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From Common Market to European Union: The New Europe's Place in the Trading World

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Abstract

What are the philosophical, political, legal and institutional bases for Europe's economic relations with the rest of the world? How have they developed over time, as Europe has moved from the narrow, sectoral basis of the recently defunct European Coal and Steel Community ("ECSC"), to the radical innovation of the European Economic Community ("EEC"), which itself has become part of the wider, politically even more ambitious integrationist structure of the European Union ("EU"), now itself on the verge of a radical expansion of its size? Does today's EU have as much or less in common with the ECSC as a fifty-year-old adult has with the gangling teenager that he once was? This is not a compendium or even semi-exhaustive description of the vast topic called "the EU's external economic relations," nor is it an attempt to claim that it is "better" or more open than those adopted by other major trading Nations (although I will gladly stake out such a claim in other contexts). Having gratefully received an invitation to write this Essay, I have instead chosen to explore a number of key themes, which are part of my daily preoccupations as a practitioner of EU trade policy.

FROM COMMON MARKET TO EUROPEAN UNION: THE NEW EUROPE'S PLACE IN THE TRADING WORLD

*Mogens Peter Carl**

INTRODUCTION

What are the philosophical, political, legal and institutional bases for Europe's economic relations with the rest of the world? How have they developed over time, as Europe has moved from the narrow, sectoral basis of the recently defunct European Coal and Steel Community ("ECSC")[1], to the radical innovation of the European Economic Community ("EEC")[2], which itself has become part of the wider, politically even more ambitious integrationist structure of the European Union ("EU")[3], now itself

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1. *See* Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty] (providing for restructuring and rationalization of the coal and steel industries). The ECSC had a term of fifty years. This term expired on July 24, 2002; *see also* O.J. C 190/1 (1999) (explaining that European Council decided not to renew Treaty, but to absorb these two sectors into sphere of European Community).

2. *See* Treaty establishing the European Community, Feb. 7, 1992, O.J. 224/1 (1992),[1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam, *supra*. The European Economic Community, renamed as the European Community in 1993, is governed by the terms of the EC Treaty.

3. *See generally* TEU, *supra* n.2, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 (stating that EU, created by Treaty of Maastricht on November 1, 1993, is governed by terms of TEU). The overall structure of the European Union encompasses not only the Euro-

on the verge of a radical expansion of its size? Does today's EU have as much or less in common with the ECSC as a fifty-year-old adult has with the gangling teenager that he once was?

These themes are worthy of a book and, undoubtedly, a great many weighty tomes are to be written by future historians who will be dissecting the perceived reasons for the successes and failures of this extraordinary, unprecedented historical experiment that is now known as the EU.

This is *not* a compendium or even semi-exhaustive description of the vast topic called "the EU's external economic relations," nor is it an attempt to claim that it is "better" or more open than those adopted by other major trading Nations (although I will gladly stake out such a claim in other contexts). Having gratefully received an invitation to write this Essay, I have instead chosen to explore a number of key themes, which are part of my daily preoccupations as a practitioner of EU trade policy.

I. *FROM "FORTRESS EUROPE" TO "GLOBALIZATION"?*

Why the quotation marks? Because the cliché "Fortress Europe"[4] was never more than a vague collection of attempts at temporarily reducing the impact on the more mature part of European industry of rapidly rising competitors, at a time when the post-war economic "miracles", especially in EEC-6, had petered out and were being replaced by post-oil shock strains and imbalances. Nevertheless, it is true that the *attitudes* of policy makers varied widely, with the Southern part of Europe being then more averse to change than the North (with a striking role reversal having taken place in many respects since then). We were reluctant back then to engage in new "foreign ventures", surmounting with difficulty our internal dissensions to participate in the launch of the Uruguay Round in 1986.[5]

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pean Community, but also the so-called "second and third pillars": the Common Foreign and Security Policy and Cooperation in Justice and Home Affairs.

4. "Fortress Europe" was a term frequently employed in the late 1980s in the United States and elsewhere to express the concern that the European Community's internal market program, described *infra* n.7, might lead to barriers to external trade investment. This concern largely disappeared in the 1990s.

5. EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION 1996, at 276, par. 703 (1996) (referencing actions of Council in June, October, November, and December of 1996).

What, then, is the explanation of why we became enthusiastic participants in the *conclusion* of these negotiations seven years later, despite the solid doses of liberalization of the last strongholds of protection that this would (and did) entail? And why did the EU emerge, only four years after that event with a blue print to move the World Trade Organization ("WTO" or the "Organization") even further forward on the path toward market liberalization and rule making (a blue print largely adopted at the Fourth Ministerial Conference ("Doha Round") in November 2001, after four years of incessant effort)?[6]

One practical, political, and economic reason was the parallel progress of the finalization of the internal European market and of the Uruguay Round. The negotiation and conclusion of the Uruguay Round coincided with the virtually complete removal of remaining barriers to *internal* EU trade ("Single Market")[7], in itself much more radical and complete than any General Agreement on Trade and Tariffs ("GATT") or WTO set of rules.

A more general explanation is the gradual convergence of public policy attitudes and thinking. Across a wide spectrum of issues, the Commission and Member State governments now adopt similar or identical positions on issues of market opening or closure. They hold comparable views on the importance of international, or multilateral, rule making versus purely national approaches. This holds true across the spectrum of industrial and services trade policy, the main remnants of former divergences being in anti-dumping and, with important nuances, in agriculture. The mind-sets of European policy makers have been shaped by the life-size experiment in breaking down intra-European barriers of all types called the EU and they now tend

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6. *See* World Trade Organization, *Doha Development Agenda, available at* http://www.wto.org/index.htm (asserting that in November 2001, Fourth Ministerial Conference ("Doha Round") was held in Doha, Qatar). The Doha Round established the Doha Development Agenda ("DDA"), which provides the mandate for negotiations on a wide range of topics.

7. *See* Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 (June 1985) (launching major legislative program to remove inter-Member State barriers to trade and investment). EC Treaty Article 14 (ex art. 7a), introduced by the SEA on July 1, 1987, set the goal of achieving the Internal Market (after also called the "Single Market") by December 31, 1992. For a description, *see* BERMANN, GOEBEL, DAVEY & FOX, CASES AND MATERIALS ON EUROPEAN UNION LAW 436-41 (2d ed. 2002) [hereinafter GOEBEL, ET.AL.]

to approach international cooperation and rule making in the same spirit. This is not intended as a disingenuous suggestion that we have all turned into fervent free traders or internationalists but that Europe is now in the forefront amongst those who see more and better international negotiation and rule-making as (possible) solutions and not as many, in some other developed or developing countries, as a problem and a challenge to their national sovereignty.

This is the real background to the otherwise one-dimensional debate about "multilateralism" and its perceived virtues or lack thereof: in Europe we have learned both, a frightening lesson twice in the past century of the consequences of purely national/nationalistic approaches, *and* the positive lesson of doing the opposite over nearly two generations of decision-makers. Few other countries have had the opportunity to learn the positive lesson, nor do they seem to have drawn all the conclusions from the negative lesson, including in particular the United States, the only other world economy of comparable size, power, and influence.

Curiously, we have moved within the space of fifteen years from the cliché of "Fortress Europe" to vociferous complaints from our partners in third-world countries (and part of our own populations) that we want to go too far and too fast (*vide* the controversy surrounding the launch of the new WTO Round of negotiations at Doha)[8], or perhaps the cliché was not really true in the first place? As to the lobbying efforts by European companies in Brussels on international trade matters, they are virtually exclusively focused on their requests on market opening, most often in other countries but sometimes also in the EU itself, and only very rarely on market closure at home.

There is, however, also in Europe greater wariness than elsewhere of what are here perceived as the simple or even simplistic notions that the WTO should focus on its classical task of market opening to the exclusion of other objectives. If globalization, in a strict economic sense of the term, is to be a success, it cannot be left only to the proverbially blind market forces that no country hesitates to tinker with in its own territory. International rule making must accommodate man's non-economic aspirations. Even to those only intent on the economic side of the equation,

8. *See Doha Development Agenda, supra* n.6.

it should be obvious that simply lowering tariffs or other obvious barriers to trade is like the story of the Dutch child plugging the holes in the dike with his fingers only to see other holes opening up and flooding the land. There is no dichotomy between market opening and better rules; the two go together. Nor is the question whether these rules should be one-dimensional or whether they should cover wider issues[9]. Virtually all key WTO rules are already today multi-dimensional, directly or by inference. Rather, the real question is whether the WTO reached perfection when its 558 pages of agreements entered into force in 1995[10] or whether important improvements should still be sought. My own answer is an emphatic "yes" to the latter, but more on this later.

II. *FROM EU FIFTEEN TO EU TWENTY-SOMETHING*

It is an interesting paradox that this evolution of thinking and attitudes in Europe has been developing *despite* the ever-growing "continental" size of our economy. The classical, and admittedly oversimplified, measure is the share of international trade in Gross Domestic Product ("GDP") which for the EU is now slightly below that of the United States and Japan (and the current data are even somewhat exaggerated by the inclusion of our immediate neighbors in Norway and Switzerland in the figures on "foreign" trade). As often, however, aggregates tend to obscure equally important exceptions or qualifications. We *need* international trade more than these figures suggest, partly for old-fashioned reasons such as a lack of energy products or raw materials, but also because foreign investment and trade in goods, services, and intellectual property is an essential way of transmitting and receiving new technology and ideas. "Free(r) trade" is, for many of us, more a deliberate "choice of society" than a choice based on any hard-nosed mercantilist calculation.

Will these attitudes change as we move from EU Fifteen to EU Twenty-something (the reader will forgive me for the coy "Twenty-something" — as this Essay is being drafted, the enlargement negotiations are still not finished).[11] The enlarged

9. For example, consumer or environmental protection.

10. *See* World Trade Organization, *Marrakesh Protocol to the GATT 1994* [hereinafter *Marrakesh Protocol*] (Apr. 15, 1994), *available at* http://www.wto.org/index.htm.

11. *See* European Commission, *Agenda 2000: For a Stronger and Wider Europe*, E.U.

Community's dependence on the outside world will drop even further. What certainly will intensify will be the dampening of any significant effect on our economies of booms or busts in the non-European economies (compounded with the adoption of the Euro as the single currency for most current Member States).[12] On the other side of the equation, the corollary will be an even greater relative dependence on the enlarged EU market of a great number of developing countries for which trade with the EU already today represents the difference between growth and stagnation or depression, hence creating an ever greater responsibility for the EU, especially towards the more vulnerable economies.

Will the accession of new Members to the EU change the attitudes represented today in the Commission or around the table in the Council of Ministers on the type of issues that are the subject of this Essay? On average, probably not. Most of the countries mooted for early membership recently went through severe trials of foreign domination and suffered the privations engendered by deeply flawed centralized economic systems. With inevitable qualifications and nuances (likely in agriculture for some of them), one may expect them to support, perhaps enthusiastically, the movement towards international market opening and rule making traced by the present EU. The main challenge for us here in Brussels will be to manage the transition from EU Fifteen to EU Twenty-something in terms of our decision-making process, and to do this most likely at the same time that we will be engaged in the final stretch of the Doha Round negotiations.

III. *THE ROLE OF THE WTO IN THE EU'S EXTERNAL TRADE POLICY*

Over the years, in a haphazard way that future historians will attribute to a grand master plan, the EU has established a dense network of trade agreements with third-world countries, includ-

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BULL., no. 7/8 (1997). This document led to the ultimate applications from Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. *See generally* Eneko Landaburu, 26 FORDHAM INT'L L.J. 1 (2002) (discussing enlargement of EU).

12. *See generally* GOEBEL ET AL., *supra* n.7 at ch.33F (stating that on January 1, 2002, Euro became single currency for all Member States except Denmark, Sweden, and United Kingdom).

ing the seventy-seven Members of the African, Caribbean and Pacific Group of States ("ACP")[13]; virtually all countries around the Mediterranean, Eastern and Central Europe (in anticipation of their accession to the EU)[14]; and a few countries beyond the immediate geographical ambit of Europe (Chile, Mexico, and South Africa).[15] More are being prepared, with Mercosur[16] and the Gulf Cooperation Council ("GCC").[17]

Today, the EU's trade is divided into three roughly equal thirds between trade with countries with which it has preferential agreements; imports where its duties have been reduced to zero in successive WTO negotiations; and the rest (and to illustrate one of the limitations of this kind of comparison of "the rest", the United States represents about thirty percent, but a sizeable part of EU imports from the United States of agricultural and other products already now are imported at zero duty). The underlying motivations have largely been "political", in the widest sense of the term, with attempts to open foreign markets to EU products generally coming in second or third place, the main exceptions being the agreements concluded over the past few years with Chile, Mexico, and South Africa, the so-called "Europe agreements" with accession candidates, and the customs union with Turkey, which all contain strong elements of reciprocal market opening.

What should be the role of the WTO? Is it necessary to make a choice between further multilateral market opening and rule making through the WTO, on the one hand, and continued

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13. *See* African, Carribbean, and Pacific Group of States, *Cotonou Agreement* (2000), *available at* www.apsec.org/gb.

14. *See* Euro-Meditteranean Partnership, *Barcelona Declaration*, *available at* http://europa.eu.int/comm/external_relations (1995); *see also* GOEBEL, ET AL., *supra* n.7, at ch.28 (explaining that Europe Agreements, requiring preferential trade and investment terms, are in effect since mid-1990s with all Central European Nations currently applying for accession). *Id.* at 1065-69. Other preferential association agreements are in force with virtually all the Nations in the Mediterranean basin, and more are being strengthened in new accords by virtue of the *Barcelona Partnership Declaration* of the European Council in 1995. *Id.* at 1069.

15. *See* GOEBEL, ET AL., *supra* n.7, at 1071-72.

16. *See* European Union, *The EU's Relations with Mercosur*, *available at* http://europa.eu.int/comm/external_relations/index.htm (explaining that Argentina, Brazil, Paraguay, and Uruguay created Mercosur in March 1991 with goal of creating common market between participating countries).

17. *See id.* (noting that Gulf Corporation Council ("GCC") was created in 1981). Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates created the Gulf Cooperation Council ("GCC") in May 1981. *Id.*

free trade agreement ventures on the other hand, or can they coexist? My answer to the latter is "yes."

Firstly, one should not see the two approaches as being mutually exclusive. However far you go in terms of removing trade barriers through free trade agreements, it will still be essential to have the WTO rule book on horizontal issues, essentially covering various aspects of governmental rule making that do not lend themselves easily to bilateral agreements and which are often as significant barriers to trade as are tariffs.

Secondly, if or when further progress in the WTO is to be hampered by continued resistance from those Members who prefer to slow down international market opening, the conclusion of free trade agreements among others may become the only viable option.

Thirdly, there are and will be countries which, even if the Doha Round does make significant progress on market access and other issues, will be willing to go further and faster towards deeper integration (inevitably, in the jargon, referred to as "WTO plus").

Nonetheless, the WTO *should*, for wider political reasons, remain the mainstay of international rulemaking: this is *the* forum where smaller and weaker Members have a chance to protect their interests through collective action, albeit in various configurations, a theme which was prevalent through the Uruguay Round but which has lost its intensity, indeed virtually disappeared, from public discourse, even in these "small and weaker Members" and now sometimes replaced by the brand of "WTO skepticism" proffered by those who prefer the world to stand still because they are oh-so-cozy behind their current preferential schemes or protectionist walls.

IV. *BACK TO BASICS*

Arguably, the world trading system needs to be revised. The main rulebook, i.e., the WTO agreements, runs to 558 pages, drafted between ten and fifty-odd years ago. Its main defects, as defined by one or the other Member, turn around the fundamental questions of predictability and fairness (and the two often connect, as we shall see below).

A. *Predictability*

"Predictability" in this context is meant to describe the extent to which a trader can expect that he will be able to sell his product (all "private" aspects of the contract being abstracted from) without the government of the importing country shifting the goal posts in a manner that the trader could not reasonably have expected. With the ever-increasing importance of government regulation in all countries regarding safety, consumer and environmental protection, etc., the risk of seeing your investment wasted or your efforts nullified grows unless the international rule book (mostly that of the WTO) allows you to calculate the risk and to take action to reduce its impact on your activities. But there is a built-in barrier to this search for greater predictability which is the survival of the Westphalian system where legitimacy and power are vested with sovereign States, however qualified by post-World War II international rule making, which puts a damper on the enthusiasm of any country to reduce its scope for national decision-making on issues seen as essential by its own citizens.

Another side of the "predictability" coin has to do with the basic issue of market opening. The WTO rulebook contains rather precise obligations on market opening[18] and this, in turn, carries with it the risk that important parts of a national economic fabric may suddenly be wiped out by foreign competition. Therefore, the Members of the WTO have agreed on a number of possible safety valves, essentially of the "safeguard action" variety.[19] However, if these are misused for reasons other than their basic purpose (i.e., to provide relief in genuinely dire straits), as we have repeatedly seen these past few years, the predictability of the system takes another hard knock.

In both examples above, the accent is on the search for the right balance between national sovereignty and international rule making, and that balance will necessarily change as our societies change. The problem is that our societies are changing at different speeds and sometimes in different directions, also in

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18. *See Marrakesh Agreement supra* n.10, art. 3, 4, & 10 (establishing WTO on April 15, 1994).

19. *See* World Trade Organization, *Safeguard Measures, available at* http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (discussing permissible safeguard measures available to WTO Members).

their respective perceptions of the outside world and of their readiness to share decision-making with others.

More concretely, what should be done, on the assumption (perhaps erroneous) that other Members of the WTO are also willing to review the rulebook with the purpose of making our respective rights and obligations clearer? The very fact that one needs to ask the question is a paradox. After all, which country in the world would choose to fix its *domestic* legislation in concrete forever after? But if not, why should the WTO remain as a 1993 time capsule? The areas that need "clarification" abound: the rules that deal with product standards, in particular, leave much to be desired, drafted as they are in rather general terms they have the effect of, alternatively, allowing for protectionist action with little or no truly defensible purpose or of "chilling" legitimate national action, especially by the weaker Members of the Organization. We also need to review and clarify the relationship between the WTO rules and those international agreements that cover the protection of the environment.

This latter point has been one of the most contentious issues in the context of the launch of the Doha Development Agenda ("DDA"), needlessly contentious because much of the debate has been based on facile stereotypes with only passing resemblance with reality. The issue is now on the negotiating agenda but the controversy remains. This is not the place to rehash the arguments of the opposing sides, but rather, to put a difficult but simple, although admittedly loaded question: how can the international community ignore the relationship between the rules according to which we govern international economic relations and those that we establish to protect the global or local environment? The answer need not be (and probably will not be) that we need to impose further barriers on trade but that the international community should have the right to decide what reasonable rules on trade may be required to support the achievement of internationally recognized environmental objectives. In order to do so, you need, *inter alia*, to ensure that the respective "rulebooks" coincide or, at least, that they do not contradict each other.

The problem is that the debate on these issues in the WTO has, ever since the creation of the Organization seven years ago, been dominated by stereotypes rather than by serious debate. Curiously, it is those same countries that have been arguing most

strongly against "green protectionism", e.g., Australia, New Zealand, and countries in North and South America, who have, and by very far, adopted the most restrictive measures against imports of various agricultural products deemed by them to create a risk for animal or plant life or safety.

The issue of "predictability" is also connected with the question of fairness. All "Western" countries are continuously modifying their domestic legislation on very specific aspects of product standardization, safety, environmental protection, etc. For the great majority of small- or medium-sized developing country exporters, this is understandably *the* problem of unpredictability, which creates an even greater concern than that over the residual tariff protection. Sanitary or phytosanitary measures are adopted and often kept in place for long periods of time, with little practical possibility that many exporters will even understand what is being expected from them (not to speak of those measures which are adopted in some countries for protectionist reasons behind a thin veneer of consumer protection). And yet, there is no real push from among the WTO membership to "review" these essential parts of the rule book (in the jargon, especially the Technical Barriers to Trade[20] and the Sanitary and Phytosanitary Agreements[21]), the "reviews" of both being largely a long drawn out bureaucratic exercise with no substantial focus. Has the Organization reached the point where its Members' desire to preserve the present degree of national leeway for action in these areas is stronger than their desire to increase predictability and fairness?

As suggested above, the "safety valves" purposely built into the system, also need to be brought up to date. The "safeguard" agreement[22], negotiated in the early 1990s, was, on purpose, drafted in such a way that it left considerable flexibility (to use a polite term) for national protective action, and this for the clearly understood and laudable reason that one wanted back

20. *See* World Trade Organization, *The Agreement on Technical Barriers to Trade* (1994), *available at* http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (explaining that document was created to standardize technical and product regulations in various participating countries).

21. *See* World Trade Organization, *The Sanitary and Phytosanitary Agreement* (1994), *available at* http://www.wto.org/english/tratop_e/sps_e/sps_e/htm (establishing basic rules to regulate food safety, animal, and plant health).

22. *See* World Trade Organization, *The Agreement on Safeguards* (1994), *available at* http://www.wto.org/wto/English/tratop_e/safeg_e/safeint.htm.

then to create an incentive for Members to move away from the informal type of arm twisting referred to in inimitable GATT and Orwellian double speak as "voluntary" restraint agreements. We should have no regrets: the new system is better than (the absence of one in) the old, but it is still not good enough, as demonstrated by the recent U.S. decision to put thirty percent tariffs on imports of steel which had actually decreased. Yet, the WTO system provides for only limited safeguards against excessive safeguard action, with dispute settlement being a long drawn-out affair during which the country taking protective action gathers "rent" in the economic theory sense of the term. All Members are potential victims of such action.

In addition to "safeguards", the WTO also allows action against unfairly priced imports ("anti-dumping"[23]) or against imports that have been subsidized.[24] Here, the experience of the past seven years is equally disturbing: both (but especially anti-dumping) are being used as surrogates for genuine safeguard action, all too often serving as the "safety net" which should only be supplied by justified safeguard action, with long delayed sanctions for transgression created by the length of dispute settlement procedures. Virtually all major economies are users of anti-dumping action, and now even many developing countries, which have taken to this type of action with much enthusiasm. The reform of the system and the tightening of the rules against protectionist abuse should be an important objective for the Doha Round.

B. *Fairness*

Is the WTO system "fair"? What does "fairness" mean in this context? How should it be achieved? To me, this is the second major issue that we need to face in the twenty-first century.

Once more, I will be highly selective in order to focus on a few key issues. So, to simplify, are the weaker (i.e., smaller and poorer) Members getting a fair shake? Are they being discrimi-

23. *See* World Trade Organization, *Anti-dumping, available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (stating that Anti-Dumping Agreement regulates export of products at lower prices than that charged in home market).

24. *See* World Trade Organization, *Agreement on Subsidies and Countervailing Measures* (1994), *available at* http://www.wto.org/english/tratop_e/tratop_e.htm (addressing multilateral disciplines regulating provision of subsidies and use of countervailing measures to offset injury caused by subsidized imports).

nated against by a system dominated by the bigger Members? Can they effectively defend their interests? My politically incorrect answer to all three is "generally, yes", hastening to add that it could, of course, be better.

Until the conclusion of the Uruguay Round, developing countries received the benefits of successive rounds of tariff reductions without having to contribute themselves. Developing countries were largely, until then, "free riders", benefiting from the market opening provided by others, largely without any reciprocity being asked by the developed countries. Therefore, it would be exceedingly difficult to argue that they had given more than they have received — on the contrary. The Uruguay Round was the big turning point when the industrialized countries committed themselves to eliminate quotas on textiles and clothing, and where developing countries, for the first time ever, were accepted to participate in the tariff negotiations and, most importantly, partly to "bind" (i.e., legally fix) some of the results of the negotiations. All Members, in all other respects (with the exception of the occasional transition period) committed themselves to abide by the new rules in all areas, and were made subject to binding dispute settlement (*quo vide*, below).

This does not detract from the argument that the system could and should be fairer. Developed countries can and should afford a much greater degree of market opening than they currently do. It is certainly true that obstacles such as tariff escalation and tariff peaks affect developing country exports disproportionately. It would, however, be a mistake to confuse this with the argument that no demands should be made to developing countries in return. Economic development is gained not only by improved market access abroad, but by opening one's own market, thus decreasing the "rent" of local oligarchies, and by adopting international rules and standards, thus creating a more conducive climate for both local and international investment.

"Fairness", however, not only has altruistic international aspects. Any policy maker has to demonstrate to his constituents that they, too, are getting a fair deal, whether this is expressed in economic terms or in terms of social fairness, protection of the (global) environment, etc. Much of the debate in Europe has been focused on the former (international) aspect, with a ground swell of support and pressure from individuals, Parlia-

ments and non-governmental organizations ("NGOs") in favor of a "development friendly" EU policy. Others are equally vocal in stressing the impact of globalization on the weaker members of society both, in developing and developed countries. This crystallized in the WTO around the question of "trade and labor" and whether the connection between trade and working conditions was something worthy of consideration in the WTO. This has proved to be one of the most divisive issues among the Members, with further consideration, at least for the time being, confined to a newly established forum of discussion in the International Labor Organization ("ILO").

It would, however, be a mistake to believe that the issue has gone away. In particular, the question of the exploitation of labor, in general or more specifically child or forced labor, will continue to return until the international community, and in particular its individual Members, implement relevant ILO instruments and not only pay lip-service to them, as so many countries do.

V. *REFORMING THE WTO SYSTEM*

A quiet revolution in international economic relations occurred when the WTO was created and when its "rule book" became enforceable through binding dispute settlement. It can even be argued that the delayed shock of realizing the implications of this new system, when all of a sudden it dawned upon the Members that they would have to abide by their commitments, led to the great opposition in the late 1990s to the EU's proposals to launch a New Round.

The great novelty of the WTO's "binding" dispute settlement system[25] is that it introduced into international law and relations the notion that an offended party can be authorized by a judicial system to take action, which can harm the economic interests of another Member if the rights of the former under the system have been harmed. Therefore, although national governments are under no direct *compulsion* to change their laws and regulations if they are found to violate the WTO, the pressure to come into conformity can be compelling when the other

25. *See* World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994), *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm#dispute.

party is given the right to apply a sufficiently important level of "countermeasures."

To invent a domestic example: this is tantamount to a legal system where, because the absence of police makes it difficult to collect fines, the winner in a law suit is allowed, within clearly circumscribed limits, to take action against the losing party's business interests.

For those who believe in international cooperation and rule making, not to speak of freer trade, this is an important positive achievement, and one should have no regrets that we now do have a law-based system. Nevertheless, this sense of satisfaction is now tempered for many by the realization that some of the unintended side effects of the new system may do more harm than good and that it is one that, paradoxically, potentially favors the stronger partner.[26]

Firstly, the system is based on the principle of "an eye for an eye, a tooth for a tooth." In brief, if country A is found to have violated country B's rights under the WTO to export to A, B may adopt retaliatory measures which will restrict A's exports to B by a similar amount (hence, "an eye for an eye"). The merit of the system is that it creates a potentially powerful incentive to be virtuous in terms of observing one's obligations under the WTO. The paradoxical, unintended, and absurd side effect is that this will lead to a doubling of the loss of trading opportunities (exports blocked and then imports curtailed) unless the offending party changes its legislation quickly.

This should be changed and there are credible alternatives. In particular, instead of putting the emphasis on sanctions (by definition negative and trade restraining in character), one should create a system based on a mixture of sticks and carrots to make Members offer trade compensation by increasing market access in other sectors to compensate for the loss of access in the sector under dispute, pending the outcome of their domestic political battle to modify legislation to comply with the WTO ruling.

Secondly, the present system is one that indirectly favors those Members that are large enough to absorb the retaliatory measures authorized by the WTO. To economies the size of the EU, Japan, or the United States, the imposition of retaliation to

26. *See supra* Part IIB. Fairness.

the tune of a few hundred million will hardly be noticed (except by the small part of the population affected). To small economies, developing or developed, this is a different matter. They will be more vulnerable to attack (although with the size of their "offense" being presumably correspondingly low, this is not the main consideration), and more importantly, they will find it more difficult to enforce their rights if the (developed) country hit by their retaliatory measures decides to absorb them and carry on regardless. This problem, in turn, is one where this built-in (albeit unintended) absence of "fairness" could be repaired by a judicious addition of compensation as an obligatory alternative to sanctions.

Last, but not least, has the system, to paraphrase Peter's principle, "succeeded to the point that it has made itself immobile"?

While criticized by anti-globalizers from left and right, the WTO has continued to act as a magnet to new candidates, now reaching 144 Members. Although thoroughly equipped with an impressive array of Councils, Committees, Working Groups and the like, it differs little from its predecessor, the GATT, which itself was largely a place where Members met to negotiate (and now also to resolve disputes in a legal forum), assisted by a modestly equipped but high quality secretariat. Abstracting from its dispute settlement function, the WTO is still largely a forum for negotiation and international rule making, requiring, for all essential purposes, consensus among its Members.

The question is whether it is realistic and desirable to continue down this road or whether we should envisage different approaches. After all, is it reasonable to expect that the same detailed rules should apply to a country in the direst economic straits as to a country at the peak of economic development? In reality, this contradiction has been overcome, partly by a liberal use of transition periods (but which, by definition, are only sticking plasters on the wound); partly by limited recourse to special provisions for developing countries (self-elected and defined, ranging from U.S.$1-a day, least developed countries to Singapore); and partly by developed countries largely closing their eyes to the persistence of non-compliance.

The basic question is therefore whether we should be ready to envisage a WTO that would apply different rules to different

countries, a two- or multi-speed rulebook. The purists are strongly opposed. Those who fear stagnation and hence, regression caused by the now unwieldy consensus-based system, have raised the question, but to howls of protest. Interestingly, those who protest the loudest are also among the strongest proponents of more "special and differential treatment" of developing countries. Translated from the usual fog of words, this means that these countries want to have their say at the negotiating table while not necessarily being bound by the outcome.

Next year's Ministerial Conference at Cancún will provide an essential test when Members will be called on to move to stage two of the Doha Round negotiations. If they fail, the stage will be set for another crisis in the Organization, in substance potentially more important than the débâcle of Seattle because it would endanger the conclusion of the new round.

VI. *THE DOHA DEVELOPMENT AGENDA*

The agreement reached at the WTO ministerial conference in November 2001 to launch a new round of trade negotiations, the DDA,[27] was necessary to move the Organization towards the realization of the two objectives above (predictability and fairness). This is not the place to reiterate the arguments underlying the EU's four-year quest to launch this new mammoth negotiation, which has the potential of surpassing the Uruguay Round in terms of its substantive contents. Suffice it to recall its basic objectives (admittedly seen from an EU perspective but also enshrined in the substance of the negotiating agenda):

- improved market access;
- special attention to developing country interests;
- the broadening of the scope of the WTO to cover, *inter alia*, investment and competition;
- the nexus "trade and environment";
- reviewing and improving the dispute settlement system; and
- improving WTO rules.

If successful, these negotiations will turn the WTO into a truly comprehensive international economic policy forum, with binding rules and mechanisms for resolving disputes in most areas touching upon international economic relations, with the

27. *See* World Trade Organization, *Trade Policy Review European Union* (June 26, 2002), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/TPR/G102.doc.

notable exception of monetary and financial issues, which will remain with the Bretton Woods institutions. The objective is to update the WTO to the circumstances of the early part of the century.

Whether we should, in the future, continue to focus on the launch of such huge enterprises is another question. The reason in the past has been that this was the only way to ensure that all participants found issues of importance to them on the agenda, that the final outcome was one that was politically sellable back home. Has this "big bang" approach run its course with the DDA? I am not (yet) convinced. The protracted birth pangs of the DDA were, indeed, caused by the "big bang" approach of the EU. If we had agreed to limit future negotiations to a simple market access round, there is little doubt that we would have succeeded earlier. The implicit logic of this, however, is that such an earlier "success" would have been at the expense of all the other issues, with little if any guarantee that they would ever see the light of day on any WTO negotiating agenda.

The more fundamental question is whether we have, with the DDA, reached, for a certain time, a plateau in what other Nations are prepared to undertake by way of international rule making and hence partial circumscription of their leeway for national law making. Because of our historical background and experience of forty-odd years of the same on a much bigger and more profound scale here in Brussels, the EU may be less reluctant to engage in such future ventures. As suggested at the beginning of this article, few, if any, other major Members have had the same historical experience.

VII. *INSTITUTIONS AND DECISION-MAKING*

Trade policy is one of the (regrettably) few areas of international relations where the EU speaks with one voice, indeed so much so that it is being held up in the ongoing constitutional Convention in Brussels as a model for what could be done in other respects. Its functioning is surprisingly simple and pragmatic, based on a generally worded treaty provision[28] and on

28. *See* Consolidated version of the Treaty establishing the European Community, art. 133, O.J.C. 340/3 (1997) I.L.M. 79, 108 (ex art. 113) [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain re-

many years of accumulated practice.

It is a system that has grown out of Member State institutional practice, with most of the power in the hands of the executive and only limited power in the hands of the legislature. This has, *mutatis mutandis*, been transferred to "Brussels" where the Commission "consults" a committee of Member State representatives[29] and then, on this basis, carries out what it considers to be the policy for which there is sufficient support inside the EU. On occasion, the Council of Ministers is asked to adopt a formal decision in terms of legislation or treaty making. The key element in this structure is the Commission's (nearly) sole right of initiative, rarely leavened by continued temptations by Member States to present their own policy proposals in areas (essentially part of services, intellectual property and investment) where there is still, what in the jargon is called national "competence"[30] (as opposed to the "competence" for initiative and action that exclusively resides with the Commission/Community in all other areas). So the Commission is the central player, as the initiator and subsequently as the negotiator/interlocutor with the outside world. What adds spice to this simplified image is, of course, the continued temptation of (some) Member States to pursue what they consider to be their national interest by currying favor with one or the other third country, arguing that *they* are (by definition) that country's best friend.

This model is, in one important respect, an anachronism in

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lated acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EU Treaty, which enables the Commission to negotiate and the Council, acting by a qualified majority vote, to conclude international agreements binding on the EC and its Member States within the scope of the Common Commercial Policy.

29. Consolidated EC Treaty, *supra* n.28, art. 133, O.J.C. 340/3 (1997), 37 I.L.M. at 108 (ex art. 113). The Commission's consultation of the so-called 133 committees of Member State representatives during international commercial negotiations is required by Article 133(3).

30. The Court of Justice held in OUI [1994] E.C.R. 5267 that most aspects of services, investment, and intellectual property remained in the competence of the Member States. The Treaty of Nice's amendment to Article 133 extends the Common Commercial Policy to most of these sectors and thus enables the adoption of decisions on the basis of qualified majority voting and confirms the Commission's exclusive negotiation role.

that it leaves little scope for Parliamentary involvement[31] (derived, as suggested above, from a European tradition diametrically opposed to that of the United States, which is further discussed below). It is difficult to imagine how this can perdure, especially in an area of political life where the impact on decisions made in areas highly technical and apparently purely economic now goes far beyond their immediate subject matter, touching upon citizens' non-economic objectives and preoccupations, whether they are ethical, social, or related to human safety or the environment. This has to change, and it will.

From the more narrow perspective of a decision-maker, it is a system that works and has the virtue of being once or twice removed from the type of lobbying pressures that hold sway in other systems such as that of the United States. It is not as if the density of lobbyists in Brussels has much reason to envy that of Washington, but decision making is largely in the hands of the executive branch (Commission, "advised" by Member State government representatives), as opposed to the United States, where authority for trade policy is vested in Congress and is consequently much more directly exposed to various types of pressures.

Once more, this is not a black and white situation. Obviously, the opinions of sectoral lobbies matter in Brussels, but it is a question of degree, or rather of many degrees. And obviously, the Commission listens ever more intently to the European Parliament, the interventions of Oxfam, and the World Wildlife Fund.

Fifteen years ago, it was rightly said that the United States found it easy to launch a new international negotiation or initiative but difficult to conclude one, whereas the EU found it difficult to launch but easy to conclude. This has fundamentally

31. EC Treaty Article 133 makes no reference to Parliament's involvement in either the negotiation or conclusion on international agreements. By tradition dating to 1973, under the so-called Luns-Westerterp procedures, Parliament is kept informed about important international trade agreement negotiations. Under EC Treaty Article 300 (ex art. 228) (as amended by the Treaty of Amsterdam), Parliament's assent, by an affirmative vote of an absolute majority of its Members, is required for such international agreements as create international institutional frameworks; have important budgetary implications; or have the effect of amending internal market legislation that has been adopted through the co-decision of the Parliament. The Parliament accordingly had to give its assent to the WTO Agreement in 1993. *See generally* GOEBEL ET AL., *supra* n.7, at ch.27A2.

changed: we find it much easier now to launch new initiatives on the international scene, but this is already beginning to be counterbalanced by what I expect to be ever-growing difficulties to conclude unless we find new ways of ensuring that we will not only be supported by our Member State governments but by our societies at large.

There are also important implications from the enlargement to EU Twenty-something, in at least two respects. Firstly, our present decision making system relies on the possibility of forcing a vote depending on the type of issue (e.g., anti-dumping), based on a simple majority of Member States or a "qualified" majority where Member States' votes are weighted roughly according to their population size.[32] But a number of issues are still subject to consensus. This is manageable with a group of fifteen countries whose interests and attitudes have, as suggested above, substantially converged over time. It will not be manageable with twenty-five Members. We have to extend majority voting to all areas of trade policy.

Secondly, already today, our well-tried and well-functioning system of consulting Member States is being forced open at the seams by changes in attitudes towards governmental decision-making. Our formerly rather opaque consultative machinery is increasingly being treated by the participants as a quasi-public forum from which the public is absent but from which it is being served the tidbits that serve the interests of those who "leak." We thus have the disadvantages of a system that has the reputation of being secretive and opaque without really having one (and hence often miss the possibility of being able to take important tactical decision in real secrecy), while not having the advantages of a truly transparent system. The "133 Committee"[33] (as it is called after the relevant Treaty provision) has thus, *de facto*, become a quasi-public forum.

One may say that this is already the case in the United States with public hearings and debates in the relevant Congressional committees, and this is arguably what we miss here. However, it is true that no government is capable of functioning without a

32. *See* Consolidated EC Treaty, *supra* n.28, art. 205, O.J. C 340/3, at 264-65 (1997), 37 I.L.M. at 121-22 (ex art. 148) (indicating mechanism for qualified majority voting in Council and current weighted votes for Member States).

33. *See supra* n.29.

reasonable degree of secrecy surrounding certain important decisions (tactical or others). In that respect, in reality, the U.S. system amply allows for secrecy (which also contributes to making it highly unpredictable for outsiders), at variance with its apparent transparency.

This is a real conundrum: how can we move towards an open forum for discussion, inevitable with Twenty-something Member States, and still preserve a capacity for setting strategy and tactics? Should the European Parliament provide this public forum and, if so, what should be the role of Member States and the Council (on the assumption, safe, I hope, that the Commission would retain its central role as initiator and external representative)? And how do we foster *genuine* "transparency" (as opposed to the mainly formalistic, superficially pleasing varieties that consist in supplying vast amounts of information without there being a real opportunity for debate on the fundamental choices, where one loses sight of the forest for the trees)?

CONCLUSION

The EU has not become a "melting pot" of people but it has become a crucible of ideas. It is unanimous in trying to influence the outside world, largely through "multilateral" negotiation and diplomacy, less through traditional power projection. It has learned some hard lessons of history. It will face the growing pangs of expanding, most likely at a prodigious pace within a short period of time, but those who will join us will have gone through a recent historical experience, which should make them support many of our current policies and approaches, even if their income per head is most often comparable to that of a mid-ranking developing country. Our decision-making machinery will be subject to a necessary overhaul, the outcome of which is too early to predict.

What I will predict is a continued strong European preference to continue to project our foreign economic objectives and policies internationally through the WTO. The main question is whether Members of the WTO have the same preference or whether the Organization is reaching the limits of what other Members are willing to accept in terms of international constraints on their sovereignty. The outcome of the Doha Round will provide the answer.