

4. ENLARGEMENT

4.5 THE CURRENT ENLARGEMENT PROCESS AND THIRD COUNTRIES

4.5.2 BALKAN REGION AND THE NEWLY INDEPENDENT STATES COUNTRIES

4.5.2.2 **The Partnership and Co-operation Agreements with the Newly Independent States**

4.5.2.2.1 *Evolution of the Partnership and Co-operation Agreements*

Relations between the EU and the Newly Independent States (NIS) are relatively recent, as the EEC and COMECON countries only re-established relations in 1988,¹ which was followed by a ten-year Trade and Co-operation Agreement (TCA) between the Soviet Union and the EEC. Based on Articles 133 and 308 EC (ex Arts. 113 and 235), the TCA granted most-favoured nation treatment ('MFN') to trade between the Parties through the generalised system of tariff preferences ('GSP'), and removed 'specific' quantitative restrictions on Soviet goods.² It aimed to promote investment and economic co-operation generally, based on principles of equality, non-discrimination and reciprocity. The TCA Mongolia was then concluded on 16 June 1992 and entered into force in March 1993.³

The TCA USSR was superseded by new bilateral agreements with almost all former Soviet republics shortly after the Presidents of Russia, Belarus and Ukraine signed an agreement establishing the Commonwealth of Independent States (CIS), which recognised the end of the Soviet Union;⁴ however, the TCA remains the main tool for relations with Belarus and Turkmenistan.⁵ Because the CIS had no legal personality, the EU entered into bilateral agreements with each NIS country (except for the Baltic republics of Latvia, Esto-

¹ Council Decision of 22 June 1988 on the conclusion of the Joint Declaration on the Establishment of official relations between the EEC and the Council for Mutual Economic Assistance, *OJ* 1988 L 157/34.

² Council Decision of 26 February 1990 on the conclusion by the EEC of an Agreement between the EEC and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic co-operation, *OJ* 1990 L 68/1.

³ Council Decision of 8 February 1993 on the conclusion of an Agreement on trade and economic co-operation between the EEC and Mongolia, *OJ* 1993 L 041.

⁴ The CIS itself was formally established on 21 December 1991, when eleven NIS Presidents signed the CIS Agreement in Alma-Ata (Kazakhstan).

⁵ See M. Maresceau and E. Montaguti, 'The relations between the European and Central and Eastern Europe: a legal appraisal' 32 *CMLRev.* (1995) pp. 1327-1367. The PCA with Belarus as well as the Interim Agreement did not come into force yet due to the suspension of bilateral relations between the EU and Belarus. The EU did not recognise the Belarus Constitution of 1994 and decided upon number of sanctions against Belarus in 1997. See website http://europa.eu.int/comm/external_relations/belarus/intro/index.htm. With regard to Tajikistan, no PCA

nia and Lithuania, with which EAs were signed and which are now candidates for EU accession). These Partnership and Co-operation Agreements (PCAs) were signed in three successive waves and, lastly, with Turkmenistan in 1998. The first four PCAs were signed with the Russian Federation, Ukraine, Kazakhstan and the Kyrgyzstan Republic in spring 1994. Moldova and Belarus signed their PCAs in July and December 1994 respectively. The PCAs Armenia, Azerbaijan and Georgia were signed in April 1996 and with Uzbekistan in June the same year. Only nine of the eleven PCAs are in force⁶ because the political situations in Belarus and Turkmenistan prevent their PCAs (which were signed in March 1998) from entering into force.⁷

4.5.2.2.1.1 The Common Strategies

The EU's external policy toward the East has been further worked out in the Common Strategies (CSs), which are important external policy tools designed to deepen relations with the PCA countries. Firstly, they clearly differentiate the EU's policy towards certain PCA countries in accordance with geopolitical and geographic factors, economic progress and further engagement in cross-border co-operation. Secondly, the CSs review and refine guidelines for mutual co-operation for the near future and provide a glimpse of new conditions to follow.

So far the European Council has endorsed only two CSs, namely those with Russia and Ukraine, which will soon share common borders with the EU. The June 1999 Cologne Eu-

was proposed due to the current instability in this country. The government of Tajikistan did not agree to apply the EU/USSR TCA either. An Agreement on trade and textile is concluded with Tajikistan (Agreement between the European Economic Community and the Republic of Tajikistan on trade in textile, *OJ* 1999 L 343/22). See website http://europa.eu.int/comm/external_relations/tajikistan/intro/index.htm. The PCA with Turkmenistan was signed in 1998 and is under ratification by the Member States. The Interim Agreement is not yet operational. See website http://europa.eu.int/comm/external_relations/turkmenistan/intro/index.htm.

⁶ Council and Commission Decision of 30 October 1997 on the conclusion of a PCA between the EC and their Member States and the Russian Federation (*OJ* 1997 L 327) entered in force 1 December 1997; Council and Commission Decision of 26 January 1998 on the conclusion of the PCA between the EC and their Member States and Ukraine (*OJ* 1998 L 49) entered in force 1 March 1998; Council and Commission Decision of 28 May 1998 on the conclusion of the PCA between the EC and their Member States and the Republic of Moldova (*OJ* 1998 L 181) entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and Armenia (*OJ* 1999 L 239), entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and Azerbaijan (*OJ* 1999 L 246), entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and Georgia (*OJ* 1999 L 205) entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and the Republic of Kazakhstan (*OJ* 1999 L 196), entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and the Kyrgyzstan Republic (*OJ* 1999 L 196) entered in force 1 July 1999; Council and Commission Decision on the conclusion of a PCA between the EC and their Member States and Uzbekistan (*OJ* 1999 L 229), entered in force 1 July 1999; see also the amended proposal for a Council and Commission Decision on the conclusion of a PCA between the EC and its Member States and Belarus (*COM* (95) 137 final), signed in 1995, but in 1996, EU-Belarus relations were stalled due to political setbacks; the proposal for a Council and Commission Decision on the conclusion of the PCA between the EC and its Member States and Turkmenistan (*COM* (97) 0693 final).

⁷ For a more comprehensive historical overview of the EU/USSR and NIS relations see M. Maresceau, ed., *Enlarging the European Union: Relations Between the EU and Eastern Europe* (London, Longman 1997) and C. Hillion, 'Partnership and Co-operation Agreements between the European Union and the New Independent States of the Ex-Soviet Union', 3 *EFARev.* (1998) pp. 399-420. On the Belarus problem, see P. Van Elsuwege, 'EU-Belarus: the Development of a Difficult Relationship', in 14 *Belarusian Review* N 1 (Spring 2002) pp. 3-10.

ropean Council adopted the CS towards Russia⁸ while the CS for Ukraine was adopted at the December 1999 Helsinki European Council.⁹ The CSs were adopted for a four year period with the possibility of their prolongation and review and, if necessary, their adaptation by the European Council.¹⁰

4.5.2.2.1.2 The EC competence to conclude the PCAs

The PCAs constitute a distinct group of ‘partnership’ agreements among the EC’s ‘association’, ‘co-operation’, ‘stabilisation’ and ‘development’ agreements.¹¹ As ‘*ad hoc* political creations’,¹² it is rather puzzling to arrange the PCAs into the politicised EU order of external agreements.¹³ However, the PCAs may be classified as ‘entry-level’ agreements that do not envisage membership of the EU but rather endorse further mutual co-operation between the Parties. They are mixed agreements based on Articles 133 and 308 EC as well as Articles 44(2), 47(2), 57(2), 71, 80 EC. The exclusive EC competence covers PCA provisions on trade in goods and services including the cross-border supply of services. A number of specific bilateral agreements have been concluded on the basis of exclusive EC competence¹⁴ although the PCAs go beyond the EC framework and have a clear cross-pillar dimension from the EU perspective. Thus, the institutional framework interrelates with the two remaining pillars of EU activity – Common Foreign and Security Policy and Justice and Home Affairs.¹⁵

4.5.2.2.1.3 The PCAs compared to other external agreements of the EU

While the PCAs are distinct among the Union’s external agreements, they can hardly be compared to ‘standard’ EC trade agreements or partnership agreements, such as those with Korea or Mexico.¹⁶ The ‘transition’ association agreements, such as the EAs with the CEEC candidates and the Stabilisation and Association Agreements with south-eastern

⁸ See point 78, Presidency Conclusions, Cologne European Council, published in *OJ* 1999 L 157/1.

⁹ See point 56, Presidency Conclusions, Helsinki European Council, published in *OJ* 1999 L 331/1.

¹⁰ Art. 67 of the CS Ukraine and Part IV CS Russia.

¹¹ For a concise classification of the EC external agreements, see D. McGoldrick, *International Relations Law of the European Union*, (London, Longman 1997).

¹² The expression is used by S. Peers in ‘EC Frameworks of International Relations: Co-operation, Partnership and Association’, in A. Dashwood and C. Hillion, eds., *The General Law of EC External Relations* (London, Sweet & Maxwell 2000).

¹³ S. Peers insists that ‘The Community’s classification of agreements is governed by politics, not law.’ *Ibid.*, at p. 175.

¹⁴ For example, an agreement with the Russian Federation on trade in textile products; *OJ* 1998 L 222.

¹⁵ See C. Hillion, ‘Institutional Aspects of the Partnership Between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine’ 37 *CMLRev.* (2000) pp. 1211-1235. Indeed, the Preambles of all PCAs confirm the commitment of the Parties to the full implementation of all principles and provisions contained in the Final document of the Conference on Security and Co-operation in Europe, documents of Madrid and Vienna CSCE meetings, the document of the CSCE Bonn Conference on economic co-operation, the Charter of Paris for a New Europe and the CSCE Helsinki document 1992.

¹⁶ For example, in the opinion of S. Peers, the PCAs belong to the ‘bottom of the EU’s hierarchy of trade relations’ between the EC’s ‘standard’ non-preferential trade and co-operation agreements with developing countries and the association agreements with Euro-Mediterranean countries. See S. Peers ‘From Cold War to Luke-warm Embrace: The European Union’s Agreements with the CIS States’, *ICLQ* (1995) pp. 829-847.

countries,¹⁷ are more appropriate patterns for comparison despite their apparent differences with the PCAs. Indeed, the EAs are Association Agreements as provided for in Articles 133 and 310 EC based on a ‘privileged link’ between an associate country and the EC,¹⁸ which explains the fundamental difference in terms of substance and objectives of the EAs when compared to the PCAs. However, as noted below at section 4.5.2.2.3, unlike the EAs and the SAAs, the Preambles to the PCAs expressly omit any reference to the integration of these countries into the Union. The 1993 Copenhagen European Council endorsed the EAs as vehicles for ‘draw[ing] the region closer to the *perspective of full integration into EU structures*’ and this thinking applies equally to the SAAs, which are also concluded on the basis of Article 310 EC. The PCAs compare to the EAs and SAAs in that they establish free trade areas with the EC;¹⁹ they are similar because of the political dialogue mechanism, and the structure and the institutional framework under the EAs, SAAs and PCAs are also similar. Certain common objectives can also be identified, such as that of fostering economic and international co-operation. Therefore, the EAs and SAAs may be considered a ‘pattern model’ or ‘structural role model’ that are designed to foster the PCA countries’ links with the EU.²⁰

The flexible development of the EAs and the SAAs proves that the differentiation applied by the EC through its external agreements is more dependant on political, economic and geographic priorities and omits any static character enabling the third countries to progress from one kind of relationship to another.²¹ Consequently, any PCA country that falls within these priorities should be given a chance to have the EA or the SAA ‘pattern models’ applied to them for the purposes of the progression of their association with the EU.

4.5.2.2.2 *The structural framework of the PCAs*

The structure of the PCAs is not identical,²² although all PCAs contain titles on general principles, political dialogue, trade in goods, provisions affecting business and investment (cover labour provisions, establishment, cross-border supply of services, general provisions, current payments and capital, intellectual, industrial and commercial property protec-

¹⁷ Signed or planned with Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia, and Albania.

¹⁸ Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

¹⁹ The following criteria for the EU membership were endorsed on the Copenhagen European Council in 1993 – the existence of democracy and the observation of human rights and protection of minorities, the existence of a market economy, the ability to cope with competitive pressures in the EC Common Market, the ability to take on the responsibility of membership (to implement the *acquis communautaire*), the capacity of the EU to absorb new members.

²⁰ For more arguments on this matter, see M. Cremona, ‘External relations and External Competence: the emergence of an integrated policy’, in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford, Oxford University Press 1999), pp. 137-176.

²¹ On the flexibility in the EC external policy, see M. Cremona, ‘Flexible Models: External Policy and the European Economic Constitution’, in G. de Búrca and J. Scott, eds., *Constitutional Change in the EU From Uniformity to Flexibility?* (Oxford, Hart Publishing 2000).

²² For example, the PCA Ukraine consists of 10 titles and 109 articles as well as 5 annexes and a protocol on mutual assistance in customs matters. The PCA with Russian consists of 11 titles, 112 articles and 10 annexes, a protocol on the establishment of a coal and steel group and another on mutual assistance for the correct application of customs legislation.

tion),²³ legislative co-operation, economic co-operation, cultural co-operation, co-operation on prevention of illegal activities,²⁴ co-operation on matters relating to democracy and human rights,²⁵ financial co-operation in the field of technical assistance, institutional and financial provisions. However, the similar institutional framework and structural unity does not mean identical wording and symmetrical obligations with regard to every PCA.

4.5.2.2.3 *Preambles and objectives of the PCAs*

As noted earlier, the Preambles to the PCAs intentionally omit any reference to certain phrases that can be found in the EAs, such as ‘the process of European integration’ or ‘the objective of membership in the EU’ mentioned in the Preamble to the EA Hungary. The PCAs aim solely at the development of close political relations; the promotion of trade, investment and harmonious economic relations between the Parties and at sustaining mutually advantageous co-operation and support of a PCA country’s efforts to complete its transition to a market economy.²⁶ Such wording clearly differs from the respective articles of the SAAs, which specify the objectives of the association as gradually developing a free trade area between the Parties and approximating its legislation with EC laws.²⁷

The PCAs contain ‘essential elements’ clauses which tie the Parties to the respect of democratic principles, human rights, and principles of market economy. A violation of these principles implies a material breach of the agreement and legitimises the unilateral suspension of the agreement.²⁸ In fact, the EU takes a flexible and political approach to this ‘essential elements’ conditionality. Compare for example, the case of the PCA Belarus, to which the EU refused to give effect due to violation of democracy, rule of law and human rights by this country, with the fact that the EU did not apply the same rationale to the PCA Russia in respect of human rights violations in Chechnya.²⁹ Essential elements clauses are inserted in other international agreements including the EAs and SAAs but the SAAs require respect for international law principles and the rule of law and are more strongly worded than those clauses the PCAs. For example, Article 2 of the SAA Macedonia provides that the essential elements ‘shall form the basis of the domestic and external policies of the Parties.’ Interestingly, the violation of the principle of free transit of goods that constitutes an essential condition for attaining the objectives of the PCAs does not entail similar consequences as regards the essential elements on democracy, the rule of law and human rights.³⁰

The *evolutionary clause* in the PCAs indicates their ‘transitional’ character, as it is through such clauses that the EU applies the ‘conditional differentiation’ in its external

²³ The PCAs Russia, Ukraine and Moldova contain separate titles on current payments and capital, intellectual, industrial and commercial property protection.

²⁴ Relates only to the PCAs Russia, Uzbekistan, Armenia and Azerbaijan.

²⁵ Relates only to the PCAs Uzbekistan, Armenia and Azerbaijan.

²⁶ Art. 1 PCA Ukraine.

²⁷ Art. 1 SAA Macedonia.

²⁸ See the joint declarations annexed to the PCAs Russia and Ukraine (Arts. 107 and 102 respectively).

²⁹ General Affairs Council, 29 April 1997: Council Declaration on Relations with Belarus and General Affairs Council 15 September 1997; Council Conclusions on Belarus.

³⁰ For example, see Art. 11 PCA Ukraine.

policy.³¹ They provide an (non-binding) opportunity for further progress in relations between the EU and a third country where the latter meets certain political and economic conditions.³² However, the evolutionary clause in the PCAs Russia, Ukraine and Moldavia creating a free trade area between the Parties, which may even result in the conclusion of new association or free trade area agreements or specific sectoral agreements, is carefully omitted in other agreements.³³

A ‘free trade area’ evolutionary clause distinguishes between ‘European’ and ‘non-European’ PCA countries. A ‘privileged link’ is established between the EU and the ‘European’ PCA country, thus bringing them closer to the EAs and SAAs.³⁴ But such differentiation in the EC’s relations with the NIS countries goes much further. The evolutionary clauses in the Caucasian PCAs (Azerbaijan, Georgia and Armenia) are less precise in their objectives³⁵ but several observations should be made in this respect. First of all, the EC considers evolutionary clauses as a trusted and non-binding tool for encouraging economic and political reforms in the PCA countries. Indeed, the bilateral relations may be intensified according to need or political inclination. Secondly, it shows that the EC is not interested in extending a potential ‘free trade area’ with the PCAs countries further than the Caucasus region, thereby recognising that the ‘European’ and Caucasian PCA countries lie at the cross-roads of key Eastern European transit routes.³⁶

4.5.2.2.4 *Institutional framework and political dialogue under the PCAs*

The EAs and SAAs provide a similar institutional framework to the PCAs.³⁷ At the top of institutional pyramid is the Co-operation Council, consisting of members of the Council and the Commission as well as ministerial level representatives of the PCA government. It is responsible for monitoring the implementation of the PCA and plays a key role as a dis-

³¹ For more about the types of differentiation in the EU external policy including the ‘conditional differentiation’, see M. Cremona, loc. cit. n. 21 at pp. 60–61.

³² Such clauses can also be found in the pre-EAs with the Baltic States or the SAAs. See Art. 13 of the trade and economic co-operation agreements with Estonia, Latvia, Lithuania, *OJ* 1992 L 403 and the Preamble and Art. 5(3) SAA Macedonia.

³³ Its creation at the recommendation of a Co-operation Council in the event that further advances are made in economic reforms and under particular titles of the Agreement, e.g., on the trade in goods, competition and industrial, commercial and on intellectual property protection and on legislative co-operation. For example, Art. 4 PCA Ukraine.

³⁴ See Hillion, loc. cit. n. 15 at p. 1216.

³⁵ Art. 4 PCA Azerbaijan provides that any part of the Agreement may evolve ‘upon positive review of changing circumstances in the respective countries in particular regarding economic conditions and implementation of market-oriented economic reforms’ at the recommendation of the appropriate PCA Co-operation Council.

³⁶ Georgian Poti ferry terminal and Supsa oil terminal are principal in providing the access of European business to the Caucasus and the Central Asia markets. The multilateral transport agreement was signed at the Baku Summit in September 1998. The EC considers the development of TRACECA trade route as essential for further economic growth in the region. See website http://europa.eu.int/comm/external_relations/azerbaidjan/intro/index.htm.

³⁷ The SAAs provide for a Stabilisation and Association Council, a Stabilisation and Association Committee and that subcommittees could be created along with a Stabilisation and Association Parliamentary Committee. It is worth noting that the European Investment Bank shall take part in work of the Stabilisation and Association Council as an observer (see Art. 109 of SAA Macedonia). Association Councils, Association Committees and Association Parliamentary Committees are provided under the framework of the EAs. For example, see Arts. 102–110 of EA Poland.

pute settlement body in the agreement's application,³⁸ meeting at least once per year. Enforcement of the Co-operation Councils' decisions is rather limited as their recommendations are not binding, unlike those of the Association Councils under the EAs and the Stabilisation and Association Council under the SAAs.³⁹

A Co-operation Committee implements the Co-operation Councils' recommendations. It consists of representatives of the Council and the Commission and the PCA government at senior civil servant level. Sub-committees and working parties assist the Co-operation Committee and have a right to make recommendations. Parliamentary Co-operation Committees provide dialogue between parliamentarians and consist of Members of the European Parliament and members of a PCA partner parliament. It may require information on the PCA's implementation and make relevant recommendations to the Co-operation Council.⁴⁰

The most important political issues and trade disputes are decided at 'summits' between the President of the EU Council, the President of the Commission and the President of the PCA country.⁴¹ Only the PCA Russia provides the legal basis for such 'high level' meetings twice a year, the eighth of which took place in Brussels on 3 October 2001 and the ninth in Moscow on 29 May 2002.⁴² While not mentioned in the PCA Ukraine, such summits take place with Ukraine.⁴³ This flexible practice indicates the inclination of the EU to enhance the institutional structure under the PCAs when necessary, in order to further mutual relations or solve trade disputes.

4.5.2.2.5 *Trade in goods*

The PCAs grant MFN treatment to goods traded between the Parties without a commitment to reduce or eliminate custom duties, subject to exceptions for the custom union and free trade agreement.⁴⁴ (The EAs and the SAAs seek to establish free trade areas gradually over

³⁸ As for the PCA dispute settlement mechanism, see the 'Daewoo' trade dispute between the EU and Ukraine, in C. Hillion, 'Trade dispute overshadows entry into force of EC agreement', 6 *EU Focus* (1998).

³⁹ A Stabilisation and Association Council issues binding decisions for the purpose of attaining the objectives of the Agreement and to resolve disputes relating to the application and interpretation of the Agreement. See Arts. 110 and 111 SAA Macedonia.

⁴⁰ For example, see Arts. 80-82 PCA Kyrgyzstan Republic.

⁴¹ The Russian PCA provides two such summits per year (see Art. 7 PCA Russia). Summits are frequently joined by other EU top officials such as the Secretary General of the Council/High Representative for CFSP, assisting the President of the European Council. See Joint Statement EU-Russia Summit, 29 May 2000, Press Release No. 8976/00.

⁴² The agenda of the eighth summit in Brussels covered issues of combating international terrorism, strengthening political and security dialogue between the EU and Russia, negotiating the creation of the Common European Economic Space, as well as the issue of visa policy toward Kaliningrad area after the enlargement. See webpage http://europa.eu.int/comm/external_relations/russia/summit_10_01/dc_en.htm.

⁴³ The fourth EU-Ukraine Summit took place in Yalta on 11 September 2001. Joint Statement by the President of the European Council, Belgian Prime Minister Verhofstadt assisted by the Secretary General of the Council/High Representative for Common Foreign and Security Policy of the EU, J. Solana, the President of the Commission of the European Communities, R. Prodi as well as the President of Ukraine, L.D. Kuchma on EU-Ukraine Summit, Yalta, 11 September 2001. See webpage http://europa.eu.int/comm/external_relations/ukraine/intro/index.htm#8. The Parties agreed to focus on approximation of Ukraine's legislation, co-operation in areas of energy, trade, justice and home affairs, environmental protection, transport, science and technology.

⁴⁴ As well as advantages granted in favour of developing countries and adjacent countries in order to facilitate frontier traffic. For example, see Art. 9(2) PCA Azerbaijan.

a transitional period of up to ten years.⁴⁵) The PCAs Russia and Ukraine apply the full MFN treatment envisaged in Article I paragraph 1 of the GATT,⁴⁶ while the other PCAs commit the Parties to MFN treatment in custom duties and charges applied to imports and exports, rules of customs clearance, transit, warehouses and transshipment; taxes and other internal charges of any kind applied directly or indirectly to imported goods; methods of payment and the transfer of such payments and the rules relating to the sale, purchase, transport, distribution and use of goods on the domestic market.⁴⁷ In addition, the Generalised System of Preferences (GSP) is extended to certain industrial and agricultural goods originating in PCA countries.⁴⁸ The EC or a PCA country's goods are imported free of quantitative restrictions, with exemptions for trade in textiles or coal or steel and measures of equivalent effect.⁴⁹ The Parties commit to the unrestricted transit of goods via or through their territories in accordance with GATT.⁵⁰ Finally, the Parties may take measures to safeguard against products imported 'in such increased quantities and under such conditions as to cause or threaten to cause substantial injury to domestic producers.'⁵¹

The PCAs were the first international agreements to impose GATT obligations on the NIS countries without their being WTO members.⁵² Moreover, the PCAs Ukraine, Russia and (the original) Belarus refer to GATT provisions on internal taxation, freedom of transit, customs valuation, custom fees, marks of origin and the publication of trade regulation. The Asian and Causarian PCAs contain no such provisions, applying only Article V (2)-(5) GATT on free transit of goods. This asymmetrical application of GATT rules is due to the expectations of EU negotiators that the 'European' PCA countries would be first to join the WTO (although, until 2001, the Kyrgyzstan Republic and Georgia were the first PCA countries to join the WTO).

GATT wording is also used in PCA provisions on fiscal discrimination or safeguard and exemption clauses. Anti-dumping and anti-subsidy rules must also be in accordance with GATT provisions⁵³ and bans on imports, exports or goods in transit are subject to derogations similar to those listed in Article 30 EC.⁵⁴ All PCAs provide that market-related prices

⁴⁵ It is interesting to note that some provisions of the SAAs on the establishment of a free trade area provide more liberal treatment than the respective provisions of the EAs. See Art. 17 SAA Macedonia and Art. 9 EA Hungary.

⁴⁶ Art. 10(1) PCAs Russia and Ukraine.

⁴⁷ For example, see Art. 9(1) PCA Azerbaijan.

⁴⁸ Council Regulation 3281/94 (industrial products), *OJ* 1994 L 348/1 and Council Regulation 3282/94 (agricultural products), *OJ* 1994 L348/57 (corrected in *OJ* 1995 L 82/29).

⁴⁹ For example, see Art. 14 PCA Ukraine. Trade in textile products and in products covered by the ECSC Treaty as well as trade in nuclear materials is subject to the provisions of specific agreements between the Parties.

⁵⁰ For example, see Art. 10 PCA Azerbaijan.

⁵¹ The Co-operation Council must be provided with all necessary information to find a solution. The Parties are allowed to take counter measures only in the case if, within thirty days after referral to the Co-operation Council, negotiations remain deadlocked. For example, see Art. 18 PCA Ukraine.

⁵² A. Vodiannikov and N. Perestuk, 'Offshornie kollisii v ukrainskom zakonodatelstve' [Offshore collisions in Ukrainian legislation] in gazeta *Bukhateria*, No. 10 (425) on 5 March 2001.

⁵³ Art. VI GATT, The Agreement on implementation of Art. VI GATT, the Agreement on interpretation and application of Arts. VI, XVI and XXIII GATT.

⁵⁴ The PCAs permit prohibitions or restrictions on imports, exports or goods in transit on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of natural resources; the protections of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions should not constitute means of arbitrary discrimination. For example, see Art. 20 PCA Ukraine.

apply to trade in goods, but non-market economy status has not been lifted in respect of any PCA country and referring to this PCA country as an ‘economy in transition’ has little effect in anti-dumping or subsidy investigations.⁵⁵ Indeed, treating PCA goods as originating in non-market economies has given rise to many anti-dumping and anti-subsidy investigations and duties by the EU.⁵⁶ Recently, some progress was made in this regard when Ukraine and Russian undertakings were allowed to be treated as ‘market economy’ undertakings on a case-by-case basis for the purposes of assessment of normal value in anti-dumping investigations.⁵⁷ Nevertheless, market economy status has only been granted in a very limited number of cases due to the failure of NIS companies to comply with conditions under secondary EC legislation.⁵⁸

PCA provisions on MFN treatment, abolition of quantitative restrictions and freedom of transit of goods could hardly be given direct effect in the EC legal order. For the moment, the ECJ’s explicit denial of direct effect to the GATT/WTO agreements in the EC legal order prevents such a prospect.⁵⁹

4.5.2.2.6 *Labour conditions*

As with the EAs and SAAs, the Parties’ nationals enjoy non-discriminatory treatment based on nationality, working conditions, remuneration or dismissal, although the obligations vary in the PCAs, indicating the EU’s differentiation. The PCA Russia explicitly and unambiguously states that the Parties ‘shall ensure’ non-discrimination.⁶⁰ The PCAs Ukraine, Moldavia, Kazakhstan are less explicit as the Parties ‘endeavour to ensure’ non-discrimination in labour conditions. The most asymmetric obligations are in the PCA’s Caucasus and Asian, in which the EU ‘shall endeavour to ensure’ against discrimination in labour conditions for the PCA nationals, while the PCA countries ‘shall ensure’ against the non-discriminatory treatment of EU nationals.⁶¹ Thus, the precise and clear wording of the PCA Russia gives legally employed Russian nationals the right to rely on its direct effect should they suffer discrimination in working conditions, remuneration or dismissal, while the other PCAs are worded to avoid any direct application.⁶²

⁵⁵ For the general overview of the EC anti-dumping policy towards non-market economy countries, see F. Jacobs, ‘Anti-Dumping Procedures with Regard to Imports from Eastern Europe’, in M. Maresceau, ed., *The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe* (The Hague, Martinus Nijhoff Publishers 1989).

⁵⁶ See statistics on anti-dumping and anti-subsidy practices by the EC Commission for the period of 2000 at http://europa.eu.int/comm/trade/pdf/adstat0900_anx.pdf.

⁵⁷ Council Regulation (EC) 2238/2000 of 9 October 2000 amending Regulation (EC) 384/96 on protection against dumped imports from countries not members of the European Community, *OJ* 2000 L 257.

⁵⁸ Such failures mainly concern a failure to comply with international accounting records and significant state interference into companies’ decisions regarding sales. See The Report From the Commission, *Overview of the Monitoring of Third Country Safeguard Cases and of the Implementation of the Trade Barriers Regulation for 1999* at http://europa.eu.int/comm/trade/pdf/adrep_2000_en.pdf.

⁵⁹ For example, see Case C-149/96 *Portugal v. Council* [1999] ECR I-8395. For the comprehensive review of the legal effect of the provisions of international agreements in the EC legal order, see A. Ott, ‘Thirty Years of Case-Law by the European Court of Justice on International Law: a Pragmatic Approach Towards Its Integration’, in V. Kronenberger, ed., *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, T.M.C. Asser Press 2001).

⁶⁰ Art. 23 PCA Russia.

⁶¹ For example, see Art. 20 PCA Azerbaijan.

⁶² See Peers, loc. cit. n. 16, at p. 836.

While the Euro-Mediterranean Agreements confer directly effective non-discrimination rights with respect to labour conditions and social security, only legally employed workers and legally established individuals as well as their legally resident spouse and children, the PCAs are drafted to exclude this outcome.⁶³ The PCAs Ukraine, Russia and Moldova envisage further agreements to co-ordinate social security systems for legally employed workers and the PCAs Asia and Caucasus lack even this modest perspective.⁶⁴ Thus, legally employed PCA nationals are deliberately deprived of non-discrimination treatment in social security on EU territory.

4.5.2.2.7 *Establishment*

While they differ, all Chapters II of the PCAs deal with the establishment and operation of companies. Most PCAs provide MFN treatment to the establishment and operation of PCA companies and their branches on EU territory. PCA companies' subsidiaries are granted national treatment with considerable reservations, while⁶⁵ EC companies, their subsidiaries and branches are granted either a MFN or national treatment regime, whichever is better. Such liberal treatment of EC companies is subject to substantial reservations in all PCAs except the PCAs Armenia, the Republic Kyrgyzstan and Kazakhstan.⁶⁶ Less liberal treatment is offered in the PCA Russia. The Parties grant each other MFN treatment exclusively with regard to conditions affecting the establishment of companies, their branches and their operation. EC subsidiaries of a Russian company or subsidiaries of an EC company in Russia enjoy either the MFN or national treatment, whichever is better.⁶⁷ Of all the PCAs, the least advantageous treatment (asymmetrically speaking) is granted to Kyrgyzstan companies, their subsidiaries and branches, as they only receive MFN treatment.⁶⁸

The establishment provisions do not apply to air, inland waterways and maritime transport but national treatment applies to the establishment of shipping agencies⁶⁹ and evolutionary clauses in the PCAs Russia and the Kyrgyzstan Republic allow for future national treatment here in line with Co-operation Council recommendations as well as for agreement between the Parties.⁷⁰

⁶³ Case C-18/90 *Onem v. Kziber* [1991] ECR I-199. See also Ott, loc. cit. n. 59, at pp. 122-123.

⁶⁴ It covers issues such as adding together all periods of insurance, employment or resident completed by such workers in the various Member States for the purpose of pensions in respect of old age, invalidity and death and for the purpose of medical care; any pensions in respect of old age, death, invalidity, industrial accidents or occupational disease, with the exception of the special non-contributory benefits. These shall be freely transferable. For example, see Art. 25 PCA Ukraine. In addition to the above, the PCA Russia envisages the conclusion of the agreement to obtain family allowances for members of a Russian worker's family, where it is applicable (Art. 24 PCA Russia).

⁶⁵ The EC reservations mainly cover such areas of economic activities as mining, fishing, real estate purchase, audiovisual services including radio, telecommunication services including mobile and satellite services, reserved services by some Member States, professional services, agriculture and news agency services. See Annex 3 to PCA Russia or Annex IV PCA Ukraine.

⁶⁶ For example, Russian reservations in Annex 4 to the related PCA cover the use of subsoil and natural resources including mining, fishing, purchase and brokerage of real estate, telecommunications, mass media services, professional activities as well as the lease of federal property.

⁶⁷ Art. 28 PCA Russia.

⁶⁸ Art. 23 PCA Kyrgyzstan.

⁶⁹ For example, see Art. 31(2) PCA Ukraine.

⁷⁰ Art. 33 PCA Russia and Art. 29 PCA Kyrgyzstan.

The PCAs allow measures for ‘prudential reasons’ in order to protect investors and the integrity of the national financial system.⁷¹

Workers of PCA country companies may enjoy limited, reciprocal freedom of movement within the EU for establishment purposes and the operation of their companies, subsidiaries and branches on EU territory. It covers the rights of entry, residence and to obtain work permits for ‘key personnel’ or ‘intra-corporate transferees’ employed by companies of the Parties. These rights are given solely for the purposes of employment in a company, subsidiary and branch and only for the period of that employment. The scope of eligibility for ‘key personnel’ or ‘intra-corporate transferees’ is precisely determined in all PCAs.⁷² The PCA provisions on MFN treatment of companies and the rights of a ‘key personnel’ or ‘intra-corporate transferees’ are sufficiently clear and precise to be directly effective. Furthermore, they are not subject, in terms of implementation and effect, to the adoption of any subsequent measure and, therefore, have direct effect.⁷³ The same applies to the obligation in all PCAs to grant three years of ‘grandfather’ rights to subsidiaries and branches of EU companies already established in the PCA country when a new national measure comes into force after the PCAs’ signature. Other establishment provisions are not precise enough to have direct effect.⁷⁴ No standstill provisions back up the Parties’ commitments but they must show evidence of their *best endeavours* to meet their obligations.⁷⁵

Detailed provisions apply to the liberalisation of financial services under the PCA Russia, indicating the EU’s interest in the Russian financial services market. A standstill clause applied to banking and insurance restrictions as of the PCA’s signature. Major restrictions on EU banking and insurance companies’ operations must be lifted within a five-year transition period from the same date.⁷⁶

The final provisions on establishment oblige the PCA countries to inform the EC of its intention to adopt new legislation or regulations that might weaken the establishment rights of EU companies, their subsidiaries and branches. The EC may request PCA countries to divulge and consult it on proposals for such measures.⁷⁷

The EAs and SAAs provide more liberal treatment of establishment than do the PCAs. The EU grants national treatment to EA companies and self-employed nationals under certain reservations,⁷⁸ while the SAAs are less advantageous as only companies may claim national treatment for establishment – not the self-employed. An unconventional evolutionary clause in the SAAs extends establishment provisions to self-employed persons five years after entry into force of the Agreement and *in the light of the relevant ECJ case law and the*

⁷¹ For example, see Art. 33 PCA Ukraine.

⁷² For example, see Art. 33 PCA Ukraine. It covers managers or supervisors of a company; employees who possess uncommon knowledge essential to certain aspects of the company (possibly requiring a specific qualification); ‘intra-corporate transferees’ temporarily transferred in pursuit of economic activities by this company. Similar provisions are contained in the EAs and the SAAs. For example, see Art. 52 of EA Hungary and Art. 53(2) SAA Macedonia.

⁷³ For more about direct effect of the PCAs provisions, see R. Petrov, ‘Rights of third country/NIS nationals to pursue economic activity in the EC’, 4 *EFARev.* (1999) pp. 235-253.

⁷⁴ For example, see Art. 34 PCA Russia, ‘the Parties *use their best endeavours* to avoid taking any measures or actions which make operation of each other’s companies more restrictive than the situation on the day preceding the date of signature of the Agreement.’

⁷⁵ For example, see Art. 30(1) PCA Ukraine.

⁷⁶ Art. 29 and Annex 7 PCA Russia.

⁷⁷ For example, Art. 30(3) PCA Kyrgyzstan.

⁷⁸ For example, Art. 44 EA Hungary.

situation of the labour market. In return, the EA and SAA countries provide much greater access to CEEC markets for EC companies than do the PCAs.⁷⁹ However, the EA countries were given up to ten years to achieve the reciprocal national treatment of EC companies with regard to the establishment and conditions of their operation while the SAA countries have not been given such an opportunity.⁸⁰

4.5.2.2.8 *Supply of services*

The services provisions in the PCAs are almost identical but the EU's 'asymmetrical' differentiation clearly favours Russia as it offers the greatest potential services market in the CIS. Indeed, the PCA Russia (including the original PCA Belarus) provides for the most liberal treatment in supply of services. First of all, it foresees that the Parties guarantee MFN treatment only to the conditions affecting cross border supply of services by companies in specified sectors.⁸¹ Secondly, like the EAs and SAAs, it allows the temporary movement of nationals but only for the negotiation and conclusion of cross-border sales agreements for goods within the specified sectors – any potential engagement in direct sales or supply of services is banned.⁸² Those engaged in negotiations may only stay until the actual time of signature of a cross-border sales agreement. The PCA Russia goes further with respect of the supply of services than the EAs and SAAs, where the Parties only 'take the necessary steps to allow progressively the supply of services by companies and nationals.'⁸³ The other PCAs contain the identical non-binding provision for companies but omit the clause on nationals.⁸⁴

As to maritime services, all PCAs oblige the Parties to give unrestricted access to their international maritime market and maritime traffic on a commercial basis. This includes not applying cargo sharing provisions in agreements with the EU and third countries and respecting the rules of non-discrimination in all unilateral measures, administrative, technical and other obstacles in the respective fields. National treatment is guaranteed for the purposes of access of ships to ports, use of infrastructure and auxiliary maritime services in the ports – including fees and charges, custom facilities and facilities for loading and unloading. Furthermore, companies and nationals of both Parties have access to provide international sea-river services in inland waterways,⁸⁵ except in Kyrgyzstan and Uzbekistan.

Uniquely, the PCA Russia also envisages the facilitation of customs clearance, co-operation on rolling stock development and the approximation of regulations in the area of rail transport. A separate article is devoted to co-operation under fair conditions in space launching, including reaching agreement on supply conditions for space launch services

⁷⁹ It covers the right of EC companies to use and rent real property; the right of EC subsidiaries to acquire and enjoy full ownership rights over real property including public goods of common interest where these rights are necessary for the conduct of the economic activities in the EA and SAA countries.

⁸⁰ Art. 48 SAA Macedonia.

⁸¹ Annex 5 PCA Russia covers thirty-five types of services including various advisory and consultancy services, computer-related services, media services and value-added telecommunication services. Tourism, transport (except for leasing of vehicles) and financial services (except for trade-related insurance) are not covered.

⁸² Art. 37 PCA Russia.

⁸³ For example, see Art. 55 EA Hungary and Art. 55 SAA Macedonia.

⁸⁴ For example, see Art. 31 PCA Kyrgyzstan.

⁸⁵ For example, see Art. 39 PCA Ukraine.

and the promotion of mobile satellite telecommunications trade with further application of MFN treatment in this area.⁸⁶

All PCAs provide for the future conclusion of specific agreements on conditions of mutual market access and the provision of services in transport by road, rail, air and inland waterways in order to assure a co-ordinated development of transport between the Parties.⁸⁷

The ‘service negotiators’ provision in the PCA Russia may well comply with the *Demirel* test and, therefore, may have direct effect. However, this possibility is impaired by a safeguard, which allows the Parties to regulate conditions of cross-border supply of services into their own territories.⁸⁸ This argument could be overridden by ECJ case law, which does not regard safeguard clauses in EC international agreements as an obstacle to their direct application.⁸⁹ Nevertheless, the PCA Russia provisions on cross-border supply of services are far more flexible due to the absence of any standstill provision, which makes them similar to those GATT articles that have been found to lack direct effect.⁹⁰

4.5.2.2.9 *General Provisions*

Most safeguard clauses in the PCAs are in the titles on general provisions. The PCAs contain traditional ‘nullify and impair’, ‘public policy’ and ‘official authority’ safeguard clauses. They first provide that national laws on entry and stay, work, labour conditions, establishment of natural persons and supply of services be applied by the Parties as long as they do not ‘nullify or impair’ the benefits provided in the PCAs.⁹¹ Like the EAs and SAAs, national limitations on labour, establishment and supply of services are justified on public policy, security or health grounds. The PCA provisions may not be applied to activities connected ‘even occasionally’ with the exercise of official authority.⁹²

Given the ECJ’s case law,⁹³ the PCA rules on labour conditions, establishment and supply of services make it impossible for nationals of the Parties to enter, stay or move in their territory, without prejudice to the key personnel and services negotiators clauses. Neither PCA nationals, key personnel nor services negotiators may enjoy a continued right of residence or to supply services within the EU territory.

The MFN treatment does not apply to tax advantages designed to avoid double taxation or other tax arrangements. The Parties are free to adopt measures to prevent tax avoidance or evasion and treat taxpayers that are not in identical situations differently, particularly as regards their place of residence.⁹⁴ The liberalisation of services in the PCA countries should not be more favourable than under the GATS nor violate GATS-compatible ‘free services trade’ agreements.

⁸⁶ Arts. 40-42 PCA Russia.

⁸⁷ For example, see Art. 40 PCA Ukraine.

⁸⁸ Art. 38(1) PCA Russia.

⁸⁹ ECJ Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641; Case C-192/89 *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461.

⁹⁰ See Peers, loc. cit. n. 16 at pp. 839-840.

⁹¹ For example, see Art. 42 PCA Ukraine.

⁹² The ‘official authority’ clause. See Art. 46 PCA Russia, Art. 41 PCA Ukraine, Art. 58 EA Hungary and Art. 61 SAA Macedonia.

⁹³ For example, see Art. 47 PCA Ukraine.

⁹⁴ For example, see Art. 46 PCA Ukraine.

In substance, the general provisions in the PCAs do not differ significantly from the corresponding provisions in the EAs and SAAs. Only the PCA Russia contains a relatively precise procedure adjusting the Agreement once Russia joins the WTO.⁹⁵ The SAA countries may apply measures to prevent the access of third-country nationals to their markets⁹⁶ but this derogation is probably designed to prevent illegal activities and immigration via these countries, although it may well inhibit cross-border economic co-operation between the SAA countries and their PCA neighbour countries.

4.5.2.2.10 *Current payments and capital*

Few provisions on payments and capital in the PCAs are binding. The PCA countries undertake to authorise any payments relating to the fulfilment of the provisions on free movement of goods, services and persons in freely convertible currency. The movement of capital relating to direct investments in companies, the liquidation and reparation of these investments and any profit stemming therefrom, is ensured.⁹⁷ This provision is clear and precise, requires no subsequent measures and, therefore, is capable of direct effect.⁹⁸ Standstill provisions apply to new exchange controls on the free movement of capital and current payments⁹⁹ but many safeguard provisions, probably intentionally, dilute the binding character of those provisions. Thus non-discriminatory exchange restrictions may be applied by a PCA country but only in exceptional circumstances ‘if such measures are strictly necessary’, such as in the case of serious difficulties in the operation of exchange rate policy, for a period not exceeding six months.¹⁰⁰

The PCA Russia goes further. Russia is not prevented from applying restrictions on outward direct investments by Russian residents, nor from maintaining existing exchange rate conditions in capital movements. However, an evolutionary clause in the same agreement envisages the further liberalisation of capital movements relating to portfolio investment, commercial credits, financial loans and credits granted to Russian residents upon the recommendation of the Co-operation Council. The Parties to the PCA Russia afford each other MFN treatment in current payments and capital movements as well as in methods of payment.¹⁰¹ The payments and capital movement regime is very similar to that contained in the EAs and SAAs, although full freedom of movement of capital between the Parties is contemplated.¹⁰²

4.5.2.2.11 *Competition, state aids, monopolies, intellectual property*

Provisions on co-operation in competition, state aids, monopolies and intellectual property matters are very different in the ‘European’ PCAs and the ‘non-European’ and PCAs

⁹⁵ For example, see Arts. 44 and 51 PCA Russia.

⁹⁶ Art. 67 SAA Macedonia.

⁹⁷ For example, see Art. 52(1) PCA Russia.

⁹⁸ See Ott, loc. cit. n. 59 at p. 110.

⁹⁹ For example, see Art. 52(4) PCA Russia.

¹⁰⁰ Art. 48 PCA Ukraine.

¹⁰¹ Art. 51 PCA Russia.

¹⁰² For example, see Art. 61(2) EA Hungary and Art. 60(2) SAA Macedonia.

Caucasus. They are not directly effective.¹⁰³ Rules on competition, state monopolies and state aids are found in the ‘European’ PCAs (Russia, Ukraine and Moldova) but are omitted in the PCAs Asia and Caucasus. The latter only refer to the possibility of examining the co-ordination of their competition laws if trade is affected.¹⁰⁴ The PCAs Russia, Ukraine and Moldova provide for co-operation in competition matters rather than any specific actions. The Parties agreed ‘to work to remedy or remove’ restrictions on competition and to enforce competition laws to combat such restrictions¹⁰⁵ but the *acquis communautaire* is not a specified reference.¹⁰⁶ The SAAs and EAs however, replicate the competition *acquis* and are directly effective.¹⁰⁷

Similarly, co-operation on state aid is not binding. The PCAs Russia, Ukraine and Moldova merely provide that the parties *refrain* from granting state aid to certain undertakings and from the production of products that distort mutual trade – but the aid schemes must be transparent.¹⁰⁸ The rules on state monopolies of a commercial character also lack any binding effect. The Parties ‘declare their readiness’ to ensure the non-discrimination towards the activities of each other’s nationals and companies.¹⁰⁹

All PCA countries have committed themselves to providing, by the end of the fifth year after entry into force of the Agreement, a level of protection and enforcement of intellectual, industrial and commercial property rights similar to that existing in the EC.¹¹⁰ However, Russia has not gone so far and has only confirmed the importance of ensuring ‘the adequate and effective protection and enforcement of intellectual, industrial and commercial property rights.’ Furthermore, by the end of the fifth year after entry into force of the Agreement, all PCA countries are obliged to accede to the main multilateral conventions on intellectual, industrial and commercial property rights.¹¹¹ The EA and SAA commitments in

¹⁰³ For the analysis of EC competition policy as an example of differentiation in EC external relations, see Cremona, loc. cit. n. 21 at pp. 86-91.

¹⁰⁴ For example, see Art. 44(4) PCA Kyrgyzstan. The PCA Georgia secures the possibility for Georgia to be provided with technical assistance to implement EC competition and state anti-monopoly rules, Art. 44 PCA Georgia.

¹⁰⁵ For example, see Art. 53 PCA Russia.

¹⁰⁶ For example, see Art. 51 PCA Ukraine. However, EC competition rules are mentioned among the priorities for approximation by PCA countries.

¹⁰⁷ (On practices banned under Arts. 81, 82 and 87 EC). For example, see Art. 69(1) and (2) SAA Macedonia. The wording of this agreement could prove even the direct effect of its provisions, ‘the following are incompatible with the proper functioning of the Agreement’ and ‘any practices of this agreement shall be assessed on the basis of criteria arising from the application of the rules of the EC Treaty.’

¹⁰⁸ For example, see Art. 49(2)(2) PCA Ukraine. However, Russia shall refrain from granting only export aids. The EU and Russia declared their readiness to bar all trade distorting practices after three years of signing the agreement, Art. 53(2)(2) PCA Russia. The EAs, Art. 63(4)(a), envisage the possibility of state aid for developing regions for five years with the right of extension.

¹⁰⁹ For example, see Art. 49(2)(4) PCA Ukraine. The respective declaration is effective after the third year from signing the PCA in Russia and after the fourth year in Ukraine and Moldova. Consultations may take place within the Co-operation Committees on the enforcement of the Parties’ competition rules and measures to combat restrictions on and distortions in mutual trade. For example, see Art. 49(3) PCA Ukraine.

¹¹⁰ For example, see Art. 50 PCA Ukraine. However, PCA Kyrgyzstan gives the possibility for the Co-operation Council may extend this deadline ‘in light of particular circumstances.’ See Art. 43(1) PCA Kyrgyzstan.

¹¹¹ All PCAs refer to such multilateral conventions such as the 1967 Paris Convention for the Protection of Industrial Property, the 1967 Madrid Agreement concerning the International Registration of Marks, the 1977 Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks, the 1977 Budapest Treaty on the International Recognition of the Deposit of Micro-organisms, the 1970 Patent Co-operation Treaty and the 1989 Protocol relating to the Madrid Agreement concerning the In-

the field of intellectual, industrial and commercial property are similar but are stronger in terms of commitment. For example, the SAA countries ‘shall take the necessary measures to guarantee’ a level of protection similar to that existing in the EC after five years of entry into force of the Agreement, including effective means of enforcing such rights.¹¹²

4.5.2.2.12 *Approximation of laws*

Approximation by the PCA countries of their existing and future legislation to the *acquis communautaire* is an important means of strengthening the economic links between the Parties. However, the PCA countries ‘endeavour to ensure’ such compatibility.¹¹³ To enhance their relations with the EU beyond the PCA, these countries are opting for a process of voluntary harmonisation.¹¹⁴ However, so far only Ukraine has pushed ahead with its European aspirations, launching an autonomous comprehensive programme of adaptation to EC law.¹¹⁵

4.5.2.2.13 *Co-operation in other areas*

Non-binding co-operation is encouraged between the Parties for the purposes of ‘contributing to the process of economic reform and recovery and sustainable development’, spanning the promotion and protection of investments and developing conditions on open and competitive public procurement to facilitating cultural co-operation. Separate bilateral agreements are concluded to foster further co-operation between the Parties in specific sectors.¹¹⁶ Despite the consistent similarities in the PCA provisions on co-operation, there are some distinctive features. For example, the PCAs Azerbaijan, Armenia, Georgia and Uzbekistan have a title on co-operation in the field of trade in goods and services under which the Parties are to co-operate on ensuring the conformity of international trade with WTO rules.¹¹⁷ The PCA partners are eligible for technical assistance to strengthen their monetary systems and for the introduction of full convertibility of their national curren-

ternational Registration of Marks (see Art. 54(2) PCA Russia). However, the list of conventions is extended for some PCA countries.

¹¹² For example, see Art. 71 SAA Macedonia.

¹¹³ For example, see Art. 51 PCA Ukraine. Approximation covers such areas as customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of life and health of humans, animal and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations and transport.

¹¹⁴ With regard to the voluntary harmonisation, see A. Evans, ‘Voluntary Harmonisation in Integration between the European Community and Eastern Europe, (1997) 22 *ELRev.*, pp. 201-220. He defines the concept of ‘voluntary harmonisation’ as when a third state adapts its national law to Community law rules which have no binding force in relation to that state and in the framing of which that state may have no real participation.

¹¹⁵ The process formally began in 1998. Ukraine’s President, Leonid Kuchma, issued a ‘Strategy of Ukraine’s integration into the EU’, which determines the priorities until 2007. The aim is meet the necessary requirements for full EU membership by that time through the wholesale adoption of EC laws and standards and the participation of Ukraine in the Council of Europe’s conventions and treaties. The Strategy envisages the main medium-term priority of Ukraine’s foreign policy – the integration of Ukraine into the European political, economic and legal arena and, thereafter, acquiring an association membership in the EU. These are seen as important elements in reforming Ukrainian legislation to EU standards. The further scope of adaptation was specified, in detail, in the ‘Concept of adaptation of Ukrainian legislation to EU legislation’ issued by the Cabinet of Ministers of Ukraine in September 2000.

cies.¹¹⁸ Co-operation in the construction industry and enterprise restructuring and privatisation also distinguishes this group of PCAs.¹¹⁹ The title on co-operation on matters relating to democracy and human rights encourages the Parties to establish or reinforce democratic institutions in order to strengthen the rule of law and protection of human rights and fundamental freedoms ‘according to international law and OSCE principles.’¹²⁰ Co-operation to prevent illegal immigration, money laundering as well as combating drug production and trafficking is also envisaged.¹²¹

The PCAs Russia, Ukraine and Kazakhstan reflect these countries’ considerable space and nuclear potential¹²² and, in the civil nuclear sector, specific co-operation agreements on trade in nuclear materials, nuclear safety and thermonuclear fusion are anticipated with Russia and Ukraine.¹²³

4.5.2.3 Common strategies

The Amsterdam Treaty prompted a new instrument in EU foreign policy. Pursuant to Article 13 EU, the European Council may ‘decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.’ The CSs are recommended by the Council and should be implemented through the application of common actions and common positions.¹²⁴

The structure of the two CSs is almost similar. They comprise four parts. Part I outlines the EU’s in relation to its partnerships with Ukraine and Russia. Part I of the CS, Russia covers the principal objectives and instruments and means of the co-operation. These issues are contained in Part II of the CS Ukraine. Part II of the CS Russia specifies the areas of action to implementing Part I. Part III of both of these CSs contains the specific initiatives to be taken by the EU towards Russia and Ukraine. Part IV considers the duration of the CSs’ application.

¹¹⁶ In detail, all PCAs cover the following fields of co-operation, industrial co-operation, investment promotion and protection, developing conditions on open and competitive public procurement, co-operation to promote alignment with internationally agreed standards and conformity assessments, increasing investment in mining and raw materials, co-operation in science and technology, raising the level of education and training, co-operation in agrarian reform, co-operation on environment and human health, co-operation within the principles of the European Energy Charter, co-operation in the field of transport, postal services and telecommunication, facilitating the involvement of the PCA countries in universally accepted systems of mutual financial settlements, prevention of money laundering, regional development, social co-operation, tourism, developing and strengthening small and medium sized enterprises, information, achieving compatibility between the systems of consumer protection, approximation of the PCAs customs systems to the EC standards, developing of an efficient statistical system, facilitation of economic reform and the co-ordination of economic policies, co-operation in increasing effectiveness of measures to counter production and trade in drugs, facilitation of cultural co-operation and financial co-operation in the field of technical assistance.

¹¹⁷ For example, see Art. 45 PCA Azerbaijan. Such co-operation includes EU assistance ‘to prepare ... eventual accession to the WTO.’

¹¹⁸ For example, see Art. 70 PCA Azerbaijan.

¹¹⁹ For example, see Arts. 47 and 60 PCA Azerbaijan.

¹²⁰ For example, see Art. 71 PCA Azerbaijan.

¹²¹ For example, see Arts. 72-75 PCA Azerbaijan.

¹²² For example, see the PCA Ukraine, which envisages the possibility of ‘long term co-operation in the areas of space research, development and commercial applications’ in space at Art. 65.

¹²³ Art. 62 PCA Ukraine and Art. 66 PCA Russia.

¹²⁴ Arts. 13, 14 and 15 TEU. For more information about the procedure of adoption of the CSs and the historical background, see Hillion, loc. cit. n. 15.

‘Strategic partnership’ is promulgated in both CSs. The EU proclaims its ‘strategic goals’ towards Ukraine and Russia, such as the emergence of a ‘stable, open and pluralistic democracy; maintenance of European stability and security.’ In the case of Ukraine it also encompasses the goal of increasing economic, political and cultural co-operation, as well as co-operation in justice and home affairs. The CS Ukraine also acknowledges and welcomes Ukraine’s European aspirations and is intended to facilitate its further rapprochement to the EU.¹²⁵ The CS Russia only promotes the integration of Russia ‘into a wider area of co-operation in Europe.’ The CS Ukraine prioritises support for democratic and economic transition, including the progressive approximation of national legislation,¹²⁶ co-operation within the context of EU enlargement (regional cross-border initiatives), co-operation in maintaining stability and security in Europe and co-operation in the field of environment, energy and nuclear safety. The CS Russia focuses mainly on consolidating democracy, the rule of law and public institutions, strengthening stability and security in Europe and includes a comprehensive security dialogue to respond jointly to some of the security challenges on the European continent. The EU will take part in developing energy policies ‘in such a way as to improve the exploitation and management of resources and security of supplies in Russia and the EU, nuclear safety and environment.’¹²⁷ Joining the WTO is considered equally important in both countries.

As for specific initiatives in the CSs, the EU made declarations and statements that may produce self-binding effects. For example, with Ukraine, the EU states its readiness to provide technical assistance towards economic and social reforms including the progressive approximation of laws. The EU also foresees the possibility of studying the circumstances establishing a free trade area between Ukraine and the EU.¹²⁸ The CS Russia envisages specific actions for creating a permanent EU-Russia mechanism for political and security dialogue, a consultation mechanism on non-proliferation issues and joint actions concerning the safe management of biological and chemical and fissile materials. Russia was promised support so that it might meet the WTO entry requirements ‘at the earliest possible time.’ These two CSs encourage co-operation in the area of justice and home affairs, in particular, to fight organised crime, corruption, money laundering, trafficking in drugs and human beings and illegal immigration. Twinning programmes, exchange schemes for students and young scientists are likely to be developed and viable welfare and social protection systems are encouraged for Russia and Ukraine.

Consequently, the CSs are designed to be a new framework for additional measures to develop the EU/Russia and Ukraine relations. It has the clear purpose of establishing co-operation in policies and instruments elaborated by the EC and the Member States and EU institutions with respect to Russia and Ukraine in order to give full effectiveness to the partnerships. Member States co-ordinate their actions *vis-à-vis* Russia and Ukraine in regional and international organisations to meet the objectives of the PCAs and CSs. The candidate countries are also invited to participate in the CS framework. The EU institutions are called on to review existing action programmes, instruments and policies to ensure they

¹²⁵ Art. 6 CS Ukraine.

¹²⁶ It is stressed in Art. 20 that it should take place in such areas as competition policy, standards and certification, intellectual property rights, data protection, customs procedures and environment.

¹²⁷ Art. 4(a) CS Russia.

¹²⁸ Art. 61 CS Ukraine.

are consistent with the CSs, while the PCA remains the legal basis for the relationship between the EU and Russia or Ukraine.

The CSs play a decisive role in furthering EU/Russia and EU/Ukraine relations. Indeed, the EU has clearly displayed its view of its future relations with these two PCA countries that will share common borders with an enlarged Europe. It is of no surprise that Russia is seen as a long-term partner with a common objective of preserving peace and stability in Europe and a reliable supplier of natural resources. Nor is it surprising that while the EU acknowledges Russia as a political and economic partner, Russia is not looked upon as a future member of the Union. However, WTO membership is considered a core element in fostering economic links.

Ukraine has been given credit for its insistent European aspirations and the EU cautiously expressed interest in facilitating closer links with Ukraine that might eventually reach the establishment of a free trade area. As a consequence, the need for comprehensive approximation of laws was steadily emphasised. Meanwhile, Ukraine and Russia have been invited to take part in cross-pillar co-operation and to strengthen their relations with the candidate countries by means of cross-border trade.¹²⁹ The CSs serve as a useful role in distinguishing EU priorities in relations with Russia and Ukraine.

4.5.2.4 Conclusions

The PCAs may be seen as a relatively successful formula in EU external policy. They are certainly reliable legal instruments for sustaining long-term relations with the CIS countries.

However, as purely 'transitional' agreements, the PCAs are designed to bring the CIS countries to the gateway of the world market economy. Intrinsicly speaking, the PCAs offer access for CIS goods to the EC Single Market and open many opportunities for EC financial and technical assistance. Principles of liberal trade, reciprocity and fair competition are core to the fulfilment of the objectives of the agreements. Importantly, the CIS countries were given the chance to build a solid institutional framework for political dialogue with the EU. Application of MFN treatment and the GSP regime significantly liberalises mutual trade in goods. Furthermore, CIS companies can rely on non-discriminatory treatment should they want to establish themselves in the EU. The PCA countries are encouraged to approximate their laws to those of the EC, particularly in areas like competition and protection of intellectual property. The WTO rules are applicable to trade relations between the Parties and further areas of co-operation have been generously provided for.

However, the PCAs also serve to keep the CIS countries at a controllable distance from any closer access to the EC Single Market. The institutional structure is weak and was previously deprived of any binding effect. The dispute settlement mechanism definitely needs revision. The liberalisation of trade in goods and services is restricted and 'sensitive sectors' are taken out of the PCAs' scope. The Parties do not commit to many standstill clauses but reserve many safeguards. Some PCAs are visibly distinguished by asymmetrical obligations between the Parties. In practice, many trade barriers are still in force, how-

¹²⁹ At the Gothenburg European Council Ukraine and Moldova, later Russia, were invited to join the 'European Conference' a high level consultation forum between the Member States and selected third countries. In October 2001, these countries participated in an informal forum dedicated to the fight against terrorism.

ever, and practically none of the CIS countries has had its ‘non-market’ economy status lifted. Few PCA provisions could potentially be regarded as having direct effect. It follows from the assumption that the ‘key personnel’ clause and a provision on free movement of capital relating to direct investments in companies in all the PCAs, non-discrimination treatment in labour and ‘services negotiators’ provisions in the PCA Russia could be regarded as directly effective. Indeed, those provisions contain clear and precise obligations, which are not subject, in implementation or effect, to the adoption of any subsequent measure.¹³⁰ Nonetheless, the purpose and nature of the PCAs in the EC legal order question this notion since they aim only at ‘sustaining mutually advantageous co-operation and support ... to complete transition into a market economy.’¹³¹ Besides, numerous references to the further conclusion of agreements as well as a lack of standstill clauses makes the PCA provisions very similar to flexible GATT rules that have been refused direct effect.¹³²

The differentiation is not hidden and reflects the geographic and geopolitical priorities of the EU. The explicit message to the CIS countries was that any further progress in mutual relations depends on their fulfilling ‘essential elements’ and other binding commitments in the agreements. Evolutionary clauses display at least three different approaches towards the CIS countries. Although the ‘European’ PCAs have the strongest chances of establishing free trade areas with the EC, certain opportunities are given to the countries of the Caucasus. Asian countries have been left far behind the common pace towards Europe.

The CSs complement the PCAs, thereby marking the emergence of the skeleton of laws governing relations with the CIS countries, where the PCAs occupy the upper level. In addition, to differentiate Russia and Ukraine from among the other PCA countries, the CSs display clear political and economic guidelines to other CIS countries wishing to enhance their relations with the EU. In the end, the PCAs should be understood as ‘entry level’ agreements, paving the way for the CIS countries to establish free trade areas with the EC, setting out a political dialogue and liberalising mutual trade with the EU. The nature of the PCAs as ‘entry level’ agreements is manifested by a considerable degree of differentiation in the seminal objectives to be fulfilled by the CIS countries (such as acquiring WTO membership and approximating national laws to EU laws), while the EU is busy dealing with its expansion to eastwards.

¹³⁰ See the *Demirel and Kziber* cases.

¹³¹ For example, Art. 1 PCA Ukraine.

¹³² ECJ, Case 21-24/72 *Internationale Fruit Company NV et al. v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.