



## Case Western Reserve Journal of International Law

---

Volume 22 | Issue 2

---

1990

# Europe 1992 and the Evolution of the Multilateral Trading System

Sylvia Ostry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

---

### Recommended Citation

Sylvia Ostry, *Europe 1992 and the Evolution of the Multilateral Trading System*, 22 Case W. Res. J. Int'l L. 311 (1990)

Available at: <https://scholarlycommons.law.case.edu/jil/vol22/iss2/8>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# Europe 1992 and the Evolution of the Multilateral Trading System\*

*Sylvia Ostry\*\**

## I. INTRODUCTION: LAUNCHING THE URUGUAY ROUND

Early in the 1980s, when the United States began its efforts to try to launch a New GATT Round, a mission which often seemed impossible and was not to succeed without great effort and mounting frustration until September 1986, Gardner Patterson wrote an essay assessing the impact of the European Community ("EC") on the world trading system and the General Agreement on Tariffs and Trade ("GATT").<sup>1</sup>

The judgement was harsh:

The Community's behavior creates serious problems for others and threatens an international trading system regularly extolled by European authorities. It can be traced to: the structure of the E.C. and its decision making process, which is slow, hard to predict, and has a protectionist bias; the E.C. propensity toward bilateralism and sectoral arrangements, which ignore the global rules and endanger the very possibility of maintaining international economic cooperation; the E.C.'s tolerance of, even affection for, discriminatory practices, which are particularly burdensome to many developing countries, the non-market economies, and Japan; and the Community's reluctance to support effective international dispute settlement procedures, which is a necessary element for a system based on general rules.<sup>2</sup>

Yet, the judgement was borne out by the history of the early 1980s.

---

\* Speech delivered at the Lehrman Institute, January, 1990, New York, New York.

\*\* Chairman, Centre for International Studies, University of Toronto; Chairman, The National Council of the Canadian Institute of International Affairs; Western Co-Chairman, The Blue Ribbon Commission for Hungary's Economic Recovery; Ph.D., Economics, McGill University and Cambridge.

<sup>1</sup> The General Agreement on Tariffs and Trade ("GATT") was established after the Second World War as a contract between trading partners that outlines rules and regulations within a multi-lateral trading system. The GATT, for many reasons, has found it increasingly difficult to adapt to changes in a multilateral trading system which is under stress. One alternative, a trend to bilateral or regional blocs and to more unilateral behavior by powerful trading countries, is likely to accelerate should the Uruguay Round of the GATT fail to deliver an acceptable package. Such a package would have to include the extension of GATT rules well beyond traditional border measures into the domain of what are essentially domestic policies.

<sup>2</sup> Patterson, *The European Community as a Threat to the System*, in *TRADE POLICY IN THE 1980's* 241 (W.R. Cline ed. 1983).

The EC was fearful of the inclusion of agriculture as a central item on the agenda of a New GATT Round. It was also opposed to negotiations on trade in services, an early U.S. priority. Thus, the EC effectively blocked, and then delayed, the launch of a New Round for four years. After a near-catastrophic Ministerial meeting in November, 1982, the EC reluctantly agreed to a New Round after strong American pressure. In this successful foot-dragging policy the EC was greatly assisted by the strong opposition of a group of Lesser Developed Countries ("LDC's") led by Brazil and India who were fiercely opposed to the inclusion of the so-called new issues of services, trade-related intellectual property, and trade-related investment measures. However, it would have been impossible for these so-called hardliners to prevent GATT negotiations on their own. Only the skilled delaying tactics of the EC gave the LDC's the clout to block negotiations with the assistance of the EC officials behind the scenes.

Why was the EC opposed to a GATT negotiation even as the protectionist fury of the United States Congress mounted as a result of the worsening current account imbalance and rapidly deteriorating competitiveness of the United States due to the overvalued dollar? The answer, as Gardner Patterson observed, lies deeply rooted in the nature of the policy-making process of the Commission. To a remarkable degree *process* determines *substance*.

All international negotiations involve action on two fronts: 1) external, between national representatives; and 2) internal, among government bureaucracies, legislators, and interest groups. But the EC is unique in that the key internal negotiations require the Commission to broker the policy pressure emanating from the Member States. Private sector groups have far less influence over policy at the Commission level compared to the Member States, in marked contrast to the United States. However, the role of the business community in creating political momentum for Europe 1992 has created, at least potentially, a stronger linkage with the Commission which might affect the final year of the negotiations.

The centerpiece of the EC system is the 113 Committee of national representatives.<sup>3</sup> While only the Commission negotiating team operates on the external front, its negotiating mandate must be secured from a consensus in the 113 Committee drawn from the senior bureaucracies of the Member States, or run the risk of defeat at the political level of the Council of Ministers. In practice the core of the policy-making mechanism is bureaucratic, with only infrequent Ministerial input on specific items and no ongoing Ministerial discussion of the thrust of the broad

---

<sup>3</sup> Named after the article in the Treaty of Rome which gave the Commission trade negotiating authority.

trade policy. As an internal bureaucratic mechanism the EC is extremely complex to operate effectively and requires considerable strategic and diplomatic skill on the part of the Commission negotiators. These negotiators which often use these skills in their external negotiations with the less "diplomatic" Americans.

One consequence of this "political economy of policy-making" is a systemic bias to conservatism and inertia in trade policy. This policy is the basic reason for the foot-dragging in the 1980s. Time was needed to bring along the Member States, many with opposing interests especially on agriculture. The absence of an effective mechanism for private sector input at the Commission level also reinforced the bureaucratic inertia on new and unfamiliar issues such as services or intellectual property, again in marked contrast to the United States where private sector groups undertook an active campaign to influence the agenda and the negotiations.

The systemic bias to conservatism and inertia has been well described by Martin Wolf:

Like the United States, the trade policy of the European Community is made by compromises among strongly represented regional and industrial interests — but, even more so. Given the need for compromise among member states, there is a tendency to agree on the lowest common denominator of protection. The allegedly more liberal countries than salvage their consciences by asserting that they are compromising their principles in favor of the still greater principle of European unity. The tendency to agree on protectionism is reinforced by the fact that decisions are ultimately taken in the Council of Ministers, which will consist of the industry or agricultural ministers directly concerned.

Another consequence of the negotiating process is to externalize internal conflict. If, for example, the West German steel industry is hurt by subsidies from the Italian Government to Italian producers, the natural response is a combination of some limit on those subsidies with greater protection against outsiders. Furthermore, because of the nature of the European Community, it is only rarely that it can agree on any far-reaching initiatives in global arrangements, where the running has been left almost entirely to the United States. Finally, once reached it is only with great difficulty that a Community position can be modified.<sup>4</sup>

There were significant, though unintended, consequences stemming, at least in part, from the delay in the launch of the Uruguay Round. In the context of the early 1980s the consequences consisted of: rising trade deficits; an overvalued dollar; regionally concentrated rises in unemploy-

---

<sup>4</sup> Wolf, 1992 *Global Implications of the European Community's Programme for Completing the Internal Market*, 27-28 (1989) Lehrman Institute Policy Paper, Series on the U.S. in the global economy No.1, New York; *See also* Patterson, *supra* note 2, at 223-42.

ment; and a weakened and weakening GATT which made it more difficult for the American administration to persuade U.S. businesses that the multilateral system was an effective guardian of American interests. Therefore, a new GATT round was seen as a way of coping with the rising protectionist fury of the U.S. Congress. Indeed, multilateral negotiations had traditionally been favored by U.S. administrations as a policy device for containing the ever-present special interest group pressure on Congress and the Tokyo Round, in the difficult decade of the 1970s, had been largely successful in this regard.

Confronted by failure to change the position of the EC and the hardline LDC's, and in an effort to increase pressure for a launch, Ambassador William Brock, the U.S. Trade Representative, ("U.S.T.R.") at that time, asked the official private sector advisory committees on trade negotiations to present their views on a new GATT round in January 1985. The report, issued in May 1985, contained some unpleasant surprises.

The Chairman's summary provided an interesting insight into the increasing ambivalence of American business attitudes to the GATT since the end of the Tokyo Round in 1979. Basically it reflected mounting frustration with the Reagan administration's economic policies. After stressing that action was urgently required on the exchange rate and fiscal front the Report stated:

While support for a new round among the groups contacted ranged from strong support to strong opposition, the broadest consensus on a New Round can best be described as moderate support provided that parallel efforts, both domestic and international, are undertaken to address the cause of American trade problems. The broadest concern over entering a new round is that it would detract from, or even replace, efforts to develop a *national trade policy* (emphasis added).<sup>5</sup>

The summary goes on to point out that support for the New GATT Round was strong only among those groups advocating the inclusion of the new issues of services, intellectual property, and investment. In sum, the American business view by mid-decade was best summarized as acceptance of unilateral negotiations on three conditions: inclusion of the new issues; a new exchange rate policy; and a *new national trade policy*.

The exchange rate policy was delivered on September 22, 1985 by the Plaza Accord.<sup>6</sup> On September 23, 1985 the new trade policy was

---

<sup>5</sup> Chairmen's Report on a New Round of Multilateral Trade Negotiations, 3, Submitted to the United States Trade Representative, May 15, 1985, Advisory Committee for Trade Negotiations.

<sup>6</sup> Agreement made at the Plaza Hotel in New York among sixty-five countries including the United States, Japan, West Germany, France, and the United Kingdom. The Finance Ministers designed an agreement to decrease the value of the U.S. dollar vis-à-vis other major currencies. The

announced in a speech by President Reagan and in an official report by the U.S.T.R.

For the first time in the postwar period the trade policy was *multi-track* including: continuing efforts to launch a New GATT Round; bilateral free trade agreements where appropriate; and more active self-initiation of the little-used section 301 of the 1974 Trade Act to deal with other countries unfair trade practices, through retaliation if necessary.<sup>7</sup> The major development on the bilateral track was the initiation of negotiations for a U.S.-Canada Free Trade Agreement. On the 301 track the major development was greater use of self-initiation under the 1974 provisions and the expanded provisions for unilateralism contained in the 1988 Omnibus Trade Act.

While it is clearly impossible to "prove" that an early launch of a multilateral round would have prevented the emergence of a new direction in U.S. trade policy, there seems little doubt that the feelings of anger and impotence stemming from the delay were an important factor in both the FTA with Canada and the expansion of unilateralism. In the former instance, the negotiations with Canada served as a "strategic threat" to both the EC and the LDC's that there were effective alternatives to the GATT. The unilateralist 301 thrust reflected the view that the GATT had become increasingly inadequate especially in dealing with a range of practices, many of which were domestic, which "unfairly" distort trade and that in the absence of multilateral rules unilateral definitions and actions may be the only alternative.

In sum, when the New GATT Round was finally launched at Punta del Este in Uruguay in September 1986, the U.S. administration shifted from its traditional overriding and singular commitment to multilateralism — an inheritance from its postwar position of undisputed hegemony — to a more complex policy stance whose evolution remains uncertain. Indeed, future developments on the bilateral or unilateral front will be strongly affected by the outcome of the Uruguay Round in December, 1990.

If U.S. trade policy has changed direction, what are the implications for change in the EC as 1992 approaches? The impact of 1992 on the EC's role in the Uruguay Round is difficult to discern. The preoccupation of the Commission with the internal market in the first few years of the negotiations probably slowed an already inertial policy-making pro-

---

policy involved coordinated central bank intervention into currency markets in order to stabilize exchange rates. For a further explanation of the Plaza Accord see Y. Funabashi, *Managing the Dollar: From the Plaza Accord to the Louvre 9-42 (1988)* Institute for International Economics, Washington.

<sup>7</sup> It is of interest to note that section 301 itself was largely the reflection of frustration with GATT dispute settlement procedures which needed basic reform, a reform effectively blocked by the EC during the Tokyo Round.

cess. Indeed, it was not until October, 1988, just before the Mid Term Review in Montreal, that any information on the external implications of the internal market was released and even then many questions remained unanswered. In fact, it was largely this lack of information which created uncertainty and suspicion in some quarters and added to the talk of Fortress Europe. Perhaps, the main effect of Europe 1992 has been the greater confidence of the Commission whose role has been strengthened as a result of the major success in the internal market exercise. A stronger Commission with a more liberal bent may be more effective during the final year of the Uruguay Round. Thus far "the jury is out" on the outcome. This cautious stance is best illustrated by examining some of the key agenda items on the Uruguay Round.

## II. THE URUGUAY ROUND

The Uruguay Round is the most comprehensive and ambitious round of negotiations in the history of the GATT. In addition, more than any previous round, it is focused on the international spillover of domestic policies. The fifteen negotiation groups cover four principal categories: 1) *market access* including tariff and non-tariff barriers in manufactured goods and, for the first time in forty years, in agriculture; 2) the so-called *new issues* of trade-related investment measures, the trade-related aspects of intellectual property right, such as patents and copyrights, and trade in service; 3) *reform of GATT rules* such as rules concerning subsidies and the actions governments may take to offset them (countervailing duties), rules about measures governments may take when import surges threaten serious injury to domestic industries (safeguards), rules which govern government actions to counter dumping, rules concerning government procurement; and 4) measures to *strengthen GATT as an institution* by establishing more effective and streamlined dispute settlement procedures, establishing better links between the GATT, the World Bank, and the International Monetary Fund, instituting procedures to review countries' trade policies and actions and giving more ministerial direction to GATT's work.

On all agenda items, of course, the role of the EC is crucially important since the Community, along with the United States and Japan, is part of the so-called Triad which will play a dominant role in shaping the world trading system for the foreseeable future. However, some agenda items are more significant than others, since they are strategic to the package as a whole, i.e. "round breakers or makers." Agriculture is clearly in this category, as are the new issues of services, trade-related intellectual property, and investment measures. Thus, it is useful to review the EC position on both agriculture and the new issues. Another item worthy of discussion is antidumping regulation which, though

scarcely visible in the Punta declaration, have become highly contentious in the past several years due to developments in Community practice. The developments have coincided with the move to complete the internal market and are probably linked to the growing concern of the Commission with the issue of competitiveness, especially vis-a-vis the Japanese. Reform of antidumping is also linked to reform of safeguards, an issue for which the EC policy stance will be critically important.

Finally, a brief review of the efforts to improve the GATT dispute settlement procedure is relevant to the need to contain U.S. unilateralist tendencies and more generally to enhance and strengthen the rule-based multilateral system.

### A. Agriculture

Agriculture has virtually remained outside GATT discipline for forty years throughout seven negotiating rounds. Because it was treated by both the United States and the European Community as peripheral it was possible for the two main players to agree to disagree on agriculture and not jeopardize the rest of the negotiation in other sectors. The Uruguay Round is quite different. Agriculture is a central item. This change was due to the high priority attached to reform of domestic agricultural policies by the United States and to the fact that such reform, a *sine qua non* for reducing or eliminating the deleterious spillover effects on trade, was the key issue for a large number of agricultural exporters in both the developed and developing world. A coalition of these small and medium-sized countries, the Cairns group, has played an important role in both the launch and the negotiations of the Uruguay Round.

The agricultural negotiations provide a good illustration of the complexity of the Uruguay negotiations as compared with earlier rounds. Not only is the role of non-Triad country coalitions unprecedented, the Cairns group is simply the best known of several which have been organized around different agenda items, but the negotiating strategy of the United States and other developed countries, such as Canada, Australia, and New Zealand, include utilizing other multilateral fora such as the Organization for Economic Cooperation and Development ("OECD") and the Economic Summit to shape the GATT negotiations. Thus, the OECD analytic device of the Producer Subsidy Equivalent ("PSE"), by bringing to light in a summary index number the "quantum" of intervention in each country, played a crucial role in forcing the debate which finally got agriculture on the Uruguay Round Agenda at a number of OECD Ministerial Meetings and Summits. Equally important, the OECD analysis shaped the context of the negotiations by focusing on the root cause of the trade distortions, the domestic intervention in the agricultural sector.



This context has, however, created a serious dilemma for the EC which has always argued that the "basic mechanisms" of the Common Agricultural Policy ("CAP"), the two-price system and the border protection in the unique form of the so-called variable levy, are non-negotiable. While the subsidy wars which began after the passage of the 1985 Farm Act in the United States and was exacerbated by the fall in the dollar after Plaza, they did create enough budgetary pressure on the EC to induce a modification of the CAP to stabilize expenditures in February, 1988. This result was a by-product of the need to increase funds for regional stabilization in the context of Europe 1992. The true nature of the EC's fundamental and unchanged dilemma was starkly revealed at the Montreal Ministerial Mid-Term Review in December 1988.

The negotiating proposal of the United States at Montreal was dramatically simple. If government subsidies are the root cause of trade distortions then the objective of the negotiations should be to eliminate them over a specified time period, say by the year 2000. This was the so-called zero-2000 proposal. The position of the United States also included the idea of "uncoupling." For instance, if governments wished to subsidize farmers they should do so in a non trade-distorting way by direct income transfers rather than by intervention in markets which blocked off price signals.

The EC position at Montreal focused mainly on the short-term or ending the expensive subsidy war and was vague on the nature and timing of long-term reform. The Cairns Group effort to bridge the gap between the two combatants failed and the result was that, although progress had been agreed to in eleven out of fifteen negotiating groups, the Latin American Cairns Group members withdrew their agreement on these items, in effect threatening an end to the Round. Only a procedural safeguard by the GATT secretariat, deferring the adjournment of the meeting until April, saved the negotiations from a premature demise.

In April, a consensus document which unblocked the negotiations emerged after much effort on the part of the GATT secretariat. A quick reading suggested that the EC had achieved an important "victory." For the objective of long-term reform the phrase "substantial progressive reduction . . . sustained over an agreed period of time" replaced the inflammatory "elimination by 2000." The detailed proposals for the achievement of long-term reform and other issues were to be tabled by the end of 1989.

The main negotiating proposal tabled by the United States at the end of November 1989 was comprehensive and specific. It included measures to reform market access, internal support, and export subsidies. To reform market access, it proposed tariffication which entails converting all barriers to tariffs, which could then be negotiated away over ten years. Regarding on internal support, the proposal suggested a form

of modified subsidies code which would include elimination or discipline. On export subsidies, the United States proposed a five year elimination plan.

Thus, the U.S. proposal, predictably greeted by the EC as reneging on the April agreement, would require a fundamental reform of the CAP. The Commission proposal, tabled in late December, while admitting that there is some scope for the scaling down of both export subsidies and import barriers, rejected their elimination over a specified time period. It accepted a partial tariffication of the variable import levy which was a significant concession to the U.S. proposal but diluted it by proposing a "rebalancing" of barriers, by raising some as other are lowered. In addition, the Commission proposal firmly emphasized rejection of the idea of "free trade" in agricultural products which would lead to a "chaotic situation." Thus, the fundamental position of the EC remained as guardian of the principles of the CAP, however modified, because as it said: "The Community remains convinced that such arrangements (i.e. elimination of subsidies and protection) are not viable . . . . This boils down to extending to all internal markets the chronic instability which rules world markets." The overall theme of the EC is, indeed, better *market management*. The aim of the Uruguay Round "can only be to progressively reduce support to the extent necessary to re-establish balanced markets . . . ." <sup>8</sup> The objective of reform is not more liberalized markets but the reduction of expenditure on export subsidies by increasing international prices and minimizing any increased access for imports to the Community.

It is difficult to forecast the outcome of the basic conflict over the role of markets in this uniquely protected sector in agriculture between the United States and the European Community. An agreement to disagree, and thus avoid any major reform, which has worked in all previous Rounds may not be feasible this time due to the coalition bargaining approach which has emerged in the Uruguay Round. For some LDC's, especially in Latin America, the rest of the agenda does not offer much, so they may feel compelled to repeat the Mid-Term strategy which upheld agreement on other "new issues" of high priority to the EC and the United States. The outcome on agriculture will have to await the negotiation of the full package at the Brussels Ministerial meeting to conclude the Round at the end of 1990.

### *B. The New Issues*

While initially opposed to the inclusion of new issues on the Uruguay Round agenda, the EC now supports their inclusion especially in the area of services and trade-related intellectual property measures. To

---

<sup>8</sup> *Agra - Europe*, London, No. 1368, Dec. 15, 1989, at P11-P12.

a considerable degree this change in position reflects not the impact of Europe 1992 but the policy activism of the U.S. private sector.

The private sector in the United States, especially business, plays a uniquely important role in policy-making. This reflects the American system of governance including: the extraordinary diffusion of power established by the Constitution; the absence of a permanent bureaucratic elite; and the emphasis on transparency; the multiple avenues for public participation in policy. Given the susceptibility of a decentralized, undisciplined Congress to special interest pressures, the Administration has utilized the device of what has been termed anti-protectionist "counterweights" for diverting and managing protectionist pressures. One key element in the counterweight system is the private sector advisory committee structure originally established under the 1974 Trade Act which launched the Tokyo Round. It was the Advisory Committee for Trade Policy and Negotiations ("ACPTN"), the top "oversight" committee in this structure, in cooperation with other U.S. business groups, which undertook the task of convincing European and Japanese corporations to lobby for the new issues. In fact, in the services sector U.S. activism extended well beyond the Triad; nine country service coalitions have been organized and meet regularly in Geneva with the GATT secretariat. In the case of intellectual property the U.S. group, working through two major industrial organizations, UNICE in Europe and Keidanren in Japan, persuaded their counterparts to table, in Geneva, a detailed trilateral proposal for an intellectual property agreement in the GATT which U.S. experts had drafted.<sup>9</sup> These two instances, services and intellectual property, are the only examples of European business playing a role in the Uruguay Round negotiations.

In services the EC position is essentially in harmony with that of the OECD group of countries recognizing the need for the Uruguay Round to produce a broad framework of principles for negotiation, a General Agreement on Trade in Services ("GATS"). This would provide the basis for continuing sectoral negotiations presumably commencing in 1991. Although there is some disagreement between the United States and the EC on the tactical issue of how best to ensure that all major sectors are included in the subsequent negotiations, the basic approach is not at issue. The major disagreement on services negotiations remains with the developing countries. However, these countries have significantly modified their initial extreme opposition.

The heated transatlantic debate over the issue of "reciprocity" which was unleashed when the EC issued the first draft of the banking directive in 1988, which helped spark the allegation of Fortress Europe,

---

<sup>9</sup> Edmund Pratt (Chairman and CEO of Pfizer), *Intellectual Property and United States Trade Professor Policy*, Speech before the Conference Board, New York, Oct. 3, 1989, at 13-18.

was largely defused by a second version of the directive in 1989 which watered down, but does not eliminate, the reciprocity provisions. This change is generally taken as a sign of greater liberalism in the current Commission. It must be expected, however, that sectoral negotiations in services will put pressure on the United States, Japan and other industrial nations to undertake reform, especially of their financial markets, in the direction of greater access. The enormous size and wealth of a fully integrated EC market in services will provide a very powerful bargaining lever to promote this desirable liberalization.

As in services, there is no disagreement between the EC and the major OECD countries in the area of trade-related intellectual property ("TRIPS"). The basic conflict is with many developing countries, led by India, who are strongly resisting negotiations aimed at eventual convergence in the basic norms and standards of intellectual property law. The extent of divergence in these laws among the industrialized countries is minimal compared with the wide differences in protection, especially in patents, afforded by the LDC's. As a major source of intellectual property the EC has a strong interest in improving protection especially in a period of accelerating technological change. Indeed, improvement in intellectual property rights has become a key element in the broader innovation policy thrust of the EC as part of the internal market completion.

Finally, in the third new issue, trade-related investment measures ("TRIMS") after lagging behind the United States for some time, the EC put forward a major and comprehensive proposal in December 1989. The proposal suggests so-called "red light" rules or prohibitions for a list of eight TRIMS. This approach was first suggested by the United States, in July 1989 and since then has gained support from Japan and the EFTA countries. Again, the idea of international rules curtailing investment measures is strongly opposed to by many LDC's, especially India. American leadership in this area may become more difficult as tension over foreign investment in the United States increases in Congress and with the general American public. Indeed, American developments may have been a factor in strengthening the EC and Japanese commitment to a major outcome in the Uruguay Round, as an insurance policy against investment protectionism not only in developing countries but perhaps even in the United States.

In summary, after initial reluctance the EC has adopted a strongly supportive position on the new issues of the Uruguay Round. Part of this change may be due to the impact of Europe 1992 and the greater confidence it has generated, especially in the private sector. But much of the private sector interest resulted from the initiative of U.S. business groups.

### C. *Antidumping*

As previously mentioned, the reform of the 1979 GATT Code on Antidumping was not an issue of concern at the outset of the Uruguay Round in 1986. Since that time, however, antidumping cases have increased enormously, especially in the EC and the United States, although Australia and Canada are also big users. Furthermore, antidumping laws have been adopted by a number of developing countries, providing increasing opportunity to offset the structural adjustment liberalizing reforms of the World Bank. Antidumping seems to have become the "weapon of choice" for protectionists.

Because the nature of world trade is changing, with globally integrated production especially in high technology sectors being far more important today than in the 1970s, and because the Tokyo Code was rather general and imprecise in a number of respects, the EC and, to a lesser extent, the United States has undertaken changes in antidumping laws, regulations, and administrative procedures which amount to unilateral changes in the multilateral rules. These developments in the EC have proved to be highly contentious and have ensured that the extent and nature of the reform of antidumping will be a key determinant of the success of the Uruguay Round in constraining protectionism in the 1990s. Thus, this evolution in antidumping has become very important.

Once again the idea of process affecting substance is key to understanding recent changes in EC antidumping practice. The role of the Commission in the EC antidumping system has been compared with that of an "examining magistrate," in contrast to the quasi-judicial mechanism of the United States<sup>10</sup> The most important reason for this difference lies in the different degree of transparency of the two systems, specifically as it affects the disclosure of confidential information. Under American law, counsel for interested parties can obtain information submitted by other parties in the proceeding. In the EC only non-confidential information is divulged to other parties and the Commission has a good margin of discretion in determining whether information qualifies as confidential. As Edwin Vermulst says:

In the absence of a system of disclosure of confidential information, as is the case in the EEC . . . the investigating authorities are the only ones with access to the complete file. Non-confidential summaries are generally of limited value. This leads to parties "shooting in the dark" at each other and to the undesirable situation that in many cases there are no external checks on the investigators until it is too late, i.e. in court.<sup>11</sup>

---

<sup>10</sup> Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the U.S.A.*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE APPROACH* 430 (1989).

<sup>11</sup> *Id.* at 431.

This relative lack of transparency has the consequence of providing a much greater leeway for administrative discretion by the Commission. This leeway is further enhanced by a judicial review mechanism whereby the European Court of Justice has limited its scope of review to procedure and has eschewed economic substance. This is best captured by a typical quote of a Court judgement:

In considering these (and similar) arguments where the Council or the Commission is required to appraise complex economic situations (as in an antidumping proceeding), the Court limits its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers.<sup>12</sup>

These two factors, limited transparency and limited review, plus the preponderant role of the Commission, which determines dumping margins and injury, combine to enlarge discretion and limit countervalance in the system. The role of the Council of Ministers is, as Bellis states, largely limited to "rubber stamping the proposals for definitive action submitted by the Commission." The Council has the power to enact legislation but "the Commission plays an essential role in the E.C. legislative process: amendments to the EEC Antidumping Regulations — can be adopted by the Council only upon a proposal to that effect by the Commission."<sup>13</sup>

An interesting side-effect of this combination of lack of disclosure of confidential information, limited judicial review, and concentration of authority in the Commission, is the EC calculation of dumping margins, a key element of the entire system. It amounts to a marked tilt in EC practice toward finding dumping, particularly against Japanese firms and firms from the Asian NIE's exporting new products, especially information technology, for which substantial services ancillary to the sale such as marketing, advertising, and distribution are required.<sup>14</sup> These methodological developments, initiated by the Commission, were codified in an amendment to the regulations in July, 1988.

The same amendment provided another extension of EC antidumping, which also seems to be targeted at the same countries and products. As Hindley explains:

---

<sup>12</sup> Hindley, *Dumping and the Far East Trade of the European Community*, THE WORLD ECONOMY, Dec. 1988, at 455.

<sup>13</sup> Bellis, *The EEC Antidumping System*, in ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE APPROACH 45 (1989).

<sup>14</sup> Vermulst, *Antidumping Law and Practice in the United States and the European Communities: A Comparative Analysis*, 497-98 (1987). See also B. Hindley, *Unfair Trade and Unfair Trade Measures: Which Threatens the World Trading System?*, Commonwealth Seminar, London, July 1988.

The central point of the extension is that where the exporter bears the antidumping duty, an additional duty may be imposed to compensate for the amount borne by the exporter. The extension provides that any party directly concerned can initiate an investigation by presenting evidence to the Commission that the resale price to the first independent buyer has not raised his Community prices by the full amount of an antidumping duty can initiate an investigation; and the investigation is very likely to result in the imposition of an additional duty. . . . The measure affects only products that pay an antidumping duty. . . . The measure affects only products that pay an antidumping duty. Thus it again bears with full force on the products from Japan and the Far East.<sup>15</sup>

These products largely come from information and technology sectors. Steps to ensure that an antidumping duty is borne by consumers is presumably designed to permit domestic industry to gain or maintain market share. Foreign firms who anticipate such action by a government will, of course, raise their prices in advance. Price rigidity, or even cartelization, seems to be a potential outcome of such a policy thrust.

In addition to these methodological developments, which are abstruse but powerful in impact, there have been other significant changes in EC antidumping policies in the past few years. In response to the problem of "circumvention" of antidumping penalties against final products by assembly in Europe, the EC adopted an amendment in June, 1987 to deal with so-called "screwdriver" plants to permit extension of antidumping penalties under specified conditions including when:

- assembly or production is carried out by a party which is related to or associated with any of the manufacturers whose exports of the like product are subject to a definitive antidumping duty.
- the assembly or production was started or substantially increased after the opening of the antidumping investigation.
- the value of parts or materials originating in the dumping country used in the assembly or production of such a product must exceed the value of all Community parts or materials by at least 50%. (What this amounts to is that if more than 60% of the parts originate in the dumping country, dumping will be found, i.e. 60% exceeds 40% by 50%).

This provision extends the application of antidumping duties to imports of parts without any prior finding of dumping of the parts. The sixty percent rule of origin is being interpreted by companies as a forty percent local content rule even though technically it is not. Within a few

---

<sup>15</sup> Hindley, *supra* note 12, at 446-47. The July 1988 codification represents a significant change in the provisions applicable to calculating margins from that previously followed. The change, which resulted in the "tilt" against products in electronics from Japan and the NIE's was developed by the Commission over the past few years. See Bellis, *supra* note 13, at 81-83.

months, as numerous observers have noted, the Japanese-owned companies concerned began to increase their use of Community parts to meet or exceed the forty percent "threshold" of Community-value components.<sup>16</sup>

But the repercussions of the screwdriver amendment did not stop there. Semiconductor firms in the United States who are major exporters to Europe are feeling pressure from European buyers to expand production in Europe; an area already well serviced by U.S. semiconductor subsidiaries. The same pressures are inducing Japanese and Korean firms to invest in Europe.

There is, as the EC has repeatedly stated, no Community local content rule. The behavior of the firms is anticipatory or perhaps simply, as the EC has argued, based on misinformation. But, as the Chairman of Intel has put it: "We have lost business already . . . . 'You can't pick up a piece of paper that says why Intel has got to manufacture in Europe . . . . The rules don't exist. But customer concerns are driving important decisions right now.'"<sup>17</sup> In October, 1989 Intel announced that it would establish a manufacturing plant in Ireland, its first such in Europe.

In yet another development stemming from a rule of origin, the EC charged a Japanese photocopying company, Ricoh, with circumventing the payment of dumping duties imposed in February, 1987 on direct exports from Japan by exporting to Europe from its California plant. Again, one might interpret this, however incorrect technically, as a foreign-determined U.S. local content decision. The required amendment to the rules of origin for photocopiers, to codify this administrative decision, was adopted in July, 1989.

This new rule of origin is unusual in that it takes a negative approach by listing the manufacturing operations that do not confer origin but does not provide guidelines as to what operations do confer origin. Since enforcement is carried out by national customs officials, if an exporter disagrees with the decision, he must first appeal to the national customs authorities and, if this fails, to the European Court of Justice.

There have been a number of other changes or "clarifications" in rules of origin. Of particular significance have been those in the information technology area. In February, 1989 the Commission announced a rule of origin for integrated circuits, which specified the country where the process of "diffusion" takes place as the determinant of origin. Once again, this was interpreted as a signal that the most significant technological process of manufacturing should be located in the EC and set in train

---

<sup>16</sup> Lee & Herzstein, *E.C. Dumping Law: A Growing Source of Trade Frictions*, 1992: THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION PART 2 11 (July 28, 1989).

<sup>17</sup> Auerbach, *U.S. Chipmakers Accuse EC of Threatening Curbs*, Wash. Post, Aug. 2, 1989, at F1, col. 6, F4, col. 2.



a number of investment decisions by Japanese firms. Those U.S. subsidiaries in Europe who import circuits from plants in other part of the world, where the diffusion process takes place, have expressed concern that this is a signal of local content pressure.<sup>18</sup> However, in technical terms, it is simply a clarification of an existing 1968 regulation defining a product's origin as where the "last substantial process or operation that is economically justifiable was performed." Similar "clarifications" are expected on a number of other information technology products.

A basic problem is that rules of origin do not come under the GATT. Indeed, there are no meaningful international rules governing national decisions in this area. The Customs Cooperation Council ("CCC") adopted the Kyoto Convention in 1973, which laid down broad general principles for national origin systems, but there is no dispute settlement mechanism and no procedure to review national practices. Moreover, some major trading countries such as the United States have never accepted even the broad guidelines of the Kyoto Convention. The Secretariat of the CCC has been given no mandate by its Member States beyond compiling compendia of national regulations. Thus, the scope for discretion in the determination and application of rules is very broad. It is of interest that the issue has now been brought to the GATT by the United States and others in connection with reform of the antidumping code in the Uruguay Round.

In summary, the EC system of applying the trade remedy law of antidumping allows significant scope for administrative discretion. The developments of the past several years suggest that antidumping regulation has become an instrument of industrial policy.

Opposition to the proliferation and extension of antidumping has mounted, not only from countries in the Pacific Rim but also from the private sector in the United States who find the cost of intermediate products and components increasingly burdensome. On the other hand, those industries which are key users are calling for a much tougher code. It is noteworthy that the United States and European semiconductor industries have joined forces to lobby their governments for more rapid and reinforced antidumping provisions to deal with "a concerted raid or industrial targeting effort (that) . . . can wipe out the production and industry of another country in one year . . . due to very short, life-times of high-tech goods."<sup>19</sup> Thus, the outcome of antidumping reform in the Uruguay Round is quite uncertain although, fortunately, it has become a

---

<sup>18</sup> *EC Likely to Create 80% Content Rule for Autos Under 1992 Plan*, 6 INT'L TR. REP. (BNA) No. 13, at 395 (Mar. 29, 1989).

<sup>19</sup> *U.S. European Industries Rush Antidumping Reforms*, No. 17, at 5 (Dec. 1, 1989). 1992: THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, Buraff Publications

key issue and a number of proposals both from the big "users" and the big "targets" are on the table in Geneva.

As both the Commission's actions and the statement from the semiconductor industry suggest, what is at issue is concern about "strategic industries" and not simply a trade remedy against "unfair" business practices.<sup>20</sup> So the use of antidumping as an industrial policy instrument by the EC must be viewed in the context of a broader policy concern about international competitiveness. The Commission's mandate to coordinate trade, competition, and technology policies was fully clarified and legitimized as the European Technology Community ("ETC") which was incorporated into the Single European Act and was a key factor in the launch of Europe 1992. A number of programs in research and development policy have been initiated. These programs are jointly funded by the Commission and industry, and target precompetitive research in selected sector. Many of these have focused on information technology and the view of the European Information Technology Industry Roundtable, contained in a May 1989 *White Paper* is instructive in this respect:

Up to now, R&D initiatives of the Commission . . . have created confidence and strengthened cooperation . . . (But) concentrating on R&D cooperation is no longer sufficient . . . The next step should be to set a goal-oriented strategy with the objective of gaining competitive advantage. This requires the creation of major initiatives targeted at specific market and technologies.<sup>21</sup>

However, such initiatives might evolve in response to what is considered to be successful Japanese policies targeting strategic industries. Therefore, the international friction which is bound to be generated will not be contained simply by a reform of antidumping in the Uruguay Round, no matter how desirable that would be.

Finally, a necessary, but insufficient, condition for reform of the trade remedy laws in the Uruguay Round would be a comprehensive agreement on safeguards, to deal with "fair" trade. In some respects, over the 1980s, anti-dumping became a thinly disguised selective safeguard action against increased imports in the same way that voluntary export restraints ("VER's") and similar measures have been used in lieu of the GATT - sanctioned article 19.

The sticking point in safeguard reform during the Tokyo Round was the demand by the EC for selective application which was strongly op-

---

<sup>20</sup> See Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovation Policies in the United States, Europe and Japan*. Council on Foreign Relations, New York, 1990, Chapter 3.

<sup>21</sup> European Information Technology Industry Roundtable, *White Paper on the European IT Industry and the Single Market*, at 13, Brussels (May 16, 1989).

posed by the LDC's. They argued, and continue to agree that by legalizing selectivity the basic GATT principle of nondiscrimination would be seriously undermined. The present U.S. position is not entirely clear but could probably support either "consensual" or agreed selectivity or non-discrimination ("MFN").

The paradox is clear. Countries have refrained from using article 19 and chosen instead selective VER's or the trade remedy laws which, by definition, are selectively applied.

These choices are also preferable because they do not require the country that invokes them to "compensate" the exporting country by liberalizing trade for products other than those subject to the safeguard action; they involve, instead, a transfer of income from consumers to the foreign producer, who holds the quota, by way of higher profits or rents. Since consumers rarely are organized enough to complain, the politics of VER's seem attractive.

One way around this conundrum would be to include selectivity as part of a "menu of options" in a revised safeguard clause. But in order to constrain its use, different "prices" should be charged for each item on the menu. Thus, for example, if the most desirable option is protection by tariff on an MFN basis, the price for that should be very low; limited compensation combined with a gradual reduction of the tariff over a specified time period. Selective protection by quantitative restriction, preferably negotiated by the importing and exporting country, should be the most "expensive option"; substantial compensation and significant reduction of the quotas over a relatively short time period. Other combinations could obviously be added to the menu. A surveillance mechanism, geared to monitoring the adjustment of the protected industry and publicizing VER's negotiated outside the GATT safeguard arrangement would also be desirable. Second helpings of any item on the menu should carry a very high price tag. After all, the Multi Fibre Arrangement has gone on for over twenty-five years and consumers have paid an enormous bill.

#### *D. Dispute Settlement*

As pointed out, the Uruguay Round agenda includes an attempt, for the first time since the founding of the GATT, to strengthen the *system per se*, including the dispute settlement procedure. It is not much use having "rules of the road" if they can be violated with impunity.

At the Mid-Term Ministerial Meeting significant progress was made in this area. The right to a panel was agreed to a right which the EC had opposed in previous negotiations and deadlines for various phases were set so that the process could be significantly tightened and streamlined. The aim of this new, speedier approach was to reduce the need for the

United States to invoke retaliation as required in sections of the 1988 Omnibus Trade Act. But an effort by the United States and many other countries to ensure that the finding of a dispute panel could not be blocked by the veto of the "offender" was rejected by the EC. This position reflected what Gardner Patterson described as the Community's traditional reluctance to support effective international dispute settlement procedures.

However, given the new concern with unilateralism the two remaining issues in dispute settlement to be agreed on by the end of the round, the right of adoption and of implementation of panel findings, have become important. The EC position in this respect will be key to systemic reform. Only a more effective GATT mechanism would provide protection in the face of the powerful unilateralist tendencies embodied in the 301 provisions of the 1988 U.S. Trade Act.

## II. CONCLUSION

This review of "Europe 1992 and the GATT" is difficult to summarize. The role of the EC fits the description of the curate's egg, parts of it are excellent. On the new issues, a strengthened EC may play a positive role both in supporting a strong outcome and in achieving a feasible compromise with the LDC opponents. On agriculture, however, prospects for a significant reform of the trade-distorting intervention of the CAP do not appear bright. More significantly, the emergence of new sources of international friction in the struggle for international competitiveness, of which changes in antidumping practice are but one manifestation, suggest that even if the Uruguay Round is a resounding success a further reinforcement and extension of multilateralism would be necessary to cope with the "new issues" of the 1990s. What is needed is another round to commence in 1991. The multi-track trade policy of the United States no longer guarantees that other countries can rely on the creator of the GATT to be its sole defender. There seems to be little evidence to date that the "new Europe" will assume the mantle of global leadership for the foreseeable future. This conclusion can only be reinforced by the events in Eastern Europe which will certainly claim the attention of the Commission for some time.

