

The Constitution of the EU: From Uniformity to Flexibility

'Flexible Models: External Policy and the European Economic Constitution'

draft paper by

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1. Introduction

In this paper I should like to raise the question: to what extent can the flexibility and differentiated integration that we are seeing emerge as a characteristic of the constitution of the European Union be applied to the EC's external relationships? The paper is intended to provide a starting point only, an outline of a framework in which we can analyse the operation of 'flexibility' and 'differentiation' in the context of external policy. The fundamental question that must be tackled is just what these concepts might mean in this particular context, and from two rather different perspectives. From one perspective, the factors that condition the type of relationship offered by the EU to third states indicate a highly developed form of differentiation between states and groups of states which is at the same time regional, developmental and conditional. Then, if we move from differentiation between states to what might be termed 'substantive flexibility' (or inflexibility) in the terms of specific external agreements, we can ask to what extent is the Community as negotiator flexible in defining the scope and content of a specific agreement so that it reflects the priorities and needs of the negotiating partner(s)? Or does the Community offer a package deal which is not so much the result of a complex multilateral multi-staged negotiation (in the style of the Uruguay Round 'package') but which is more like the travel agent's package, a standard-form contract requiring adherence to an essentially non-negotiable core of commitments. The idea of a 'non-negotiable core' also raises the possibility of a parallel between the core commitments required of third states, and the (putative) common core to which the Member States are committed and which form a unifying set of values and norms holding together a Union which has flexibility built into its post-Amsterdam constitution. After a brief exploration of 'differentiation' and 'flexibility' as these terms are used in external policy-making, we will go on to look at external policy from both these perspectives and at the evolving rationale, generated both internally and externally, for what is becoming a key component of the Community's external policy.

2. Flexibility and differentiation

The concepts of flexibility and differentiation are used by the EC in its external policy, and by the wider international community, in distinctive ways. 'Flexibility', in the form of waivers, derogations, safeguard and other exceptional measures, is of course one of the supposed characteristics of GATT 1947 which founded the European Court of Justice's conclusion that 'the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.'¹ One aspect of flexibility thus denotes the extent to which - in crude terms - the EC may be willing to take account of the particular needs of its interlocutors and to depart from strict reciprocity in its agreements, either in formulating the substantive obligations themselves or, where substantive reciprocity is the ultimate objective, in allowing flexible implementation such as asymmetric timetables, special derogations

¹ Case C-280/93 *Germany v Council* [1994] ECR I-4973, para 110.

and/or financial support for the transition. Flexibility in this sense is closely connected to ideas of reciprocity, and may have implications for the status of the legal obligations created by agreements.

As the Community's network of international relations, especially its contractual relations, grows ever more complex, we can see the emergence of a number of key, or core, provisions. The most obvious of these is the clause which stipulates that democracy and the rule of law and respect for human rights and fundamental freedoms are essential elements of the agreement,² but other principles are emerging. Increasingly, reciprocal trade liberalisation is the ultimate objective, provisions on services are included, and in such cases we are likely to find provisions requiring the harmonisation of certain key related policy areas, such as competition and the protection of intellectual property. The reasons for this are multi-layered, interconnected and not always explicit. In part no doubt we are seeing a reflection of developments at a world trade level, as links are made between trade liberalisation and the adoption of minimum standards, with fierce debate as to how far this linkage can and should extend. However this is not only a question of external pressure; there is a rationale for these developments which arises out of the connection within the Community's own economic constitution between market integration and market regulation and which raises questions as to the extent to which other elements of that constitution (individual rights, judicial review processes, non-discrimination ...) can and should be exported along with market liberalization.

Differentiation is increasingly identified by the Community (and especially the Commission) as a key element in its external policy formation. The implication is that the need to differentiate is based on objective differences between the Community's interlocutors, for example their different stages of economic development.³ In fact we find the Community defining its own basis (or bases) for differentiation, making its own assessment of what factors may be relevant, and then using these to delimit the 'offer' it is prepared to make to the third state or group of states in question. Differentiation in this sense not only affects the type of agreement a third state may be offered: a reciprocal free trade agreement, an association agreement with or without a recognition of membership aspirations, a 'cooperation' or a 'partnership' agreement. It also affects autonomous Community measures, such as trade preferences, and financial and technical assistance.

² Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, 23 May 1995, COM(95)216 final. Approved by Council 29 May 1995.

³ Edwards and Philippart point out that 'differentiation' in the pre-Amsterdam intra-Community context also carried with it an implication that the differences were based on objective factors, whether economic or social: Edwards and Philippart, *Flexibility and the Treaty of Amsterdam: Europe's New Byzantium* CELS Occasional Paper No.3 (University of Cambridge Centre for European Legal Studies 1997) at p.3, citing Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"' (1984) Michigan Law Review 1274.

The assessment of 'difference' will depend on a number of factors. In what follows these are grouped into three categories: (i) regional or geopolitical, (ii) developmental or economic, and (iii) conditional.

(i) Differentiation may be geographical or geopolitical: we find the Community developing specifically regional policies towards (for example) south-east Europe, the Euro-Mediterranean region, southern Africa, the 'European' and 'Asian' newly independent states (NIS) of the former Soviet Union. In some cases these regional policies will be the result of regional integration movements within the regions concerned, such as the Interregional Framework Cooperation Agreement with MERCOSUR (Brazil, Argentina, Paraguay, Uruguay)⁴ or the Framework Agreement on co-operation with the Cartagena countries (Bolivia, Columbia, Ecuador, Peru, Venezuela).⁵ In other cases, sub-regional distinctions depend on the Community's own differentiation: with south-east Europe, or the NIS, for example.

(ii) Differentiation may also be based on economic or developmental characteristics. This is not only a matter of making special provision for developing countries as a group but of differentiation between different levels of development within the group. In its Green Paper on the future of EU-ACP relations,⁶ the Commission stated that the Union is striving to forge its external identity through, inter alia, 'an effective and *differentiated* development policy' and that new EU-ACP trade arrangements taking effect after 2000 must 'take account of the differentiation among ACP countries in respect of their level of integration into the global economy, their level of development and their perceived needs.' This type of differentiation is closely connected with, and likely to lead to, flexibility in the structure and terms of agreements and assistance programmes as well as in implementation provisions.

(iii) A third aspect of differentiation is more overtly based on the Community's own assessment of its partners and may be termed 'conditional differentiation'. By this I mean the way in which conditions (sometimes general, sometimes quite specific) are attached to the development of relations between the EU and its partners. These range from accession conditions, through general 'human rights' clauses in trade agreements, to references to specific ILO Conventions in regulations on trade preferences. Distinctions are made on the basis of compliance with specified - usually primarily political - conditions. A particularly fully-worked out example of this, as we shall see, are the Council's Conclusions of April 1997 on the principle of conditionality governing the development of the EU's relations with certain countries of south-east Europe⁷ which have been

⁴ OJ 1996 L 69/1.

⁵ Council Decision 98/278/EC OJ 1998 L 127/10.

⁶ 'Relations between the European Union and the ACP countries on the eve of the 21st century - challenges and options for a new partnership' COM(96)601 final.

⁷ Conclusions of Council on the principle of conditionality governing the development of the EU's relations with certain countries of south-east Europe 29 April 1997, Bull.EU 4-1997.

followed through in regular assessments by Commission and Council. Here we see judgments being made on progress against targets set by the EC itself, resulting in decisions to (for example) renew or not renew tariff preferences. We also see conditions explicitly attached to the progressive development of relations, from tariff preferences, to financial assistance, through to first stage cooperation agreements and ultimately to association agreements.

This last point raises a more general question about differentiation. We can sense a certain ambiguity as to the extent to which Community-established differentiation is intended ultimately to be transcended. Conditional differentiation may have a relatively clear progressive aim, in the sense that the Community is at least in part attempting to influence conduct by offering incentives. Developmental differentiation would be hard to justify if it were not responsive to the changing economic status of the Community's partners. Geographic or regional differentiation, based on geopolitical allegiances and strategies, may change over time but is unlikely to disappear altogether.

These three aspects of differentiation - regional, developmental and conditional - are linked closely together, as we shall see in the following examples.

3. Regional, developmental, and conditional differentiation

(i) Regional differentiation

(a) regional integration and regional differentiation

The Community's external policy has always had a regional dimension,⁸ and over the last ten years we have seen the development of this dimension into a way of structuring its relationships and even, one may say, the Community's way of looking at the world. The increasing sense of the Community's own international identity, which is based on a regional identification, has formed the basis for regional initiatives such as the 'Europe' Agreements with central and eastern Europe,⁹ the Euro-Mediterranean Partnership,¹⁰ the

⁸ See generally Edwards and Regelsberger (eds.), *Europe's Global Links: The European Community and Inter-Regional Cooperation* (Pinter 1990).

⁹ EC - Hungary Association Agreement OJ 1993 L347; EC - Poland OJ 1993 L348; EC - Romania OJ 1994 L 357; EC - Bulgaria OJ 1994 L 358; EC - Slovakia OJ 1994 L 359; EC - Czech Republic OJ 1994 L 360; EC - Estonia OJ 1998 L 68/3; EC - Latvia OJ 1998 L 26/3; EC - Lithuania OJ 1998 L 51/3; EC - Slovenia, COM(95) 341. For comment see Maresceau & Montaguti, 'The Relations Between the EU and Central and Eastern Europe: A Legal Appraisal' (1995)32 CMLRev 1327; Cremona, 'The New Associations' in Konstadinidis, *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Dartmouth 1996).

¹⁰ 'Strengthening Mediterranean policy of EU and implementing a Euro-Med Partnership', Bull EU Supplement 2/95; Barcelona Conference Declaration and Work Programme 27-28 November 1995, Bull. EU 11-1995. Euro-Med Agreement with Tunisia OJ 1998 L 97/1; Euro-Med Interim Association Agreement between EC and PLO for the benefit of the Palestinian Authority for the West Bank and the

EU-MERCOSUR Framework Agreement,¹¹ and relations with South-East Asia.¹² The EU's regional approach has not only no doubt been strengthened by regional integration initiatives such as MERCOSUR, the Andean Pact, ASEAN, APEC and NAFTA. In fact, the EU has raised regional integration (both economic and political) into an objective of its regional strategies. It is actively encouraging regional integration in the form of initiatives such as the Barcelona process,¹³ EU-ASEAN cooperation,¹⁴ within Central and Latin America,¹⁵ and its regional strategy towards the former Soviet Union and south-east Europe. This encouragement towards regional integration works two ways, in the sense that by strengthening links between certain groupings, it also serves to reinforce the regionally-based differentiation between these groupings.

Here I will briefly mention two examples. First, in the proposals for the new regional economic partnership agreements with the ACP States (discussed below) we can see an

Gaza Strip OJ 1997 L 187/1; proposal for conclusion of a Euro-Med Agreement with Jordan COM(97) 554 final. For comment see Cremona, 'The Euro-Mediterranean Partnership: A Regional Strategy for the EU' in Xuereb and Pace (eds.) *The European Union, the IGC and the Mediterranean: State of the European Union Conference 1996* (EDRC, University of Malta 1996); Edwards and Philippart, 'The Euro-Mediterranean Partnership: Fragmentation and Reconstruction' (1997) 2 EFA Rev. 465; Hakura, 'The Euro-Med Policy: The Implications of the Barcelona Declaration' (1997) 34 CMLRev 337.

¹¹ Interregional Framework Cooperation Agreement with MERCOSUR (Southern Common Market: Brazil, Argentina, Paraguay, Uruguay) OJ 1996 L 69/1. For comment see Casella and Marques, 'European Union - MERCOSUR Relations: A Critical Overview' (1997) EFA Rev.455; Dauster, 'MERCOSUR and the European Union: Prospects for an Inter-Regional Association' (1998) 3 EFA Rev. 447.

¹² The Commission communication 'Towards a New Asia Strategy' COM(94)314 final, makes a distinction between three regions within Asia: East Asia, South Asia and South-East Asia. Cooperation Agreement with ASEAN (Indonesia, Malaysia, Philippines, Singapore, Thailand) 1980 OJ 1980 L144. Myanmar, Laos and Vietnam have since acceded to ASEAN and it is intended that Cambodia do so. For comment see McMahon, 'ASEAN and the Asia-Europe Meeting: Strengthening the European Union's Relationship with South-East Asia?' (1998)3 EFA Rev. 233.

¹³ Barcelona Conference Declaration and Work Programme 27-28 November 1995, Bull. EU 11-1995.

¹⁴ The ASEM process (Asia-Europe summit Meetings) first took place in Bangkok in March 1996, bringing together leaders of ten East and South-East Asian countries and the EU Member States and the European Commission; dialogue covers economic and commercial, cultural and political issues. See Commission Communication, 'Creating A New Dynamic In EU-ASEAN Relations' COM (96)314 final.

¹⁵ For example, the Economic Partnership, Political Coordination and Cooperation Agreement between the EC and Mexico (the 'Global Agreement') includes a provision on regional cooperation in which the parties agree to promote initiatives 'that promote intra-regional trade in Central America and the Caribbean; stimulate regional cooperation on the environment and on technological and scientific research; promote the development of the communications infrastructure needed for the economic development of the region; stimulate initiatives to improve the standards of living of those living in poverty' (Art 37) OJ 1997 C 350/6. The Interregional Framework Cooperation Agreement between the EC and MERCOSUR includes cooperation within which 'the Parties shall seek to further the objectives of MERCOSUR's integration process' (Art 18) OJ 1996 L 69/1. There is a similar provision in the Framework Agreement on Cooperation between the EC and the Cartagena Agreement (the Andean Pact) and its member countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), OJ 1998 L127/11, Art 26.

emphasis on existing regional integration groupings. The Commission stresses the need to 'consolidate regional integration processes as a step on the way to global integration. The EU proposal will have to take account of the will for integration displayed to varying degrees by countries in sub-Saharan Africa, the Caribbean and the Pacific and developments in integration processes.'¹⁶ Such groupings as the SADC (Southern Africa Development Community) and CARICOM could, the Commission suggests, form the basis for new partnership agreements.

Second, the Partnership and Cooperation Agreements (PCAs) with the New Independent States of the former Soviet Union contain preambular statements asserting that regional cooperation is an objective of the agreement:

'desirous of encouraging the process of regional cooperation in the areas covered by this Agreement between the countries of the former USSR in order to promote the prosperity and stability of the region; ... bearing in mind the utility of the Agreement in favouring a gradual rapprochement between Russia and a wider area of cooperation in Europe and neighbouring regions and Russia's progressive integration into the open international trading system.'¹⁷

One of the objectives of this PCA is 'to provide an appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe.'¹⁸ One practical effect of this is that although an MFN obligation forms the basis of the bilateral PCA trading relationships, the PCA allows the NIS partners to preserve existing preferential arrangements *inter se* at least for a transitional period.¹⁹ It is worth noting an added incentive here: to the extent that Russia (for example) enters into treaty-based free trade agreements within the NIS, these will be excepted in the same way as the EC's existing preferential and free trade agreements (such as the Europe Agreements), by analogy with GATT Article XXIV.²⁰ Promotion of regional cooperation between the NIS is not only an element of the bilateral PCAs. It is also found among the Commission's priorities for the new TACIS Regulation:

'Regional and inter-state cooperation remain fundamental instruments in promoting stability and sustainable economic relations among NIS countries. Such regional cooperation both among NIS themselves and with non-NIS have increased significantly in the past few years. ... The NIS are also engaged in

¹⁶ COM(97) 537 final at section 5.1.

¹⁷ PCA with Russia OJ 1997 L 327/1.

¹⁸ PCA with Russia OJ 1997 L 327/1, Art 1.

¹⁹ PCA with Russia OJ 1997 L 327/1, Art 5. In the case of Russia this transitional period is five years.

²⁰ PCA with Russia OJ 1997 L 327/1, Art 10(2). There is an explicit reference to GATT Art XXIV which is typical of the way in which the PCAs 'shadow' GATT disciplines. The exception to MFN treatment covers free trade and customs union agreements and also 'advantages granted to particular countries in accordance with the GATT and with other international arrangements in favour of developing countries'.

regional cooperation initiatives which draw them increasingly into political dialogue and economic cooperation with their central and western European neighbours. ... The new regulation must facilitate the promotion of regional cooperation aimed at consolidating stability, democracy and economic development, in particular when such cooperation draws together the NIS, candidate countries and the EU.²¹

The draft Regulation itself places regional cooperation among the key aims of the assistance programme:

‘The programme shall aim to promote inter-state, inter-regional and cross-border cooperation between the partner states themselves, between the partner states and the Union and between the partner states and Central and Eastern Europe.’²²

(b) the regional approach in south-east Europe

The Community has explicitly adopted what it calls a ‘regional approach’ towards the countries of south-east Europe. On 30 October 1995 the Council adopted a set of Guidelines for future negotiations with and between the parties to the conflict in former Yugoslavia.²³ These were wide-ranging, covering humanitarian assistance, the appointment of a High Representative by the UN, and reconstruction. The Council also stated that the EU’s long-term relation with the countries of the region should ‘take the form of agreements in the framework of a regional approach’. This regional approach has formed the basis of all further assessments and statements, including the Commission’s common principles of October 1996,²⁴ and the Council Conclusions of April 1997,²⁵ to which we shall return.

What does the regional approach of the Union amount to, in the context of this particular region? The first point to make is that the Union makes its own differentiation between states. In contrast to the ACP States, where the Commission has said that ‘it would, of course, be for the ACP countries themselves to choose the regional structures with which the EU negotiates’,²⁶ in south-east Europe the distinctions are based entirely on the Community’s own assessments. Thus a ‘regional approach’ in this specific sense only covers those states of the region who are *not* part of the group of applicant associated

²¹ Explanatory Memorandum to Commission proposal for new TACIS Regulation for 2000-2006.

²² Commission proposal for new TACIS Regulation for 2000-2006, Art 2(5).

²³ Bull EU 10-1995 at p.138.

²⁴ Commission report of 2 October 1996 on common principles for future contractual relations with certain countries in south-eastern Europe (Albania, FYROM, Bosnia & Herzegovina, Croatia, FRY) COM(96)476 final.

²⁵ Council Conclusions on the principle of conditionality governing the development of the EU’s relations with certain countries of south-east Europe, Bull. EU 4-1997, p. 132.

²⁶ COM(97)537 final at section 5.2.

states. These latter states form a separate grouping, with their own sub-division into those who have been found to be close enough to compliance with primary accession criteria to have started negotiations (currently Slovenia), and those who have not yet done so (currently Bulgaria and Romania). For the other states in the region, to whom the 'regional approach' applies, the Community distinguishes between Albania and the former Yugoslav Republic of Macedonia (FYROM) on the one hand, and on the other Croatia, Bosnia & Herzegovina (BiH) and the Federal Republic of Yugoslavia (FRY), partly because the former already have 'First Generation' agreements with the EC, and partly on the grounds that the latter are party to the Dayton/Paris peace agreements.²⁷

Second, the EU is adopting an approach towards these vulnerable states which is based on 'common principles' but which treats each state individually depending on its economic and political progress and its compliance with explicit conditions at each stage. Third, among these conditions is a 'regional approach' in the sense that regional openness and cooperation is an important element. In its 1995 Guidelines the Council stated that the fostering of reconciliation and establishment of open and cooperative relations between the states should be one of the purposes of future agreements with countries in the region, and they should 'have an element of clear political and economic conditionality'; willingness to engage in regional cooperation (as well as political and economic reform) will determine their future relations with EU. This is spelled out further in the Council Conclusions adopted in April 1997, and also in the FYROM Preferential Cooperation Agreement itself.²⁸ The Preamble to the FYROM Agreement articulates the Community interest in promoting regional as well as domestic political and economic stability, recognising the 'global' nature of security.²⁹ More substantively, the agreement contains clauses encouraging cooperative and good-neighbourly relations with other countries in the region, and underlining the importance of these cooperative relations for future development of relations with Union. According to the Commission these clauses are intended 'to ensure FYROM's contribution to regional stability and cohesion'.³⁰ Similar clauses are likely to feature largely in any future agreement with BiH, Croatia or (although at the moment this seems an impossibly long way off) FRY.

(c) differentiation in relations with the New Independent States

²⁷ COM(96)476 final. (see note 24).

²⁸ Council Decision 97/831 OJ 1997 L 348/1; the Agreement came into force 1 Jan 1998. See also Council Decision 97/471 providing macro-financial assistance for FYROM OJ 1997 L 200/59. The Agreement only covers industrial products. FYROM is however a GSP beneficiary for agricultural products and imports of wine are covered by Reg 70/97 OJ 1997 L 16/1 and Reg 2636/97 OJ 1997 L 356/16.

²⁹ See also Council Decision adopting Common Position 98/633/CFSP on the Process on Stability and Good-Neighbourliness in South-East Europe (the Royaumont Process) OJ 1998 L 302/1.

³⁰ COM(96)476 final (see note 24).

Differentiation on a regional basis is also clearly evidenced in the EC's relations with the states of the former Soviet Union, although it is far less clearly articulated. The first and greatest distinction in a twofold differentiation³¹ is between those States which have association agreements with the EC in the form of Europe Agreements, have applied for membership of the EU and are now part of the pre-accession process (the Baltic states)³² and those (the New Independent States or NIS) which have Partnership and Cooperation Agreements (PCAs).³³ In its May 1995 Communication on Russia,³⁴ the Commission stated that since accession to EU is 'not in the EU's view, an option for [the NIS countries], the network of PCAs ... must provide the framework which will allow the bridging of the political and economic gap between those countries acceding to the EU and their neighbours to the East.' However, a regionally-based difference has also been made between the so-called 'European' NIS (Russia, Ukraine, Moldova and Belarus) and 'non-European' NIS (Kyrgyzstan, Kazakhstan, Georgia, Armenia, Azerbaijan, Uzbekistan and Turkmenistan). More recently, in its Agenda 2000 documentation, the Commission has stressed the fact that the post-enlargement EU will have borders with Russia, Ukraine, Belarus and Moldova; these states will become its nearest Eastern neighbours.³⁵

The overall effect of this distinction, which is not explicit in the PCAs themselves, is that the European PCAs hold out at least the prospect of a relationship with the EU that is closer to, though not the same as, that found in the Europe Agreements with the countries of central and eastern Europe (CEES), possibly leading ultimately to an association. The non-European PCAs are closer to Trade and Cooperation Agreements,³⁶ although with additional elements such as the provision for political dialogue. The most obvious manifestation of the difference is the so-called 'evolutionary clause' that is present in the agreements with the European NIS. As far as trade relations are concerned, all the PCAs have as their immediate objective the establishment of non-preferential MFN-based trade relations, effectively putting in place some of the elements of WTO membership for

³¹ A term used by Hillion, *op.cit* note 33, at p.401.

³² See note 9; even among these states a distinction has been made between Estonia, which has started formal negotiations, and Latvia and Lithuania which have not yet done so.

³³ PCA with Russia OJ 1997 L 327/1. PCA with Ukraine OJ 1998 L 49/1. PCA with Moldova OJ 1998 L 181/1. PCA with Belarus COM(95) 44. PCA with Kyrgyzstan COM(94) 412 and Interim Agreement OJ 1997 L 235/1. PCA with Kazakhstan COM(95) 137 and Interim Agreement OJ 1996 L 306/49. PCA with Georgia COM(96) 135 and Interim Agreement OJ 1997 L 129/22. PCA with Armenia COM(96) 136 and Interim Agreement OJ 1997 L 129/1. PCA with Azerbaijan COM(96) 137. PCA with Uzbekistan COM(96) 254 and Interim Agreement OJ 1998 L 43/1. PCA with Turkmenistan COM(97) 693. For comment see Hillion, 'Partnership and Cooperation Agreements between the EU and the New Independent States of the Ex-Soviet Union' (1998) 3 EFA Rev.399.

³⁴ Commission communication on EU and Russia: the future relationship COM(95)223 final.

³⁵ Agenda 2000 'For a Stronger and Wider Europe' COM(97)2000, Bull.EU Supplement 5/97.

³⁶ As they come into force for each State, the PCAs will replace the Trade and Economic and Commercial Cooperation Agreement concluded with the USSR in 1989, OJ 1990 L 68/1.

these states.³⁷ The 'European' PCAs also include a clause committing the partners to consider the prospect of negotiating a free trade agreement (with however no commitment as to the start of negotiations). The objectives of the PCA with Russia include:

'to create the necessary conditions for the future establishment of a free trade area between the Community and Russia covering substantially all trade in goods between them, as well as conditions for bringing about freedom of establishment of companies, of cross-border trade in services and of capital movements.'³⁸

There are other differences; for example, the European PCAs contain provision for the coordination of social security provision similar to the social security clauses in the Europe Agreements,³⁹ a clause not found in the non-European PCAs.

In its Explanatory Memorandum to its proposal for a new TACIS Regulation to provide economic and technical assistance to the NIS and Mongolia, the Commission emphasises differentiation between the NIS, although this is articulated in terms of their differing levels of commitment to economic transition and progress towards democratic systems, rather than geopolitical factors. Again, although the Commission does say that a number of the NIS partners themselves advocated a more differentiated approach, the process of differentiation depends on the Community's own assessment and its results are built into the Regulation which is an autonomous instrument not subject to negotiation. The Commission says that it considered the possibility of accommodating regional differentiation through the adoption of a number of separate regulations, but 'in the interests of flexibility', decided to propose one overall regulation. Within the draft Regulation, differentiation is spelt out:

'The programme shall take into account the differing needs and priorities of the principal regions covered by the regulation and in particular the need to promote democracy and the rule of law. In the Western NIS and the Caucasus particular attention shall be given to creating a favourable investment climate, promoting regional cooperation and building a wider area of cooperation across Europe. In Russia particular attention shall be given to reinforcing the rule of law, strengthening the economic and financial framework, and promoting industrial cooperation and partnership. In Central Asia and Mongolia particular attention shall be given to strengthening democracy and good governance, supporting the

³⁷ Eventual membership of the WTO is recognised as a mutual objective in the preamble to the PCAs, and under Art 4 of the PCA with Russia, the parties agree to consider changes that may be necessary in the light of eventual WTO accession by Russia.

³⁸ PCA with Russia OJ 1997 L 327/1, Art 1. Art 3 further provides: 'The Parties undertake to consider development of the relevant Titles of this Agreement, in particular Title III [on trade in goods] and Article 53 [on competition policy], as circumstances allow, with a view to the establishment of a free trade area between them. The Cooperation Council may make recommendations on such development to the Parties. Such development shall only be put into effect by virtue of an agreement between the Parties in accordance with their respective procedures. The Parties shall examine together in the year 1998 whether circumstances allow the beginning of negotiations on the establishment of a free trade area.'

³⁹ PCA with Russia OJ 1997 L 327/1, Art 24.

development of networks, and promoting fundamental, sustainable, economic reform.⁴⁰

(ii) differentiation and economic development

The distinction between the associated 'Europe Agreement' states of central and eastern Europe (including the Baltic states) and the European and non-European NIS, with differing levels of Partnership Agreements is based on economic development as well as geographic and geopolitical factors. None of the NIS are yet members of the WTO, and the PCAs reflect this; they are all still treated by the EC as 'non-market economy' states for the purpose of anti-dumping policy. In a somewhat different way economic status also affects the Community's relations with the developing countries.

The idea of differentiation based on the developmental status of the partner States is inherent in the special provisions for developing countries found in the GATT (and now WTO). In the Preamble to the Marrakesh Agreement establishing the WTO the parties refer to their 'different levels of economic development' and recognise that there is a need 'for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.' Part IV of GATT 1947 (which forms part of GATT 1994) contains specific provisions on trade and development, such as Article XXXVI(8) allowing for less than full reciprocity in trade negotiations between developed and less-developed contracting parties. Other examples among the Multilateral Agreements on Trade in Goods in Annex 1A include Article 4 of the Agreement on Trade-Related Investment Measures (TRIMS), and Article 12 of the Agreement on Technical Barriers to Trade, on special and differential treatment of developing country members, which includes time-limited exceptions. The GATS also contains in Article IV a specific provision designed to increase developing country participation in trade in services.

This approach has formed the basis of the Community's development policy, and in particular the Lomé Convention, which offers a degree of non-reciprocal preferential trade to the ACP States with special provision for the least-developed, landlocked and island States.⁴¹ In the Commission's words:

'The EU used [this] policy (involving non-reciprocal trade preferences) in the Yaoundé and now Lomé Conventions, as an instrument of development, and to provide an economic dimension to its assistance to former dependent territories. Agreements between the EU and developing countries which aim to strengthen

⁴⁰ Commission proposal for new TACIS Regulation for 2000-2006, Art 2(4).

⁴¹ The Fourth Lomé Convention was signed at Lomé, Togo 15 December 1989, OJ 1991 L229/3; a revised text of Lomé IV following mid-term review was signed in Mauritius 4 November 1995, Council & Commission Decision of 27 April 1998 OJ 1998 L 156/1.

trade and other links can provide support for economic, social and political reforms in the countries concerned.⁴²

The 'graduation' mechanism adopted in the more recent GSP Regulations is a specific example of Community policy differentiation between developing countries.⁴³ Here I would like only to highlight the extent to which differentiation has become a key concept for the EC in defining its approach to the re-negotiation of Lome, incorporating differentiation *between the ACP States* (as opposed to differentiation between developed and developing states) on a dual basis: regional and economic.

In its Communication on guidelines for the negotiation of new co-operation agreements with the ACP countries,⁴⁴ the Commission proposes that the ACP States should continue to be treated as a group (reflecting their own wishes) but that within this framework, 'there is a need for differentiation reflecting the regional dimension of economic and trade cooperation, the increasing role of regional integration as a factor for development and, more generally, the need to adjust to the facts of life and the specific circumstances of the ACP group's various components by conducting dialogue and cooperation activities at the most appropriate level'. Thus the proposal is for the negotiation of a new overall EU-ACP partnership agreement, to be followed by differentiated regional or subregional economic co-operation and partnership agreements linked to the overall agreement. The initial partnership agreement would establish as an overall objective the conclusion of economic cooperation agreements with the ACP regions, specifying the regional subgroups and countries, the general framework and overall timetable for the economic cooperation or partnership agreements to be negotiated during the second stage.

These regionalised agreements (for West Africa, Central Africa, southern Africa, East Africa, Caribbean and Pacific Regions) will develop cooperation in a number of areas and as the Commission states 'an approach aimed at enhancing the economic partnership would obviously have to take account of each partner's level of development, constraints and capacities'. We are therefore seeing differentiation based on regional and economic considerations, within an overall framework coming under the rubric of a 'partnership'.

(iii) conditional differentiation

⁴² Commission report, 'WTO Aspects of EU Preferential Trade Agreements with Third Countries' presented to the General Affairs Council in April 1997 and to the European Council at Amsterdam, June 1997.

⁴³ The graduation mechanism takes account of developmental and specialisation criteria; the GSP Regulation also gives greater preferences to the least developed countries. See most recently Council Regulation 2820/98/EC of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 OJ 1998 L357/1.

⁴⁴ COM(97) 537 final.

In the case of the ACP States therefore, we have an approach in which the level of economic integration envisaged by regionally-based agreements may deepen over time as a result of the economic development of the partner states. In contrast, with south-east Europe we have an example of 'conditional differentiation' in which progress towards greater economic integration with the EU depends on political as well as economic progress.

In EU policy towards south-east Europe generally, the 'regional approach' to relations has been expressly linked to conditionality. In reviewing the position of the Western Balkans in December 1998, the Council stressed 'the importance it attaches, in the EU's relations with all these countries, to conditionality in the framework of the EU's regional approach.'⁴⁵ We shall now turn to look at this aspect of differentiation in more detail.

The Guidelines adopted in October 1995 by the Council⁴⁶ make it clear that Community assistance with reconstruction and regional economic development was to be conditional:

'The granting of longer term measures will be subject to criteria of conditionality which should include the following elements:

- ◇ implementation of the terms of the peace agreement
- ◇ respect for human rights, minority rights, and the right to return of all the refugees and displaced persons
- ◇ with respect to FRY (Serbia & Montenegro), the granting of a large degree of autonomy within it for Kosovo
- ◇ respect for the principles of market economy
- ◇ cooperation with the international war crimes tribunal.'

These conditions form the basis of the 'common principles for future contractual relations with certain countries in South-Eastern Europe' adopted by the Commission in October 1996.⁴⁷ The Commission suggests a set of common principles for negotiating with the three states that do not yet have any agreement with the EU (Croatia, Bosnia and Herzegovina (BiH), Federal Republic of Yugoslavia (FRY)), although negotiations need not be carried out in parallel, and progress will depend on meeting preconditions; no date is given for starting negotiations. Pre-agreement trade relations are covered by autonomous trade measures such as the General System of Preferences (GSP) and these, as well as financial assistance measures such as the PHARE programme, are also subject to conditionality. The Commission is quite open in stating that the EU has a great interest in peace and stability in the region, and 'given the three republics' [Croatia, FRY, BiH] interest in forging closer ties with the EU, the establishment and content of contractual

⁴⁵ Conclusions of the European Council, Vienna, December 1998 (para 108).

⁴⁶ Bull EU 10-1995 at p.138.

⁴⁷ COM(96)476 final.

relations with them does also represent an effective tool in bringing about the desired stability.’⁴⁸

What is particularly interesting about these conditions is that they are more than purely rhetorical: it is possible to trace their concrete application in the more detailed Council Conclusions on conditionality adopted in April 1997,⁴⁹ and subsequent regular reports and assessments by Commission and Council.

The Council Conclusions of April 1997 were based on a strategy paper by the Commission of February 1997 and establish conditions which are both general and specific to individual countries. The Council adopts a graduated approach, which means that different degrees of conditionality will apply to (in ascending order) trade preferences, financial assistance and economic cooperation (under PHARE), and contractual relations. Contractual relations themselves will also be graduated, in the sense that the start of negotiations will require less progress than their conclusion, and an initial first stage trade and cooperation agreement may lead on to an association agreement. It is worth noting that the general conditions include not only free and fair elections, an independent media, and compliance with the GFAP (General Framework Agreement for Peace), but also ‘readmission of nationals of the states concerned who are present illegally in the territory of a Member State of the EU’. In addition, the Council specifies criteria for judging compliance with these conditions under the heads of democratic principles, human rights, rule of law, respect for and protection of minorities, and market economy reform.

Since 1997 assessments have been made on a regular basis by the Commission (April 1998, November 1998, May 1999) and Conclusions on future policy adopted by the Council. As a result, each state is in a different position and these five countries illustrate a range of different stages of relation with the EU, as well as being drawn together in the so-called ‘regional approach’ with its explicit political and economic conditionality. FYROM has a second stage agreement granting preferential trade conditions, with political dialogue included within the agreement, and an evolutionary clause in the agreement itself; financial and technical assistance is granted via the (autonomous) PHARE instrument. Albania has a first stage agreement establishing essentially basic MFN trade conditions,⁵⁰ together with autonomous trade preferences renewed annually and PHARE assistance. BiH has no agreement, but benefits from trade preferences, and from PHARE assistance although the later is limited to assistance linked to the implementation of the peace plan. Croatia has no agreement or PHARE assistance, but benefits from autonomous trade preferences renewed annually. FRY has no agreement, no trade preferences (although it enjoyed these briefly for a period of a few months in 1997)

⁴⁸ Ibid. at p.4.

⁴⁹ Bull. EU 4-1997, p. 132.

⁵⁰ OJ 1992 L343/1.

and no PHARE assistance; on the contrary it is subject to economic sanctions such as the freezing of funds held abroad and prohibition of new investment.⁵¹ The Community has difficulty differentiating between Serbia and Montenegro within FRY: although the Commission in its reports differentiates between them, the Council Conclusions do not on the ground that all the measures covered by the regional approach (trade preferences, PHARE, negotiation of agreements) can only apply to states and therefore FRY must be treated as a whole.⁵² The EC is claiming that progress for all these states up (or down) the 'ladder' of trade preferences, financial assistance, and first and second stage agreements with a 'goal' of association status, is subject to compliance with specific conditions, on the basis of regular assessments by the Commission. The most recent events in Kosovo have also indicated that progress in relations with the EU may be offered as a 'reward' for helping with the immediate crisis and, longer term, maintaining a stance which conforms to western European political priorities (such as the EU position on Serbia), with a view - according to the EU - to promoting greater stability in the region.⁵³

Other examples of both positive and negative conditionality are easy to find, although in other cases we tend to see a 'one-off' reaction to a particular situation, rather than a sustained policy such as that towards south-east Europe. For example, the EU reacted to the execution of Ken Saro-Wiwa in Nigeria in 1995, imposing an arms embargo and suspending development cooperation, as well as imposing 'political sanctions' in the form of a CFSP decision to refuse visas to named members of the government.⁵⁴ In 1998

⁵¹ An arms embargo has been in place since 1996, when the general economic sanctions against Serbia and Montenegro were lifted: Common Position 96/184/CFSP OJ 1996 L 58/1. In March 1998 a common position on economic and political sanctions was adopted: Common Position 98/240/CFSP on restrictive measures against Yugoslavia OJ 1998 L 95/1; the sanctions include a confirmation of arms embargo; embargo on supply of 'equipment which might be used for internal repression or terrorism'; a moratorium on government-financed export credit support; visa restrictions on named key officials. A number of measures threatened in Common Position 98/240 have now been adopted, including Council Regulation 926/98/EC of 27 April 1998 OJ 1998 L 130/1 implementing economic aspects; and further measures dealing with (inter alia) prohibition of new investment in Serbia, prohibition of flights by Yugoslav carriers between FRY and EU Member States, a ban on the supply and sale of petroleum products, and a visa ban for an extended list of people 'close to the regime'.

⁵² Although see Joint Action 98/301/CFSP of 30 April 1998 adopted by Council under Art J.3 TEU in support of Montenegro OJ 1998 L 138/1, intended to provide immediate assistance to the new government to continue economic and political reform. In addition in January 1999 the Montenegrin national airline was exempted from the flight ban imposed on Yugoslav carriers in September 1998.

⁵³ In April 1999 the Special General Affairs Council in its Conclusions on Kosovo, noted the help being given to the refugees by Albania and held out the possible 'reward' of upgraded relations: 'The EU notes that the progress in stabilization and development in Albania will contribute to the further enhancement of EU Albania relations, including programmes towards a future upgrading of contractual relations' and promised 'technical and financial advice and assistance to aid Albania as much as possible'. The Council adopted a very similar conclusion in relation to FYROM, and this message was endorsed by the Political Dialogue meetings between the EU and Albania and FYROM respectively both held on 27 April 1999.

⁵⁴ Common Position 95/515/CFSP of 20 Nov. 1995 on Nigeria OJ 1995 L 298/1, since extended several times. Development cooperation was suspended, but 'Exceptions may be made for projects and programmes in support of human rights and democracy as well as those concentrating on poverty alleviation

some of these measures were rescinded, although the arms embargo remains, in the light of the promise of elections in 1999 and the release of political prisoners.⁵⁵ Development cooperation was not fully re-instated but 'a dialogue' may be resumed with the Nigerian authorities 'with a view to re-engagement after the installation of a democratically elected civilian government.' In the meantime, development cooperation with Nigeria may continue only for actions permitted by the 1995 common positions. The EU also committed resources to sending observers and an EU spokesperson to the elections, and support for the functioning of the Nigerian Independent National Election Commission.⁵⁶

What appears to be a clear-cut example of conditionality applying to (inter alia) development cooperation, coupled with positive measures designed to support political initiatives of which the EU approves becomes more complicated when one takes account of the limited nature of the sanctions imposed (an oil embargo was not imposed, for example) and the special arrangements made to ensure that Nigeria could participate in some sporting events such as the World Cup.⁵⁷ The preamble to the common position adopted in October 1998 is also revealing in referring to the political importance of Nigeria for the Community's other priorities in Africa: 'the European Union attaches great importance to the relationship between the Union and Nigeria in recognition of the pivotal regional and international role of this country, especially its contribution to peace-keeping activities, e.g. in Liberia and Sierra Leone, which the Union continues to support'. It seems clear that Community policy was a careful balance of small-scale measures and rhetoric, with the Community (economic and political) interest precluding more far-reaching sanctions and encouraging normalization as quickly as possible.

Belarus provides another example of positive and negative responses to a particular situation. In early 1997 the EC reacted to the constitutional crisis in Belarus in terms which were closely tied to its relations with the EU: having expressed doubt as to 'the declared willingness of the Belarusian Government to work constructively with the EU and relevant international organizations towards establishing a political system which respects the internationally accepted norms for human rights and political freedoms' the EU stated that 'cooperation between EU Member States and institutions and Belarus cannot proceed in the absence of convincing efforts to establish such a system.'⁵⁸ Later in 1997 the Council deplores 'the Belarusian authorities' non-constructive, indeed

and, in particular, the provision of basic needs for the poorest section of the population, in the context of decentralized cooperation through local civilian authorities and non-governmental organizations.'

⁵⁵ Common Position 98/614/CFSP of 30 October 1998 concerning Nigeria OJ L 1998 293/77.

⁵⁶ Joint Action 98/735/CFSP of 22 December 1998 in support of the democratic process in Nigeria OJ 1998 L 354/1.

⁵⁷ See for example the adverse comments in a EP Resolution on Nigeria of 18 Dec 1997, OJ 1998 C14/204, and Common Position 97/820/CFSP on the implementation of 95/544/CFSP on Nigeria OJ 1997 L 338/7.

⁵⁸ General Affairs Council 29 April 1997: Council Declaration on Relations with Belarus.

obstructive; attitude to its relations with the European Union' and stating that 'relations between the European Union and Belarus will not improve while Belarus fails to move towards respect for human rights and fundamental freedoms and to observe the constitutional principles inherent in a democratic State governed by the rule of law', the Council concludes that neither the EC nor its Member States can yet formally conclude the Partnership and Cooperation Agreement (nor the Interim Trade Agreement).⁵⁹ Implementation of Community technical assistance programmes (under TACIS) was halted, 'except in the case of humanitarian or regional projects or those which directly support the democratization process'; and this led to the adoption of a TACIS programme for the development of civil society in Belarus, which might be seen as a positive measure designed to bring about an improvement in the conditions which had led to the negative refusal to conclude the PCA.⁶⁰

The position taken towards Belarus was founded on the conditions attached to the PCAs, most notably respect for democracy, the rule of law and protection of human rights. Nevertheless we can see a differentiation between Russia and Ukraine (whose PCAs are now in force) on the one hand, and Belarus on the other, which is not simply founded on a refusal to conclude the PCA with a state which was not observing these 'essential elements'. As with Nigeria, the relative importance to the EU of the partners is clearly crucial. The war in Chechnya, although it caused some heart-searching, did not ultimately block the conclusion of either the interim agreement or PCA with Russia. While issuing statements deploring what was happening in Chechnya, the EU was also careful to stress that it 'attaches importance to its relations with Russia ... is concerned at the possible consequences of the crisis' and 'that these relations must be based on the shared principles of the United Nations and the OSCE, as confirmed in the Partnership Agreement'.⁶¹

Ward has suggested an even more substantial differentiation in the Community's insistence (or not) in including a 'human rights' clause in all its agreements: a differentiation based in part on the importance of the relationship from the Community's perspective, and in part on an unstated distinction which appears to be drawn between developing and industrialised countries.⁶² Contractual relations between the EC and industrialised countries such as the USA and Australia are largely based on sectoral agreements, and these have escaped from the EC's policy of including human rights

⁵⁹ General Affairs Council 15 Sept 1997: Council Conclusions on Belarus.

⁶⁰ Council Decision 98/1/EC of 18 Dec 1997 on a TACIS Civil Society Development Programme for Belarus for 1997 OJ 1998 L 1/6.

⁶¹ Presidency Statements on Chechnya, Brussels (17-01-1995) - Nr. 4215/95 (Presse 11) CFSP: 2/95, and Brussels (23-01-1995) - Nr. 4385/95 (Presse 24) - CFSP : 7/95.

⁶² Ward, 'Frameworks for Cooperation between the European Union and Third States: a Viable Matrix for Uniform Human Rights Standards?' (1998) 3 EFARev.505. See also Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' (1998) 3 EFA Rev.253.

clauses in all trade and cooperation agreements.⁶³ Can one then argue that there is a policy of differentiation between developed and developing countries, whereby the Community will insist on an element of conditionality in its contractual relations with the latter - an element which itself forms a basis, as we have seen, for further differentiation?

It is hard to deny some element of differentiation (not to say discrimination) here, but there are other reasons for the Community emphasis on sectoral agreements with the industrialised world, rather than on general trade agreements. One of the most important is the constraint imposed by the GATT - and now WTO - and in examining just what this means we will be moving on to a consideration of the different treaty options that are open to the Community and the flexibility shown by the Community in negotiating their substantive provisions.

4. Flexibility

(i) trade provisions and reciprocity

The most fundamental distinction in the possible options for the trade provisions within agreements is that between reciprocal and non-reciprocal preferential agreements. As an international institution which is bound by the GATT, and which is now a WTO contracting party, the EC is bound in its external economic relations by the basic MFN obligation found in Article 1 GATT 1947. Developing countries benefit from special exemptions under GATT rules which allow a developed member (such as the EC) to grant trade preferences without insisting on reciprocity.⁶⁴ Where, on the other hand, trade preferences are granted to a developed member, in order to comply with GATT these (i) will have to be based on reciprocity and (ii) will either have to be offered to all other GATT parties under the MFN obligation, or will need to fulfill the GATT conditions for free trade areas and customs unions which operate as an exception to the MFN obligation. A fully reciprocal trade preference bilaterally negotiated and then offered to all other parties under MFN is not a viable proposition, so as between developed countries the effective choices are (i) a trade relationship based on MFN tariffs bound under GATT; or (ii) a GATT-compliant free trade (or customs union) agreement. The latter are by no means unknown, of course, having been concluded by the EC with the industrialised states of Europe, first as bilateral FTAs with the EFTA states, and then extended within the multilateral European Economic Area Agreement. It is noticeable, however, that these examples relate to countries within Europe. As the Commission points out in the context of notifications to GATT under Article XXIV, 'the WTO Secretariat data contains very

⁶³ Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, 23 May 1995, COM(95)216 final; approved by Council 29 May 1995.

⁶⁴ See for example Art XXXVI(8) GATT 1947. Although, as the Commission has pointed out, the WTO does not contain any objective tests for 'developing' countries; their status is largely a matter of self-selection.

few examples of recent free trade agreements being concluded between parties which are not geographically contiguous or linked by other regional arrangements.’⁶⁵

The alternative to a full free trade area (which to satisfy GATT conditions must cover ‘substantially all’ the trade between the parties and should not exclude any sector completely) is therefore to conduct trade on an MFN basis, with specific agreements designed to reduce non-tariff barriers such as (for example) mutual recognition of standards and conformity assessment and customs cooperation. So for example, although in the early stages of the New Transatlantic Agenda agreed with the USA in 1995 there was discussion of a possible free trade agreement, the Transatlantic Economic Partnership (TEP) launched in May 1998 and the Action Plan adopted in November 1998 is based (as far as trade in industrial goods is concerned) on a common initiative to encourage further reductions of MFN tariffs within the multilateral context of the WTO. The Commission discussion document which preceded the TEP is clear about the reasons for this. In addition to the need to be seen to be supporting and not undermining the multilateral trading system, there is much more to be gained, in terms of EC-USA trade, by using the combined weight of these trading blocs to lever a generalised reduction in tariffs.

‘A bilateral elimination, on a preferential basis, of all industrial tariffs between the EU and the US is not part of this proposal. The average level of tariffs prevailing in both economies is already low, though major gains remain to be made in sectors where ‘peak’ or significant tariffs remain. These gains will be well worth having, but much greater gains will accrue from the elimination of industrial tariff barriers on an MFN basis involving a broad range of other countries ... The proposed tariff initiative is explicitly and exclusively multilateral; the EU and the US will make a joint commitment that, in future multilateral negotiations, they will eliminate all industrial tariffs by 2010 if a critical mass of trading partners (understood in terms of volume of trade and/or numbers of countries) do the same. A bilateral preferential deal is thus ruled out.’⁶⁶

The TEP does not make an explicit joint commitment in quite this form, and limits itself to joint initiatives designed to reduce industrial tariffs multilaterally. But the reasoning behind a multilateral rather than bilateral approach in the case of major industrial trading partners is clear.

This tendency towards multilateralism is also evidenced in the reciprocal free trade agreements which have formed the basis of economic relations within the ‘wider Europe’: with the EFTA states (the EEA and FTA with Switzerland), with Turkey, Malta and Cyprus (the Association Agreements and Customs Union), with the countries of central and eastern Europe (the Europe Agreements) and the Mediterranean states (the Euro-Med

⁶⁵ Commission report, ‘WTO Aspects of EU Preferential Trade Agreements with Third Countries’ presented to the General Affairs Council in April 1997 and to the European Council at Amsterdam, June 1997. The EC’s Global Agreement with Mexico is an exception here.

⁶⁶ The New Transatlantic Marketplace, Communication of Sir Leon Brittan, Mr Bangemann and Mr Monti, 11 March 1998.

Agreements). Of these, only the EEA is in itself multilateral, but the others form part of a network of similar agreements, including horizontal agreements between the EC's partners, encouraged by the EC as part of its policy of promoting regional integration referred to earlier.

'As well as serving ... transitional and developmental goals, ... the EU's preferential agreements do serve to open markets by pushing forward a pattern of tariff disarmament in partner countries, helping them to prepare for further multilateral liberalisation. This feature of the EU's agreements has become more significant in recent years, as the EU has concluded or is negotiating in the context of its new Mediterranean policy new association agreements with Mediterranean partners, which include the establishment of free trade areas on a reciprocal basis. The EU has also been encouraging partners to join the WTO if they had not done so.'⁶⁷

The Partnership and Cooperation Agreements represent another network of agreements, with the emerging economies of the former Soviet Union. These are not (yet) free trade agreements. They are reciprocal agreements establishing MFN treatment as far as tariffs are concerned and abolishing quantitative restrictions on industrial goods, so bringing these non-members of the WTO into a trading relationship with the EC on a par with its GATT-based multilateral framework. We have already noticed that it is the PCAs with the European states (Russia, Ukraine, Moldova, Belarus) which envisage the possibility (though without commitment) of a free trade agreement, thus supporting the conclusion that the general objective for trade relations within the 'wider Europe' is based on free trade (and customs unions).⁶⁸

There are two main groups of *non-reciprocal* preferential agreements: that is agreements which offer preferential access to the Community market in return for MFN treatment for Community goods. These are first the Lomé Convention with the developing ACP states and second the agreement with FYROM (Albania and the other states of former Yugoslavia are likely to be offered similar agreements once political and economic conditions are satisfied). It is worth noting that countries in these two categories which not yet have agreements with the EC (such as Croatia), or whose agreements do not offer trade preferences (such as Albania, India, or Brazil), are in general covered by

⁶⁷ Commission report, 'WTO Aspects of EU Preferential Trade Agreements with Third Countries' presented to the General Affairs Council in April 1997 and to the European Council at Amsterdam 1997.

⁶⁸ This reflects what the Commission has called the 'strategic' dimension to preferential agreements: 'provide an economic dimension to wider agreements with neighbouring countries, with which co-operation was envisaged'; Commission report, 'WTO Aspects of EU Preferential Trade Agreements with Third Countries'.

autonomous trade preferences such as the General System of Preferences or the special regulations for former Yugoslavia.⁶⁹

A tendency is becoming clear, however: a tendency to move towards greater levels of reciprocity in trade agreements. The old-style Cooperation Agreements with the Mediterranean states, such as Algeria or Morocco, which were non-reciprocal preferential agreements, are being replaced by the newer Euro-Med Agreements which envisage eventual free trade. Even the Lomé Convention, the flag-ship of non-reciprocity for the developing countries, looks likely to be replaced with agreements which, although certainly not insisting on any fixed timetable for full reciprocity, are designed to lead in that direction. The Commission in its policy paper on Guidelines for the negotiation of new cooperation agreements with the ACP countries puts this perhaps rather coyly but nevertheless clearly:

‘It will not be possible to enhance the EU-ACP economic partnership without abandoning the traditional approach to trade - centred on a system of unilateral preferences - in favour of a more balanced approach characterised by a genuine partnership and taking account of the parties’ mutual interests.’⁷⁰

The model being proposed by the EC to the ACP includes regional agreements which may be either economic cooperation agreements (which although not totally reciprocal would contain an element of reciprocal treatment for EU exports with provision for further liberalisation) or economic partnership agreements (which would provide for the gradual establishment of reciprocal WTO-compliant free-trade areas). Their trade provisions would provide for differing degrees of reciprocity and appropriate timetables. The timing and length of the transitional periods, during which the (non-reciprocal) status quo in trading terms would be maintained, is proving to be a contentious issue in the negotiations which have now got under way. A waiver under Article IX WTO and/or Article XXIV(10) GATT would be required both to maintain existing preferences during the negotiating period and for the non-reciprocal economic cooperation agreements. The long-term objective for the EU appears to be to achieve WTO-compliant free trade agreements with each of the ACP regions.⁷¹ To the extent that non-reciprocal trade preferences survive, this will take the form of autonomous measures, in particular the GATT-compliant GSP system.

⁶⁹ The Commission has suggested that if any ACP state decides that it does not want to be part of the move toward reciprocity envisaged in the proposals for new cooperation agreements, it will continue to benefit from trade preferences within the GSP system: COM(97)537 at sect.5.4.

⁷⁰ COM(97) 537 at section 5.1.

⁷¹ ‘In the long run, the harmonisation of the preferences offered by the EU to all LLDCs and a proliferation of economic cooperation agreements compatible with the WTO, and in particular GATT Article XXIV on free-trade areas, would ultimately mean that the EU’s future trade arrangements were perfectly in line with WTO provisions and require no exceptions.’ COM(97) 537 at sect.5.5. The Commission recognises however that the interim arrangements, including the non-fully reciprocal economic cooperation agreements, will require WTO exceptions under either Art.IX WTO or Art.XXIV(10) GATT.

A highly significant precedent has been set with the signing earlier this year of a new trade, development and cooperation agreement with South Africa.⁷² Existing EC relations with South Africa operate at a number of levels. In April 1997, South Africa became a qualified member of the Lomé Convention.⁷³ Under this agreement South Africa participates in the Lomé institutions but it will not be eligible for non-reciprocal trade preferences or access to funding from the European Development Fund (EDF).⁷⁴ There is also a 1994 Cooperation Agreement⁷⁵ which will be complemented by the new Free Trade Agreement, as well as sectoral agreements on science and technology,⁷⁶ wine and spirits, and fisheries.

In June 1995 negotiations were opened for a bilateral trade agreement with the ultimate objective of the establishment of a free-trade area. The projected FTA will comply with WTO rules, will cover the free movement of goods in all sectors, the ultimate liberalisation of trade in services, and the free movement of capital.⁷⁷ The agreement will also cover Economic Co-operation, including trade and investment promotion and cross-border initiatives facilitating regional trade and investment. At the end of the transitional period the FTA will cover the bulk of trade⁷⁸ between the parties, with an element of differentiation between the two parties. Liberalisation will be asymmetric, with the Community proceeding more quickly, and South Africa able to exclude sensitive products to a greater extent than the EC, including products which are sensitive within Botswana, Namibia, Lesotho and Swaziland (BNLS countries), with whom South Africa

⁷² See 'The European Union and South Africa: An overview of the relationship in the light of the conclusion of the Trade, Development and Cooperation Agreement', European Commission, April 1999.

⁷³ Council Decision 97/535/EC on Decision 1/97 of the ACP-EC Council of Ministers approving the Protocol governing the accession of South Africa to 4th Lomé Convention as revised in Mauritius OJ 1997 L 220/1.

⁷⁴ Instead, financial assistance is provided through autonomous Community regulations: Council Regulation 2259/96 on development co-operation with South Africa OJ 1996 L306/5 provides the legal basis for the European Programme for Reconstruction and Development (EPRD); Council Regulation 213/96 on implementation of EC investment partners financial instrument (ECIP) for Latin America, Asia, Mediterranean, South Africa OJ 1996 L28/2 sets up a specific mechanism to encourage private sector investment in the form of joint ventures and investment by Community undertakings.

⁷⁵ OJ 1994 L 341/62. This Agreement is based on both the trade and development co-operation provisions of the EC Treaty (Articles 133 and 181 [ex 113 and 130y] EC), and provides the basis for normalisation of EC - South Africa relations post-apartheid. It does not contain specific measures on trade but provides a basis for further negotiation.

⁷⁶ Council Decision 97/763 concluding Agreement for technical and scientific co-operation OJ 1997 L 313/25.

⁷⁷ Immediate commitments in relation to services will be limited to existing GATS commitments and in particular MFN treatment.

⁷⁸ Agricultural products will be included although the Community proposes exceptions for products totalling about 39% of the EU's current agricultural imports from South Africa.

has a customs union (the Southern Africa Customs Union - SACU).⁷⁹ These countries are also fellow members of the SADC⁸⁰ (which in August 1996 adopted a Trade and Development Protocol, designed to lead, within 8 years, to the establishment of a free trade area⁸¹).

One Commissioner has referred to the objective of this Agreement as being to create a 'Developmental Free Trade Area', 'not just an old fashioned Free Trade Zone',⁸² the difference apparently lying in the level of flexibility - the account that can be taken of South Africa's own developmental needs - and also the account taken of South Africa's relationship with its regional partners. The Commission sees the FTA as an instrument that will encourage regional economic integration (and thus fit into its priorities for the revised Lomé Convention). The projected Free Trade Agreement with South Africa will thus represent an interesting attempt to bring together WTO-compatible reciprocal free trade with differentiation and developmental objectives.

It is also possible to see this move towards reciprocity of trade liberalisation in the most recent EC agreement with Mexico. The Economic Partnership, Political Coordination and Cooperation Agreement between the EC, its Member States and the United Mexican States⁸³ has as its object 'to strengthen existing relations between the Parties on the basis of reciprocity and mutual interest. To this end, the Agreement shall institutionalize the political dialogue, strengthen commercial and economic relations by means of the liberalization of trade in conformity with the rules of the WTO and shall reinforce and broaden cooperation' (Article 2). The Preamble also refers to the parties' 'attachment to the principles of the market economy and mindful of the importance of their commitment to free international trade in conformity with the rules of the World Trade Organization (WTO) and in the context of their membership of the Organization for Economic

⁷⁹ According to the Commission, the EU will liberalise 95% of its South African imports within 10 years, whereas South Africa will liberalise 86% of its EU imports within 12 years. Under the terms of the SACU Treaty the BLNS countries will have to approve the FTA before it can enter into force: Commission paper of April 1999, see note 72.

⁸⁰ The members of the Southern Africa Development Community (SADC) are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, the Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. The EU has a regular dialogue with the SADC in the form of Ministerial Conferences, the third of which was held in Vienna, November 1998. The Conference affirmed that the basis of the EU-SADC 'partnership' was 'democracy, human rights, good governance and sound economic policies'. The meeting included political dialogue and discussion of regional integration issues.

⁸¹ For an overview of the various regional integration agreements in Southern Africa, see Mörner, 'Regional Integration And Trade Liberalisation In Southern Africa - An Overview' ITLQ (full citation needed).

⁸² 'Building a New Framework for Trade and Co-operation with South Africa and the other Countries in the Southern African Region' by João de Deus Pinheiro, former European Commissioner For Development, presented at European Conference on Southern Africa, Maastricht, 17 April 1997.

⁸³ OJ 1997 C 350/6, COM(97)527.

Cooperation and Development (OECD), with particular emphasis on the importance of open regionalism'. The trade provisions of the Agreement are designed to achieve 'a bilateral and preferential, progressive and reciprocal liberalization of trade in goods and services, taking into account the sensitive nature of certain products and service sectors and in accordance with the relevant WTO rules' (Article 4). This is to be achieved by decisions of the Joint Council set up by the Agreement which will establish the procedures and timetable for this progressive liberalisation. The decision of the Joint Council will deal with customs duties and charges having an equivalent effect, quantitative restrictions and measures having equivalent effect, the prohibition of fiscal discrimination, customs cooperation, technical regulations and standards, mutual recognition of conformity assessment, and exceptions and safeguard measures including anti-dumping (Article 5). The 'relevant WTO rules' referred to include Article XXIV GATT, so the ultimate objective is intended to be at least an Article XXIV-compliant free trade area, although the timetable for achieving this is left to the Joint Council to determine. Likewise for services, the Joint Council is to decide on the arrangements for a progressive and reciprocal liberalization of trade in services, in accordance with the relevant WTO rules, in particular, Article V of the GATS, and taking account of the commitments already undertaken by the parties within the framework of that Agreement (Article 6). The Joint Council, consisting of the EU Council of Ministers, the European Commission, and Members of the Government of Mexico, will have the power to take binding decisions and the speed at which trade liberalisation actually occurs will of course depend largely on the degree of commitment shown in the Joint Council and willingness to implement its decisions.

What are the reasons behind the discernible move towards reciprocity and free trade not only within the wider Europe but further afield? Both the Agreements which have been signed (with South Africa and Mexico) and those that are projected as part of the re-negotiation of Lomé, put great emphasis on compliance with WTO rules, and there is no doubt that this is a factor. GATT rules on free trade have been tightened up to some extent by the Uruguay Round Agreements, especially in terms of the timetable for achieving a free trade area or customs union,⁸⁴ and are being taken more seriously, in part because there are so many more of them. The EC has an interest in its trading partners, who are increasingly entering into preferential agreements of their own, complying with WTO rules and is giving greater emphasis to doing so itself.

A further factor, which also lies behind the WTO approach to trade and development, is the (contested) view that developing countries will derive most benefit from full integration into the global economy. This emerges clearly in the Commission's statements on the re-negotiation of the Lomé Convention. One of the elements of the new partnership proposed by the EU is to be 'enhanced economic cooperation in the mutual interest, with cooperation being extended into a series of trade-related areas and focused

⁸⁴ The Understanding on the Interpretation of Article XXIV in GATT 1994 states at para 3 that the 'reasonable length of time' by which a customs union or free trade area should be achieved 'should exceed 10 years only in exceptional cases'.

on integration in the world economy.' Although, as we have seen, the Commission emphasises differentiation in the new agreements, particularly in order to take account of the needs of the least developed states (LLDCs), this should not rule out reciprocal liberalisation, in the context of regional integration, altogether:

'However, this necessary differentiation between LLDCs and other countries should not be at the expense of the regional integration processes under way. Many ACP LLDCs belong to customs unions or free-trade areas with which it would make sense to conclude economic cooperation agreements involving a degree of reciprocity. The benefits of taking part in an area of enhanced economic cooperation with the EU should outweigh any interim costs of liberalisation.'⁸⁵

This 'no gain without pain' attitude does however also recognise that additional financial assistance will be needed to help with the transition:

'Reciprocity would, however, require a greater adjustment effort from these LLDCs, efforts which would have to be taken into account when assessing their needs and give rise to extra help in the form of flanking measures (transition aid, macroeconomic assistance, sectoral assistance etc.).'⁸⁶

Likewise, in discussing the new agreement with South Africa, the Commission recognises that the BNLS states within the SACU customs union will suffer 'adjustment costs' as a result of opening up their markets to competition with EU producers, as well as a reduction in revenue from the lowering of tariffs. Nevertheless, the Commission states that 'in the long term' the agreement will have a net positive effect for the BNLS countries.⁸⁷

(ii) Flexibility and asymmetry

Having identified a tendency, or even a policy, on the part of the EC which looks increasingly for reciprocal trade liberalisation from its partners, both bilaterally and multilaterally, we should now ask what degree of flexibility is, or can be, incorporated into these aspects of the EC's economic agreements. Flexibility in practice appears in two forms: first in relation to the timing of commitments, sometimes including an asymmetry in the timetable, and second in the levels of coverage and exemption and derogation allowed.

Flexibility as to timing operates in a number of ways. At one level, provision can be made to move from one type of commitment to another by means of staged new agreements: the evolutionary clause in the 'European' PCAs, for example, or the Agreement with FYROM. The proposed new regional agreements with the ACP states would fall into this category too, specifying the period after which to assess the progress made towards liberalisation and to establish a timetable for subsequent stages, including the move

⁸⁵ COM(97) 537 at sect 5.3.

⁸⁶ COM(97) 537 at sect 5.3.

⁸⁷ Commission paper of April 1999, see note 72.

towards regional economic partnership agreements which would provide for the gradual establishment of a free trade area. The Agreement with Mexico relies on a timetable to be established by the Joint Council, without giving a deadline. Clearly, there is a great deal of scope for flexibility here in terms of the timetable, although one should bear in mind that trade preferences granted outside an ultimate commitment to free trade require a GATT exemption or waiver, and once a free trade agreement is concluded, the Article XXIV GATT time period expectation of 10 years comes into play. Flexibility in timing can also include asymmetric timetables in the agreement itself, as is the case in both the Europe and Euro-Med Agreements and the prospective FTA with South Africa. Under this approach, the EC will dismantle its tariff barriers more quickly than the partner (often immediately), within the overall timetable and deadline.

Flexibility also appears in the level and types of exemption and derogation permitted by an agreement, and these may also be asymmetric. To take just a few examples: the Europe and Euro-Med Association Agreements⁸⁸ both contain 'infant industry' clauses allowing for the increase or re-introduction of customs duties by the partner state (not the EC) in derogation from the staged elimination of tariffs envisaged by the Agreements.⁸⁹ These are seen as exceptional measures and are subject to conditions relating to the nature of the industries which need protection, a limit to the amount of increase of duty, the retention of an element of preference for Community products, limits on the time for which the duties may be imposed, and consultation requirements. The fact that prior consent does not have to be obtained before the initial introduction of these protective measures (although it will be needed if the duties are retained beyond the initial five year limit) underlines the element of flexibility here. These agreements, and other free trade agreements, also contain a 'safeguard measures' clause whereby protective measures can be taken where a product is imported under such conditions or in such quantities as to cause 'serious injury' to domestic producers of like or competing products or serious disturbance in any sector of the economy.⁹⁰ These clauses, which follow the substance of the Community's Regulation on safeguard measures⁹¹ are reciprocal and intended to be compatible with the WTO Agreement on Safeguard Measures.

Although free trade agreements must cover substantially all trade between the parties in order to comply with GATT, they may be flexible in their treatment of sensitive products, either through differential timetables, or through exemptions and derogations. In the Euro-Med Agreement with Tunisia for example, although the EC is to remove all tariffs on industrial products immediately, Tunisia is to abolish duties on industrial goods

⁸⁸ With the exception of the Association Agreement with Israel.

⁸⁹ See for example Art 14 of the Euro-Med Agreement with Tunisia, Art 28 of the Europe Agreement with Poland.

⁹⁰ See for example Art 25 of the Euro-Med Agreement with Tunisia, Art 112 EEA, Art 30 Europe Agreement with Poland, Art 17 PCA with Russia.

⁹¹ Regulation 3285/94 on common rules for imports OJ 1994 L 349/53.

according to a graduated timetable which varies according to the category of products listed in the Annexes. In the Agreement with Mexico, the Joint Council, in establishing the trade liberalisation programme is to establish coverage and transitional periods, taking into account 'the sensitive nature of certain products'. The FTA with South Africa also contains derogations for products which are sensitive to the EC, to South Africa, and to South Africa's customs union partners in SACU.

For agricultural products the agreements have special provisions and normally do not envisage full liberalisation. This of course reflects both the historical difficulty of applying GATT disciplines to agricultural products and the particular history of the extreme sensitivity of the EU Member States to the idea of open competition and free trade in agricultural markets. The Commission has defended this stance:

'Sectoral exclusion is not a feature of any recent agreement but total liberalisation of agriculture has never been possible because of the need, which has been explicitly recognised in some negotiating mandates and implicit in them all, to avoid conflict with the common agricultural policy... On agricultural goods, the EU's recent agreements are characterised by careful liberalisation within the coverage of the agreements concerned. It is important to put this in context: GATT Article XXIV has never envisaged that a free trade area or customs union would require entirely free trade in all products between the participating members. It envisaged that the general tests in Article XXIV would be met and that substantially all the trade would be liberalised. Nevertheless it remains the case that a more restrictive regime in agriculture remains possible in a manner consistent with Article XXIV provided the sector is itself covered and provided there is real liberalisation within that sector over the transitional period.'⁹²

Here, therefore, the EC's move has been away from complete exclusion of the sector (as was the case for example with the original FTAs with EFTA states) towards a commitment to negotiate further liberalisation on a product-by-product basis (a 'positive list' approach), with plenty of scope for flexibility in terms both of timing and indeed the ultimate goal. The FTA with South Africa represents the most ambitious initiative so far in this respect, in that it would include agricultural products in the ultimate objective of free trade, subject to a 'negative list' of sensitive products⁹³ (the negative list however comprising around 45% of South African agricultural exports to the EC). Not surprisingly, the negotiations on agriculture have proved the most contentious aspect of the agreement. The fact remains that the flexibility for agricultural products in EC free trade agreements, while possibly defensible under current GATT rules, is generally more of a benefit to the EC than to its partners and sits uneasily with the EC position on the benefits of trade liberalisation for developing economies.

⁹² 'The place of agriculture in free trade agreements', sect. IV of Commission report, 'WTO Aspects of EU Preferential Trade Agreements with Third Countries' presented to the General Affairs Council in April 1997 and to the European Council at Amsterdam, June 1997, .

⁹³ Inter alia, cut flowers, apples and apple juice, pears, oranges and orange juice and wines.

One final aspect of trade liberalisation should be mentioned. Increasingly, the EC defines trade to include trade in services as well as goods. Countries negotiating trade agreements with the EC can expect to find the liberalisation of services on the agenda, and the terms of the clauses of services are fairly standardised: a commitment framed in terms of GATS-based MFN treatment,⁹⁴ with the prospect of negotiated liberalisation in the light of future developments within GATS. These developments have been (and will be) to a great extent sector-based (financial services, telecommunications, information technology, maritime services etc.) and future bilateral negotiations are likely to reflect this aspect of services liberalisation, although this does not of course rule out 'package deals' encompassing a number of sectors. Where the other party is a WTO member, the services provision will typically be phrased as a reaffirmation of existing GATS commitments (for example, the Euro-Med Agreement with Tunisia, the Europe Agreement with Poland). Where the party is not a WTO member, the clause will seek to achieve a broadly similar level of MFN obligation (for example, the Euro-Med Agreement with Jordan, the PCA with Russia). The Global Agreement with Mexico goes (potentially) further than most in providing - by means of decisions to be adopted by the Joint Council - for 'a progressive and reciprocal liberalization of trade in services', in accordance with the relevant WTO rules, in particular, Article V of the GATS (Article 6). The Framework Agreements with the Andean Pact, MERCOSUR and Brazil (which do not contain specific trade liberalisation commitments) do not contain specific commitments on services, but include them as one aspect of the envisaged cooperation.⁹⁵

This increasing attention to services is clearly partly - indeed largely - the result of the GATS and sectoral negotiations within the GATS framework. However it is also evidence of a different phenomenon which we will explore more fully in the next section: the extension of external economic policy⁹⁶ beyond the customs union into other aspects of the internal market. The external dimension to the internal market was perhaps rather late in being recognised but its implications can no longer be ignored.⁹⁷ Leon Brittan has said that his 'own instinct is that the current process of liberalising trade in services is not very different from the early steps to liberalise trade in goods'.⁹⁸ We should not then be surprised at the rather cautious nature of the EC's position in relation to services, and its policy of maintaining a high degree of flexibility in its bilateral contractual commitments.

⁹⁴ The GATS-based MFN obligation is unconditional and not based on reciprocity; national treatment (full non-discrimination) is based on individual country commitments contained in schedules.

⁹⁵ Agreement with MERCOSUR, Art 5; Agreement with the Andean Pact, Art 3(2); Agreement with Brazil, Art 3(2).

⁹⁶ Using this term in a general sense which is not tied to Article 133 [ex 113] EC.

⁹⁷ See Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in Craig and de Burca (eds.) *EU Law: An Evolutionary Perspective* (OUP 1999); Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (OUP 1994).

⁹⁸ Leon Brittan, 'WTO and Services: The Current and Future Agenda' Geneva, 24 June 1997.

However in practice this means that the EC's position bilaterally is effectively GATS-driven, following the position it is taking within multilateral GATS negotiations. While the EC does not show any sign of being keen to enter into full-scale bilateral liberalisation of services ahead of global liberalisation, negotiating partners who are not yet members of the WTO are likely to find that they are expected to make at least reciprocal MFN commitments to the EC in the services sector.

(iii) Market Integration and Market Regulation

To further this discussion of flexibility within EC external economic policy, and particularly within economic agreements, we need to return to the question of the external dimension to the internal market, and its implications. Internally, market integration has been accompanied by - or rather has led to the need for - market regulation. Dismantling of trade barriers has led to the need for common policies on (inter alia) technical standards, certification systems, regulatory policies, and competition rules. What I believe we are now seeing is a recognition by the EC that the already identified increased emphasis on reciprocal free trade leads to a need for a regulatory dimension to its external policy. To some extent this approach has been driven by the development of relations with the applicant states of central and eastern Europe. Alignment of their regulatory policies in relation to standards, competition, intellectual property, services etc. was an obvious part of their pre-accession preparation.⁹⁹ But the principle is a broader one, and covers agreements with states which have no prospect or desire for accession. The link between market integration and market regulation, including the issue of the level at which regulation should take place (international, regional, national etc.), is a question with which both the EC legal order and the WTO system have had to contend, and as we all know the answers that have been given have not always been the same. This is not the place for a proper comparison of these approaches.¹⁰⁰ What we will do, however, is attempt to gain an impression of the EC approach to the link between liberalisation and regulation in the specific context of its external agreements. Our aim will be to see whether the EC is developing a policy stance in these areas which sets up (at the least) a presumption as to substantive content when negotiating agreements with third country partners.

One of the most striking features of Community agreements concluded within the last decade has been the inclusion of provisions on harmonisation or approximation of laws. In many cases a general clause is accompanied by provisions dealing with harmonisation of specific laws such as (for example) technical standards, competition, or intellectual property protection. The most well known of such clauses are perhaps those found in the Europe Agreements. Here the parties declare that the major precondition for economic

⁹⁹ For example, Commission Communication on approximation of laws COM(94)391 final, 16 Sept. 1994; Commission 'White Paper' COM(95)163 final, 3 May 1995.

¹⁰⁰ See for example, Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', Jean Monnet Working Paper 3/99.

integration of the associated state into the Community is the approximation of existing and future legislation to that of the Community,¹⁰¹ particularly in (among others) the fields of customs law, company law, banking law, intellectual property, financial services, consumer protection, indirect taxation, technical standards and the environment.¹⁰² There are then further specific provisions among those dealing with economic co-operation dealing with, for example, intellectual property rights, the acceptance of EC industrial and agricultural standards, and protection of health and safety of workers. However there are also approximation clauses in the Euro-Med Agreements,¹⁰³ in the PCAs,¹⁰⁴ and very specific approximation commitments in the customs union agreement with Turkey.¹⁰⁵ In (almost¹⁰⁶) every case, it is a matter of approximation to Community norms. As I have argued elsewhere, there is a real sense in which acceptance of Community standards is becoming a condition of liberalised market access, for services as well as goods.¹⁰⁷

One reason for this is linked to the problems that may arise under WTO rules where states seek to impose their own standards on imports. As far as technical standards are concerned, the WTO rules are based on the principles of MFN and national treatment (subject to exceptions); these principles do not in themselves remove the barriers to trade caused by a multiplicity of different national standards, and the compatibility of even non-discriminatory standards with (for example) the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)¹⁰⁸ is itself a problematic issue.¹⁰⁹ Within the EC such non-discriminatory barriers have been attacked by the twin weapons of mutual recognition and harmonisation, based on the Treaty itself and secondary legislation. A parallel approach is possible in international trade, within WTO rules. As the Commission has said in the context of EC - USA negotiations:

¹⁰¹ Art 68 Europe Agreement with Poland.

¹⁰² Art 69 Europe Agreement with Poland.

¹⁰³ Art 52 Euro-Med Agreement with Tunisia. This is the general provision; there is also a specific reference to the 'promotion' within Tunisia of Community technical rules and European standards for industrial and agri-food products and certification procedures, with the possibility of concluding agreements for the mutual recognition of certification: Art 40.

¹⁰⁴ Art 55 PCA with Russia.

¹⁰⁵ Turkey Customs Union Agreement OJ 1996 L 35/1. Art 52 is the general provision; specific provisions include Art 37 on competition, Arts 12 and 26 on customs, anti-dumping and commercial defence measures.

¹⁰⁶ Art 55 of the Association Agreement with Israel is an exception.

¹⁰⁷ See Cremona, 'The European Union as an International Actor: Issues of flexibility and linkage.' [(1998)3 EFA Rev.67 at 86.

¹⁰⁸ OJ 1994 L336/40.

¹⁰⁹ See for example the WTO Appellate Body decision *EC Measures Concerning Meat and Meat Products (Hormones)* which can be found on the WTO website at <http://www.wto.org/wto/dispute>

‘two areas for bilateral (non-MFN based) co-operation exist ... First, mutual recognition. Where WTO Members require an independent verification of a product, or mandate a government agency to verify compliance, Members may bilaterally recognise the competence of their respective certification bodies. The WTO/TBT agreement explicitly recognises this right, while requiring “positive consideration” to recognise other Members that could demonstrate equivalent competence. Second, harmonisation. All Members are free to determine the specifications that products must meet, within certain general rules. Nothing prevents two countries from harmonising such specifications, provided that these are applied to other Members in a non-discriminatory manner.’¹¹⁰

Harmonisation is one way, therefore, of extending trade liberalisation bilaterally in conformity with WTO MFN obligations. But (as with reciprocity) there is more to it than this. The Community sees harmonisation of laws affecting trade in goods and services as part of the process of economic integration which will benefit emerging economies and developing countries. As such it argues that harmonisation to EC standards is not only good for the EC in the sense that it diminishes ‘regulatory competition’ on export as well as domestic markets, but regulatory convergence is good for the partner countries as well: enhanced cooperation with the ACP states for example will need to

‘improve the ACP countries’ capacity to handle other trade-related issues, including compliance with technical, health and safety standards, basic labour rights, environmental measures, investment protection, protection for intellectual property rights, trade in services, competition policy, consumer policy and access to public procurement, all of which are set to play an increasingly crucial role in international trade. Closer cooperation in these areas will therefore be necessary.’¹¹¹

Provisions on standards cooperation are thus also to be found in agreements which do not offer trade liberalisation but which establish a framework for cooperation, such as the agreements with the Andean Pact¹¹² and MERCOSUR.¹¹³ The Commission has even argued that regulatory convergence towards EC norms will benefit third countries in that they will then benefit from any mutual recognition agreements that the EC concludes with major importers such as the USA.¹¹⁴

¹¹⁰ The New Transatlantic Marketplace, Communication of Sir Leon Brittan, Mr Bangemann and Mr Monti, 11 March 1998.

¹¹¹ Commission Guidelines COM(97) 537 at sect 5.1.

¹¹² Art 12 of the Framework Agreement on Cooperation between the EC and the Andean Pact OJ 1998 L 127/11.

¹¹³ Art 6 (on agri-food and industrial standards and certification) of the Interregional Framework Cooperation Agreement between the EC and MERCOSUR OJ 1996 L 69/4.

¹¹⁴ The New Transatlantic Marketplace, Communication of Sir Leon Brittan, Mr Bangemann and Mr Monti, 11 March 1998, at sect. B(6).

Competition policy provides a good example of this regulatory convergence and the imposition of Community norms within trade agreements, to differing degrees depending on the level of integration envisaged. The early FTAs with the EFTA states declared certain uncompetitive practices incompatible with the agreement in terms that were based on the language of the EC Treaty Articles 81 and 82 [ex 85 and 86]. Enforcement was inter-state in nature, via the institutional dispute resolution procedures set up by the agreements. These clauses only applied to practices which affected trade between the parties in the context of the agreement. They did not seek to establish common harmonised competition rules within both parties, and indeed the very different approaches of some of the EFTA states to competition policy issues was one of the attractions for the EC in drafting the competition provisions in the EEA. The EEA, at the other extreme, establishes a full-scale application of EC competition policy within the EEA territory, although by parallel enforcement agencies (the EC Commission and the EFTA Surveillance Authority).¹¹⁵ The EEA, with its explicit attempt to create a 'dynamic and homogeneous' area, is a special case of harmonisation. However, again within the last decade, the Community has adopted an approach which both links competition to economic integration and emphasises harmonisation. Devuyst has pointed out, 'the EC has also been very active in extending its own competition policy model to countries that do not yet have a tradition in the enforcement of antitrust rules. The instrument used to achieve this goal has been linkage with preferential and non-preferential trade agreements.'¹¹⁶

Among the preferential trade agreements referred to by Devuyst the Europe Agreements are the pioneers. In its 22nd Report on Competition Policy (1992), the Commission stated:

'The Europe Agreements ... do not envisage the same degree of economic integration and therefore do not contain the same ambitious rules as the EEA Agreement. However because the Europe Agreements aim at achieving greater economic integration than the Agreements concluded with the EFTA countries in 1972, their competition rules go beyond those contained in the latter.'

The rules in these agreements 'go beyond' the EFTA agreements of the 1970's by imposing a two-fold obligation on the partner countries. As with other trade agreements, provisions containing the principles of Articles 81, 82 and 87 [ex 85, 86 and 92] EC are included.¹¹⁷ But, in the interests of consistency in the application of the rules, these

¹¹⁵ EEA OJ 1994 L 1/1, Articles 53 - 60 and Protocols 21 - 27; Agreement between EFTA States on establishing EFTA SA and EFTA Court OJ 1994 L344/1. For comment see Diem, 'EEA Competition Law' [1994]5 ECLRev. 263.

¹¹⁶ Devuyst, 'The International Dimension of the EC's Antitrust Policy: Extending the Level Playing Field' (1998)3 EFA Rev.459 at 469. See also Jacquemin, 'The International Dimension of European Competition Policy' (1993) 31 JCMS 91; Bourgeois, 'Competition Policy and Commercial Policy' in Maresceau (ed.) *The EC's Commercial Policy after 1992: The Legal Dimension* (Kluwer 1993).

¹¹⁷ Art 63(1) Europe Agreement with Poland. Industrial products and services are covered; exclusions operate for agricultural and fisheries products and coal and steel products (the latter dealt with in a separate protocol).

provisions go further by making explicit reference to the EC Treaty Articles in the context of the interpretation of the agreement: assessment of practices contrary to these provisions shall be made on the basis of 'criteria arising from the application' of Articles 81, 82 and 87 EC.¹¹⁸ Implementing rules are drawn up by Association Council decision, and these rules establish enforcement mechanisms and procedures which (taking place at national level by national competition authorities) are likely to be more effective than the inter-state mechanisms of the early free trade agreements.¹¹⁹ The implementing rules that have been adopted also contain provision for cooperation between enforcement agencies similar to those found in the cooperation agreements concluded by the EC in cases where the EC's trading partner already has a fully-functioning competition policy and harmonisation is not an issue.¹²⁰ The implementing rules in the Europe Agreements in fact imply the existence of a second level of obligation imposed on the partner country: the obligation to align its competition laws with those of the Community, including the establishment of effective enforcement agencies.¹²¹ The Euro-Med Agreements contain almost identical provisions in relation to the application of competition rules modelled on Community rules to trade between the parties; the harmonisation provision is less specific but capable of encompassing competition policy.¹²²

The Turkey Customs Union Agreement, envisaging a closer degree of economic integration, imposes even more stringent competition policy requirements. It contains 'carbon copies' of Articles 81, 82 and 87 EC including significantly an actual prohibition of anti-competitive conduct as opposed to a mere declaration of incompatibility, and also including the equivalent of Article 81(2) EC, so that prohibited agreements are automatically void (the EEA is the only other agreement to do this). The Turkey Agreement also contains very specific approximation of laws provisions with respect to competition policy: Turkey was to pass a competition law modelled on that of the EC (including block exemption regulations and 'the case law developed by the EC authorities'), and establish a competition authority, before the entry into force of the

¹¹⁸ Art 63(2) Europe Agreement with Poland. This broad phrase presumably covers not only EC secondary legislation and decisions of the European Court of Justice and Court of First Instance, but also Commission interpretative communications.

¹¹⁹ Art 63 Europe Agreement with Poland. Implementing rules adopted by EC-Poland Association Council OJ 1996 L 208/24. For comment see Van den Bossche, 'The International Dimension of EC Competition Law: The Case of the Europe Agreements' (1997) 18 ECLR 24.

¹²⁰ See in particular, EC - USA Agreement on competition, 1995 OJ L 95/45; Agreement between the EC and the USA on the application of positive comity principles in the enforcement of competition laws OJ 1998 L 173/26; see also proposal for a Council and Commission Decision concluding the Agreement between EC and Canada regarding the application of their competition laws COM(98)352 final.

¹²¹ Art 69 Europe Agreement with Poland.

¹²² Arts 36 - 38 Euro-Med Agreement with Tunisia establish the primary obligation. Art 52 provides that 'cooperation shall be aimed at helping Tunisia to bring its legislation closer to that of the Community in the areas covered by this Agreement.'

customs union.¹²³ As a corollary, there is the possibility of reviewing the trade defence mechanisms, especially the anti-dumping clause, in the light of an effective enforcement of competition rules, a provision which links trade liberalisation to effective regulatory mechanisms in an unusually explicit way.¹²⁴ Neither the Europe Agreements nor the Euro-Med Agreements contain such undertakings.

As we have seen, the Global Agreement with Mexico envisages the eventual establishment of a free trade area in both goods and services, and so one would expect extensive competition provisions. In keeping with the style of this agreement, however, the enactment of substantive provisions is left to the Joint Council. The Council is to 'establish mechanisms of cooperation and coordination among their authorities with responsibility for the implementation of competition rules,' a cooperation procedure similar to that in the specific cooperation agreements with the USA and Canada. However the Joint Council also has within its remit the adoption of rules relating to practices covered by Articles 81 and 82 as well as mergers, state monopolies, and public undertakings.¹²⁵

Among the non-preferential agreements, the competition provisions in the PCAs provide a good example of differentiation. In keeping with the fact that they are not free trade agreements, the provisions on competition are more limited, and they do not use the terminology of Articles 81, 82 or 87 in their reference to anti-competitive practices. In the 'European' PCAs, such as that with Russia, the parties agree 'to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the Community and Russia'. This 'work' will include ensuring that the parties 'have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction'¹²⁶ and 'rules on competition' are among the areas covered by the approximation of laws provision: 'Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community'.¹²⁷ Restrictions and distortions of competition will be dealt with by consultation within the institutions set up by the Agreement (no implementing rules are envisaged). The provisions in the 'non-European' PCAs are more embryonic: competition is included in the provision on approximation of laws, together with technical assistance from the Community, and 'the

¹²³ Art 37 Turkey Customs Union Agreement.

¹²⁴ Art 42 Turkey Customs Union Agreement.

¹²⁵ Art 11 Global Agreement with Mexico.

¹²⁶ Art 53 of the PCA with Russia. This Article also includes provision for state aids, state monopolies and public undertakings.

¹²⁷ Art 55 of the PCA with Russia.

Parties agree to examine ways to apply their respective competition laws on a concerted basis in such cases where trade between them is affected'.¹²⁸

The Framework Agreement with MERCOSUR also contains more embryonic competition provisions. Cooperation on 'trade matters' includes 'trade discipline such as restrictive trade practices',¹²⁹ and 'cooperation in business' includes eliminating barriers to industrial cooperation 'using measures which promote compliance with competition rules and foster the tailoring of those rules to the needs of the market'.¹³⁰

What conclusions can we draw from this range of agreements? As is evidenced also by the Commission's efforts in the multilateral framework of the WTO, the Community is concerned that trade liberalisation should be accompanied by more effective regulatory disciplines, and preferably commonly agreed principles.¹³¹ Market integration carries with it the need for market regulation. In a global, multilateral context, the Commission has stressed the flexibility of its approach to establishing common rules: 'rather than seeking to establish "minimum common standards", we have advocated a flexible approach based on the need to develop common approaches in relation to anti-competitive practices with a significant impact on international trade and investment'.¹³² Some degree of commitment to the principles of free competition is expected in all current bilateral trade agreements, with the commitments being more rigorous and - importantly - more clearly based on the Community model in the case of countries with which a high degree of integration is envisaged (free trade and customs union agreements). Regulation of competition in this context involves two kinds of provision: provision for effective enforcement, including cooperation between enforcement authorities, and (where necessary) provision for the adoption of substantive competition rules.¹³³

5. The Economic Constitution

¹²⁸ Art. 44 of the PCA with Kazakhstan, COM(95) 137 final.

¹²⁹ Art 5 of the Framework Agreement with MERCOSUR.

¹³⁰ Art 11 of the Framework Agreement with MERCOSUR.

¹³¹ See Commission Communication of 17 June 1996, 'Towards an International Framework of Competition Rules', COM(96) 284; Singapore Ministerial Declaration, WTO Ministerial Conference, 13 Dec. 1996; Commission Discussion Paper of 19 March 1999, 'Trade and Competition'.

¹³² Commission Discussion Paper of 19 March 1999, 'Trade and Competition' at p.7.

¹³³ These two elements are often present in the provisions relating to intellectual property, which there is no space to examine here. In the case of intellectual property, however, the promotion of 'regulatory discipline' will often include references to, or even a commitment to sign up to, international conventions (which do not so far exist for competition): see for example Art 54 of the PCA with Russia, Art 12 of the Global Agreement with Mexico.

This paper has, so far, set out two connected arguments. First, that differentiation of an increasingly developed kind between its trading partners is a noticeable feature of current EC and EU external policy, and this will affect the type of relationship 'offered' to the third country and the consequent level of economic integration envisaged. 'Partnership', 'Cooperation', 'Association', 'Developmental', 'Framework' and even now 'Stability' are a few of the terms used. Partnership is often used where a close relationship is desired, either within the wider Europe or as part of development policy; Framework Agreements are used as the basis for more extensive commitments that are not (yet) on a Partnership level. These categories are becoming more important than the legal base-founded categories of Association and 'simple' trade agreements. This differentiation depends on geographic and geopolitical priorities, as well as political and economic status (or conditionality), and is by no means static, in that third countries can and do 'progress' from one kind of relationship or agreement to another.

Second, we have established a number of substantive priorities in the conclusion of economic integration agreements by the EC. First is the move towards reciprocal free trade, and away from non-reciprocal preferences. Second is the emphasis on establishing a degree of 'regulatory discipline' which may involve harmonisation or approximation to Community models, and which covers broadly trade-related issues including technical standards, competition policy and intellectual property. The emphasis on the Community model will be stronger where a greater degree of integration is envisaged, and/or where the agreement is envisaged as supporting a major economic and legislative reform programme in the partner state.

Both these factors impose a constraint, or a lack of flexibility, in the EC's negotiations with its trading partners. To a considerable extent, the EC will offer a package of provisions that fits its own conception of differentiation and its own views of what level of integration is desirable, and will 'tailor' the regulatory provisions accordingly.

We shall now turn, rather more briefly, to a final question. In considering the degree of flexibility which the EC brings to the negotiating table, we have taken into account the very real constraints imposed by its WTO obligations.¹³⁴ However it is a truism to say that the EC model of economic integration is, or has become, very different from the GATT or WTO model. At the risk of greatly over-simplifying, the EC model may be characterised as 'constitutional', with its 'essential characteristics' such as primacy over national law, the creation of individual rights, and institutionalised decision-making and judicial review procedures, operating not merely alongside but as a part of its economic law provisions. The WTO model is, despite arguments supporting its constitutionalisation,¹³⁵ one which as yet 'merely' creates rights and obligations between

¹³⁴ The Commission is increasingly fond of claiming that all its (new) agreements are WTO-compatible, and will generally include a section on WTO-compatibility in its policy papers.

¹³⁵ See for example Petersmann, *The GATT/WTO Dispute Settlement System*. International Law, International Organizations and Dispute Settlement (Kluwer Law International 1997).

the Contracting Parties; although it may be moving in that direction it is still some distance away from the EU's 'constitutional charter based on the rule of law'.¹³⁶ What model is the EC adopting (consciously or otherwise) where it makes demands, or creates expectations that its trading partners will conform to Community standards (political as well as technical) and regulatory disciplines? To put it another way, could the spill-over effect which leads from market integration to market regulation lead further down the path of economic constitutionalism? The Union itself represents a multi-dimensional system within which inter-connected legal orders reflect differentiated integration.¹³⁷ Are we seeing, in the partial extension of the 'Community acquis' to some third states, the boundaries of the Community legal order becoming more porous so that the distinction between being 'in' or 'out' is blurred?

Whether or not this might happen in the future, the evidence is that this has not happened yet. This is not just a matter of content, of 'gaps' in the essential elements of the Community acquis in even the most integrationist agreements, the fact that horizontal or flanking policies such as environmental policy and social policy are barely touched upon: the substantive content of the Community's economic constitution will always be contested. Even where rules are adopted which follow the Community model, in relation to tariff and non-tariff barriers for example, their interpretation will not necessarily mirror that of the equivalent EC provisions: the Court has said that Community agreements are an 'integral part' of the Community legal order,¹³⁸ but equally similarity of terms does not by itself imply identical interpretation, as terms need to be read in the context of their objectives and the framework within which they are designed to operate.¹³⁹ Interestingly, one of the reasons given for this conclusion in the *Polydor* case (in the context of a free trade agreement) was the absence in the agreement of an institutional structure capable of achieving a balance between market integration and market regulation:

'the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the Community and Portugal.'¹⁴⁰

This institutional structure is not only a mechanism for creating common principles or harmonised norms. It is a means of reconciling conflicting and competing interests, a key element of the constitutional process that is itself a key to the Community's legal, and

¹³⁶ C.f. *Opinion 1/91 (re the Draft Agreement on a European Economic Area)* [1991] ECR I-6079.

¹³⁷ Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998)4 ELJ 355.

¹³⁸ Case 181/73 *Haegeman v. Belgium* [1974] ECR 449, para 5.

¹³⁹ Case 270/80 *Polydor Ltd. and RSO Records Inc. v Harlequin Record Shops Ltd. and Simons Records Ltd.* [1982] ECR 329, paras 14 - 18.

¹⁴⁰ *Ibid.*, para 20.

political, order. Miguel Poiares Maduro has argued, in discussing the role of the Court of Justice in this process:

‘The existence of a common market and the political dimension of European integration means that all decisions which concern that market should take all affected interests into account. ... the Court of Justice should not second guess national regulatory choices, but should instead ensure that there is no under-representation of the interests of nationals of other Member States in the national political process.’¹⁴¹

This may well not reflect the reality of the Community system, but the emphasis on process and participation is significant nonetheless. If we put ‘nationals of third states’ in place of ‘nationals of Member States’ we see just how far Community agreements with third countries are from even possessing the necessary infrastructure for such a constitutional model of integration. To the extent to which third states are expected to conform to Community regulatory norms, neither they nor their citizens have any real involvement in the decision-making processes, legislative or judicial, which give rise to those norms and which have to undertake the complex balancing of interests to which Maduro refers. Arrangements for consultation are included in the EEA and Turkey Customs Union Agreement, and are a de facto part of the pre-Accession Partnership but the decision-making autonomy of the Community legal order has never really been compromised.¹⁴² The conditionality, both political and economic, which plays an increasingly important part in Community external policy, requires third states to conform to standards, principles and objectives (such as increased regional integration) set by the Community itself. Neither does forming an integral part of the Community legal order necessarily imply that the nature and structure of an agreement is such as to give rise to the creation of directly enforceable individual rights.¹⁴³ In the *Hermes* ruling the Court is more concerned with its interpretative jurisdiction and the preservation of uniformity of interpretation (and thereby the integrity of the Community legal order) than with the issue of individual rights.¹⁴⁴ The purchase of nationals of third states within the Community legal order, even in the context of economic integration agreements, is still precarious.

¹⁴¹ Miguel Poiares Maduro, *We, the court: The European Court of Justice and the European Economic Constitution*. (Hart Publishing 1998) at 173.

¹⁴² On decision-making within the EEA, see *Opinion 1/91 (re the Draft Agreement on a European Economic Area)* [1991] ECR I-6079, and Cremona, ‘The “Dynamic and Homogeneous” EEA: Byzantine Structures and Variable Geometry’, 19 *ELRev.* (1994) 508. On the Turkish Customs Union Agreement, see Peers, ‘Living in Sin: Legal Integration under the EC-Turkey Customs Union’ (1996) 7 *EJIL* 411.

¹⁴³ Cases 22-24/72 *International Fruit Company* [1972] ECR 1219; Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641; Case 12/86 *Demirel* [1987] ECR 3719; Case C-280/93 *Germany v Council (bananas)* [1994] ECR I-4737. It goes without saying, perhaps, that any decision of the Court of Justice on the direct effect or otherwise of a Community agreement is operative only within the Community legal order, not that of the other Contracting Party/ies.

¹⁴⁴ Case C-53/96 *Hermes International v. FHT Marketing Choice BV*, judgment 16 June 1998, [1998] ECR I-0000. Tesauro AG does however put forward an interesting argument which links reciprocity of obligation with direct effect at paras 32-33.

And yet neither does this absence of participation in the institutional framework and unilateral adoption of Community norms fit the classic 'WTO model' of economic agreement based on mutually advantageous reciprocity of rights and obligations.¹⁴⁵ Community agreements may be designed to comply with WTO criteria, but the degree of differentiation and (lack of) flexibility in the Community's external economic policy sits somewhat uneasily with WTO concepts of non-discrimination and mutuality. If one aspect of the debate surrounding flexibility in the post-Amsterdam Union concerns the extent to which it is possible to identify a core of essential commitments within the economic constitution, and the procedures necessary to safeguard Member States' interests in the exercise of 'closer cooperation', the integration model which the Community is offering to third countries appears to combine a set of standardised commitments with the absence of both procedural transparency and the processes needed to underpin a constitutional project.

¹⁴⁵ Admittedly also an ideal more than reality.