinguishable from previous ones because their scope is significantly more far-reaching. The Europe Agreements look beyond a trade policy geared towards achieving normalization and instead look toward some level of integration.

The Community's stated objective regarding these agreements is to create a stable environment for political and economic growth within the context of a free marketplace of products and ideas.⁹⁰ This objective reflects the three goals of virtually all coordinated assistance to the Eastern and Central European states: the promotion of market economies, stability, and democracy. Each goal contributes to create a climate that will enable the Community to access larger markets.

There are limits to what the Community will do to allow access to its markets by the former East Bloc. For example, the Community will not completely integrate the Eastern and Central European nations through membership in the Community.⁹¹ Integration, however, is the ultimate goal of the three Central European states that have signed

89. EEC TREATY, *supra* note 9, art. 113.

90. See Eur. Parl. Doc. (DOC EN\RR\105815) 11 (1991) (Report of the Committee on External Economic Relations on a General Outline for Association Agreements with the Countries of Central and Eastern Europe) (A3-0055/91) [hereinafter European Parliament].

91. Mark Maresceau, General Introduction: The New Association Agreements in the Framework of the European Community's External Policy (Draft). Seminar: The Implementation and Prospects of the New Association Agreements between the European Community and Poland, Hungary, and Czechoslovakia 4 (Brussels: Dec. 17, 1991) (author has copy on file) [hereinafter General Introduction].

Europe Agreements.⁹² Each of their respective accords includes a clause stating that the associated country's ultimate objective is to join the Community.⁹³ The Preamble to the EC-Hungary agreement provides an example:

[T]he final objective of Hungary is to become a member of the Community and that this association, in the view of the parties, will help to achieve this objective.⁹⁴

These clauses demonstrate two points: 1) that the outside countries desire membership in the Community and 2) both sides agree that association is a step in that direction. Some find the incorporation of these points to be a politically important.⁹⁵ However, much stronger language was included in the EC-Turkey Association Agreement,⁹⁶ and Turkey is not considered to be close to Community membership. At most, one could argue that the clause is reference to the distant goal of membership, not a precursor to inevitable membership.⁹⁷ One should not overstate the significance of such hortatory declarations, nor underestimate the savvy of Community negotiators.

All three agreements cover four key areas: political cooperation; trade of goods; movement of persons, services, and capital; and economic, cultural, and financial cooperation.⁹⁸

a. Political Cooperation

The agreements call for political dialogue, including meetings at the highest level with regard to issues of mutual interest.⁹⁹ This dialogue is designed to provide greater continuity in the relationship between the parties with regard to matters between the two countries, as well as to matters that involve third parties.¹⁰⁰

92. *Id.*

93. *Id.*

94. European Community-Hungary Europe Agreement (author has copy on file) [hereinafter Hungary Europe Agreement].

95. General Introduction, *supra* note 91, at 4.

96. Council Decision 64/372, 1964 O.J. 3987.

97. Sandurska, *supra* note 65, at 2505.

98. General Introduction, *supra* note 91, at 3.

99. *See, e.g.*, European Community-Poland Europe Agreement, arts. 2-5 (author has copy on file) [hereinafter Poland Europe Agreement].

100. Commission, Information Note, The European Community (EC) and the Countries of Central and Eastern Europe: Poland, Hungary, the Czech and Slovak Federal Republic (CSFR), Bulgaria and Romania (annex 2) 2 (Mar. 10, 1992) (DG I - E - 3) (final) (author has copy on file) [hereinafter Information Note].

This provision is the first time that an association agreement included political cooperation.¹⁰¹ Political dialogue between the two parties on issues of regional or international importance creates an opportunity for the Community to use its economic influence as a persuasive tool for forging a common approach. It is not overly cynical to suggest that political cooperation is yet another tool to steer the destiny of Eastern and Central Europe away from Brussels.

b. Free Movement of Goods

The agreements treat industrial and agricultural products differently, utilizing a more liberal approach for industrial products. A preferential treatment scheme for the associated states and free trade zones are to be established over a ten year period.¹⁰² The governing principle is "asymmetrical reciprocity;" the Community must concede trade advantages over the short and medium-term, while Poland, Hungary, and Czechoslovakia liberalize trade over the medium- and long-term. As a result, on the first day of the agreement, approximately sixty percent of the Community's imports from the three countries will enter duty free. All remaining quantitative restrictions are to be eliminated within five years,¹⁰³ except for the barriers on textiles which will be removed in six years.¹⁰⁴

Providing early trade advantages to the associated countries in the industrial sector is wise policy. With respect to industrial products, the Community is in a position to provide early advantages to the three Central European countries by opening up its markets.¹⁰⁵ The industrial sectors are where the Community is strongest and in the least need of protection. Coupled with the fact that the former Communist states are relatively poor, inefficient, and economically decades behind the Community, the inescapable conclusion is that the transition from asymmetrical to symmetrical trade relations can best be achieved by giving the associated countries a chance to adapt to both the free market system and economic integration.

Agricultural trade is based on a greater degree of harmony and reciprocity than industrial trade. While the association agreements rec-

101. See General Introduction, *supra* note 91, at 5. Maresceau notes that this is the first time that article 238 has been used in conjunction with political cooperation with third states. *Id.*

102. See, e.g., Poland Europe Agreement, *supra* note 99, art. 7.

103. *Id.* art. 13.

104. The accords also consolidate the GSP and quantitative restriction liberalization previously achieved.

105. European Parliament, *supra* note 90, at 28.

ognize the relaxation of the specific and non-specific quantitative restrictions of 1989-1990, the new regime calls for gradual liberalization on a *quid pro quo* basis by providing immediate access for some Eastern and Central European agricultural products.¹⁰⁶ However, the associated countries are given immediate access to Western markets under existing Community quota and tariff ceilings.¹⁰⁷

The Community's sensitivity in the agricultural sector is clearly manifested in the agreement.¹⁰⁸ In light of the difficulties facing the Common Agricultural Policy, not much can be required from the EC in this sphere.¹⁰⁹ Nonetheless, because gradual entry into Community markets by way of annual quotas is particularly important to the associated countries, the Community so provides.

Nevertheless, even the modest concessions on agriculture are subject to an "escape" clause. Notwithstanding any of the provisions providing greater access to its market, the Community can, upon the perception of a "serious threat" to the market, take whatever measures necessary to protect itself, pending successful consultations between the parties to resolve the problem.¹¹⁰

The agreements also lay out common principles applying to all goods covered. Four of those stand out. First, there is a "stand-still" clause blocking the introduction of any new barriers. This includes all forms of direct or indirect barriers—customs duties or equivalent charges, product discrimination, tax discrimination. Not surprisingly, there is a corresponding exception, at least for the three Central European countries. They are "allowed to derogate exceptionally from the standstill clause in order to protect, under strict conditions, their infant industries and sectors in restructuring."¹¹¹

Second, there is a non-discrimination clause—one of the most important aspects of any free trade arrangement. The non-discrimination clause prevents either party from taking any action of an internal fiscal nature that discriminates for or against another party.¹¹² The clause also prevents the use of internal tax refunds to "subsidize" national

106. See, e.g., Hungary Europe Agreement, *supra* note 94, art. 20.

107. *Id.*

108. See EEC TREATY, *supra* note 9, arts. 38-47.

109. The Community's sensitivity in the agricultural realm is classically illustrated through the ongoing failure to achieve agreement in the Uruguay Round of the GATT. The Community is reluctant to stop subsidizing its food producers. See Dodwell, *Trade Talks Fall on Deaf Ears*, FIN. TIMES, 2 Apr. 1992, at 14.

110. See, e.g., Poland Europe Agreement, *supra* note 99, art. 21.

111. Information Note, *supra* note 100, at 2 (annex 2).

112. See, e.g., Poland Europe Agreement, *supra* note 99, art. 28; cf. EEC TREATY, *supra* note 9, art. 95.

producers.¹¹³

Third, there are anti-dumping provisions in each of the accords. The anti-dumping provisions protect all parties from unloading products cheaply to force competitors out of the market.¹¹⁴ If a party finds that another is dumping, then the party may defend itself via the procedures laid down in the agreements and the GATT.¹¹⁵ The goal of both parties in resolving dumping problems is to find a solution that is mutually acceptable, with priority given to solutions that least disturb the functioning of the accords.¹¹⁶ This goal is significant because the inclusion of the Community's anti-dumping regulations into the agreement implies the end of state-trading treatment toward the associated countries.¹¹⁷

Fourth, the agreements contain protocols on the rules of origin, in order to prevent the introduction of non-indigenous products. Among other things, the rules define "originating products" and determine what products fall under the agreements. The rules also provide for methods of administrative cooperation to insure smooth implementation. The regulation of product origination is important in these particular agreements because there is no common customs union. The agreements allow free movement for only those products originating in an associated country. Products from third countries are not free to move about without restriction. By contrast, under a customs union scheme anything admitted into the economic space may move freely, regardless of origin.

This omission of a common customs union distinguishes the associations between the Community and the Central European states from previous association agreements concluded with Greece, Turkey, Malta, and Cyprus, all of which incorporated custom unions. This omission can be seen as a further indication of the EC's unwillingness to take steps suggesting future accession to the Treaty of Rome.¹¹⁸ Fur-

113. *Cf.* EEC Treaty, *supra* note 9, art. 96.

114. The agreements apply to dumping as defined in the GATT: where the products of one country are introduced into the commerce of another country at less than the normal value of the products. *See* GATT, *supra* note 13, art. VI(1).

115. *Id.*

116. *See, e.g.*, Hungary Europe Agreement, *supra* note 94, arts. 29, 33.

117. General Introduction, *supra* note 91, at 6.

118. *Id.* The Community's refusal to establish similar customs unions with Poland, Hungary, and Czechoslovakia can be seen as an attempt to further distance the EC from the prospects of admitting the associates as full members in the Community. In other words, if there is no customs union then there certainly is no EC membership. However, Professor Maresceau does note that not all countries that have acceded to the Community had an intermediate customs union step. The U.K., Denmark, Spain, and

thermore, this omission could be explained by the lack of parity between the EC's economy and the three associated states. There is likely a realization that the Central European states might become economic vassals of the Community under the large and complex body of Community commercial rules.¹¹⁹

c. Movement of Persons, Services, and Capital

The agreements have included chapters on the movement of workers, the right of establishment, and the supply of services in the participating states. Regarding workers, the rule is that only those Polish, Hungarian, and Czechoslovakian citizens already legally established in the Community may remain and be free from discriminatory treatment.¹²⁰ There is no right of entry to the Community for the Central European states and there is no right to employment. The agreements offer only hollow declarations calling for an increase in worker access. While these declarations encourage improved access to employment in the Community, they are subject to each member state's assessment of its own labor market.¹²¹

This leaves each member state with the power to determine the number of Poles, Hungarians, and Czechoslovaks that will be able to move to its state and work. There is little hope that the member states will favorably consider employing Central European workers. The recent rise of xenophobia and anti-foreigner attitudes, fuelled by relatively high levels of unemployment in parts of the Community, strongly suggest that there will be little access to jobs in the West.¹²²

There is some hope for access to employment in the medium-term. After the first five years of association, the parties are stated to meet and make recommendations for improving worker movement and access to Community jobs. While this does not guarantee anything resembling the free movement of workers, it at least creates the possibility that the almost insignificant worker's movement language currently

Portugal had no customs union prior to accession. In fact, only Greece has evolved from a common customs tariff regime to membership in the EC. *Id.*

119. *See id.* at 7. However, the Community does include in the association agreements the basic corpus of Community competition laws. *See supra* notes 117-18 and accompanying text.

120. *See, e.g.,* Poland Europe Agreement, *supra* note 99, art. 37(1).

121. *Id.* art. 41.

122. Note that there is only one existing association agreement that explicitly refers to free movement of workers: the EC-Turkey Association Agreement. General Introduction, *supra* note 91, at 9. For a review of the recent rise of fascism in Western Europe see *Europe's New Right*, NEWSWEEK, Apr. 27, 1992, at 6-11.

in the agreements will be improved.¹²³

The right of establishment also is found in the association agreements. "Establishment" in the context of the accords is the right of nationals of either the Community or the associated countries to take up and pursue economic activities as self-employed persons.¹²⁴ The term "persons" includes both legal and natural entities, which means the agreements tolerate companies, professional firms, and any self-employed entrepreneurs—from inventor to plumber.

The general rule is that each party must provide national treatment to the companies and the nationals of each of the other countries.¹²⁵ The scheme that is set up is similar to that set up for the movement of goods. There is an asymmetrical opening of markets to each others' establishments. The Community must open itself to the three Central European republics immediately by not discriminating in favor of its own establishments. The associated countries, by contrast, may reciprocate over a transitional period of up to ten years for some sectors, while other sectors must be made available to Community businesses immediately. For sectors that are gradually opened, the agreement imposes a "stand-still" requirement preventing the introduction of any new discriminatory regulations or measures for most types of establishments. However, there is an exception to the stand-still requirement which allows the associated countries to derogate during the transitional period and discriminate in favor of certain restructuring projects, sensitive markets, or newly emerging industries.

The supply of services and capital also are incorporated in the Europe Agreements. The supply of services is to be applied progressively, using the same transitional period used throughout the accord.¹²⁶ The parties agree to take the steps necessary to facilitate the supply of services in all participating countries. These steps include a limited "free" movement of persons, but only for those whose services necessary in the Community. The services envisioned are those required to facilitate imports and exports in the Community. For example, international transport services and the production of sales support systems throughout the common economic space will likely increase.

As for capital, the agreements undertake to authorize, in freely

123. Poland Europe Agreement, *supra* note 99, art. 42.

124. See EEC TREATY, *supra* note 9, art 52. The Treaty defines the right of establishment in the EC. "Freedom of establishment shall include the right to [take up and pursue] activities [as self-employed persons and] to set up and manage [undertakings], in particular companies [or firms] . . ." *Id.*

125. General Introduction, *supra* note 91, at 11.

126. *Id.* at 11-12.

convertible currency, any "balance of payment" disbursements concerning goods, services, or persons of the Community of an associated state.¹²⁷ The agreements also protect the free movement of capital necessary to facilitate direct investment.¹²⁸

The Community took a new step in these most recent association agreements. The accords incorporate a competition chapter in each of the respective texts. Articles 85, 86, and 92 of the Treaty of Rome are effectively made part of Central Europe's laws as they relate to trade with the EC. Although the Central European states are spared from complying with the accords' competition rules for the first five years,¹²⁹ the imposition of those principles will be painful for several reasons.

For example, aside from the basic problem associated with the complexity and size of the Community's competition policies, the associated countries will need to create bodies of laws in compliance with those rules.¹³⁰ Further, there are probably few Communist trained economists and lawyers with the expertise necessary to contend with the army of competition lawyers in Brussels when disputing and resolving potential disagreements. Sadly, it might be that very lack of expertise that allowed the Community's competition rules to find their way into the three treaties. An incomplete understanding of the nuances of competition law would explain the ease with which the Community negotiators persuaded their counterparts to capitulate.

d. Economic, Cultural, and Financial Cooperation

A major objective of the agreements is to enable the associated countries to transform their economies throughout the transitional phases of the agreements.¹³¹ To that end, the agreements embrace policies designed to bring about the economic and social development of the Central European partners. Economic cooperation is multi-levelled. It involves industrial initiatives improving priority areas through promoting favorable investment climates, and embracing scientific and technological development. It includes agriculture, energy, nuclear energy, environmental policy, telecommunications, transport, banking, in-

127. See, e.g., Poland Europe Agreement, *supra* note 99, art. 59.

128. General Introduction, *supra* note 91, at 12.

129. The agreements allow the associated countries to invoke the equivalent of article 92(3)(a) of the Treaty of Rome as a prophylactic against the competition rules of the agreement during a transitional period. Article 92(3)(a) allows for the giving of aid to promote development for the underdeveloped. See EEC TREATY, *supra* note 9, art. 92(3)(a).

130. See General Introduction, *supra* note 91, at 8.

131. Information Note, *supra* note 100, at 4.

surance, monetary policy, health and safety, tourism, customs, rules, and more.

As for cultural cooperation, the agreements leave open the possibility of an assortment of cultural programs. This suggests that the member states of the Community and the associated countries are free to create their own cultural links. Suggested areas include literary translations, preservation of historical and cultural monuments and sites, training of persons working in these fields, and European events designed to promote the natural links that exist between the parties by virtue of their common home and history.

Finally, the agreements codify the existing financial assistance programs that are already applied to the three associated states. These programs are predominantly the PHARE program and the G-24 coordinated assistance programs.¹³²

e. Final Considerations

The Europe Agreements cover only Poland, Hungary, and Romania. Consequently, all remaining Eastern and Central European countries are subject to only first and second generation trade relations and the various unilateral measures that have been taken on by the Community to improve market access and the economic potential of former CMEA members.

Negotiations are currently underway with Bulgaria and Romania to advance their relationships with the Community to the (current) third phase. There is no reason to expect that the same will not occur eventually with Albania.

Before discussing what is wrong with the association agreements, something should be said about what is right with them. Two aspects of the agreements stand out as great achievements. To begin with, the use of asymmetrical trade liberalization demonstrates their dynamic flexibility. While this gradual process of market access does not extend to all economic sectors, it does provide some immediate free movement of goods, capital, and services into the Community. This approach will allow some "breathing room" for the associated states, while they undertake the transition from planned economies to market economies. Moreover, the inclusion of the non-trade aspects of the accords should be applauded. Specifically, the political, cultural and social coordination enshrined in the treaties uniquely qualifies them as "Europe Agreements." They serve to acknowledge the inextricably linked pasts and futures of the two parties.

132. See generally *supra* note 44 and accompanying text.

The fundamental drawback of the Europe Agreements is the Community's refusal to extend future membership to the former Communist states. It was a mistake to leave open the question of full membership. The agreements should provide clear guidance to the timing of negotiations on future accession to the Community.¹³³

The arguments against extending membership to Poland, Hungary, and Czechoslovakia, or any former East Bloc country, are based on conservative pragmatism. Opponents caution against committing to eventual membership for political and economic reasons.¹³⁴ One could argue that, politically, in light of the short-comings of Maastricht and the recent reluctance of some EC members to strengthen their union, it would be imprudent to discuss a wider union. Many have suggested that Maastricht demonstrated the fundamental weaknesses of the Community and that trying to move the Community in too many directions at once might shake the very foundation of the EC.¹³⁵ Others could argue that, economically, the relatively weak economies of the former Communist states would make them an unacceptable financial burden that the Community could not and should not support.¹³⁶ Instead, they assert that the current regime is sufficient to maintain stability and encourage the growth of market economies.¹³⁷ This suggests that the current agreements, which leave open the possibility of future membership, provide enough impetus for a successful association geared around a free trade area.

The above arguments are ill-conceived. Gradual free trade coupled with the possibility of eventual Community membership is not enough. Such an approach is too slow and indirect, and its incentives for real change are insufficient. Real change, in turn, is critical to the success of the experiments in the East. Free trade zones will only succeed if the partners are of comparable economic strength.¹³⁸ If not, the weaker countries cannot compete and will eventually fail.¹³⁹ What is needed is the proper climate to encourage investments and economic prosperity. Currently, the Central and Eastern Europeans do not have sufficient capital to do this on their own. They need foreign (Community) capital. Foreign investors are not confident enough in the markets to invest

133. European Parliament, *supra* note 90, at 11.

134. See Sandurska, *supra* note 65, at 2505-08.

135. See *id.* at 2507.

136. *Id.* at 2505.

137. *Id.*

138. *Id.*

139. *Id.*

massive amounts.¹⁴⁰ The reformation of Eastern and Central Europe will add another \$80 billion (U.S. dollars) to the foreign debt that these countries already have now.¹⁴¹ The Community can ensure the success of the pro-democracy revolutions by encompassing Central and Eastern Europe into the Common Market. This occurred with the former GDR. In five months the legal framework for its accession into the Community was complete. The East German political and economic situation was not so unlike that of the rest of the former East Bloc as to make them eligible and the rest ineligible.

Furthermore, membership in the Community is desirable for political reasons. The political future of the East is not secure. There are many factions hoping to seize an opportunity to reverse the current democratization. While the old line Communists are effectively discredited and are unlikely ever to seize power again, the military and old Communists turned nationalist neo-fascists are ever present. By linking the political and economic futures of both sides of Europe, the Community could further stabilize the situation. This is the lesson of Greece, Portugal, and Spain—countries that transformed from dictatorships to democracies and attained EC membership.¹⁴² It should be conceded that membership will only be likely, if at all, in the long-term. However, fault does not entirely rest with Community. It will never be easy to integrate fully the former communist countries. Reciprocal trade cannot be implemented in the short-term. For example, a fully liberalized financial sector (i.e., free movement of capital) would substantially disrupt the economies of the integrating states.¹⁴³ It could be a decade before their financial sectors are fully liberalized. Thus, even if membership were a probability, it could not happen until the next century. This point is not an argument against membership. It is only an argument against moving too quickly.

For those who fear the costs of Central and Eastern European integration into the Community, they should consider the cost to the EC of the political chaos and mass migration of hungry and oppressed thousands—maybe millions.¹⁴⁴ If the worst case scenario comes to fruition,

140. Attali, *Donning the Prickly Mantle of Free Trade*, THE EUROPEAN, Apr. 9-12, 1992, at 23.

141. Giles Merritt, *The EC Can't Afford to Let Eastern Europe Founder*, INT'L HERALD TRIB., Dec. 7, 1990, at 6.

142. See generally, J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2456 (1991).

143. Commerzbank, *Supporting Eastern Europe's Reforms: Is EC Membership within Reach?*, THE ECONOMIST, Apr. 18-24, 1992, at 68.

144. Sandurska, *supra* note 65, at 2508.

tion, political pundits might one day yearn for the stability and prosperity of the Cold War years.

