Article

EC/EU's Global Actor in International Trade after Enlargement under the Aspect of the WTO's Dispute Settlement System

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I. THE EUROPEAN COMMUNITY AS A SUCCESSFUL PATTERN OF ACCOMPLISHING FREE TRADE WITHIN EUROPEAN COUNTRIES AFTER THE SECOND WORLD WAR

The European Union (EU) is the largest trading block in the world.[1] The EU[2] has developed from establishing the European Coal and Steel Community (1952), the European Economic Community (1958)[3] and European Atomic Energy Community (1958) and has grown from 6 original Member States to 15 with over 370 million consumers.[4] The 5th enlargement on May 1, 2004 was a new milestone in the development of the EU. 10 new Member States[5] come from Central and Eastern Europe. The accession of Bulgaria and Romania on January 1, 2007 will complete the 5th enlargement. All new Member States have to accept the entire acquis communautaire, namely the detailed laws and rules adopted on the basis of the EU's founding treaties.[6] The enlargement has afforded the

1. *See* Rafael A. Porrata-Doria, Jr., *The Common Market of the Twenty-First Century?*, 32 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 2 (2004).

The USA remains the world's biggest market, but the EC including 25 members, and soon 27 members, has grown into a market almost as large as the USA. The EC share in the WTO has increased as a result of its enlargement. The US power at the WTO has been on the decline, and cooperation with the EC has become decisive to determining the establishment of the WTO institutions. Most formal legislative rules are essentially unchanged – one nation, one vote. *See* J. H. BARTON, J. L. GOLDSTEIN, T. E. JOSLING & R. H. STEINBERG, THE EVOLUTION OF THE TRADE REGIME 13 (Princeton: Princeton University Press 2006).

2. The European Community and the European Union are often used interchangeably. As a matter of fact, the two terms are different. The EU refers to the political manifestation of European integration that includes the European Community as well as other common structures. The European Union is wider than the European Community because the Treaty on European Union (Maastricht Treaty) contains 3 pillars, namely the intergovernmental cooperation of the member states in the field of Common Foreign and Security Policy, cooperation on matters of Justice and Home Affairs, and the three Communities. *See* Rainer Arnold, *European Constitutional Law: Some Reflections on a Concept that Emerged in the Second Half of the Twentieth Century*, 14 TULANE EUROPEAN AND CIVIL LAW FORUM 64 (1999); Tore Totdal, *An Introduction to the European Community and to European Community Law*, 75 NORTH DAKOTA L. REV. 63 (1999).

3. The European Economic Community was later renamed the European Community according to the Treaty on European Union (Maastricht Treaty) signed in 1992. The European Community is the central element of the European Union. The goal of the European Community is to establish a common market within its Member States. The common market was further developed by the Single European Act of 1986 into an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. *See* Uwe Blaurock, *Steps Toward A Uniform Corporate Law in the European Union*, 31 CORNELL INTERNATIONAL L.J. 377 (1998).

4. The 15 Member States of the EU are Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Finland, and Sweden.

5. The 10 new Member States are the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic.

6. *See* Eneko Landaburu, *The Fifth Enlargement of the European Union: The Power of Example*, 26 FORDHAM INTERNATIONAL L.J. 5 (2002); Dana Neacsu, *Romania, Bulgaria, the United States and the European Union: The Rules of Empowerment at the Outskirts of Europe*, 30

Member States and the institutions with an opportunity to reflect on and elaborate the EU's mechanisms of influence. The enlargement process is indeed an external Europeanization.[7]

The enlargement most directly influences intra-Union trade and external trade. The 5th enlargement has broadened the single market and application of the common commercial policy to the new Member States. On the other hand, the 5th enlargement has enhanced the EC's position in the global trading system, especially in the World Trade Organization (WTO). The EC has become one of the most important global actors in the international trade. In consequence, the enlargement of the EU has obviously the most impact on external trade.

II. BASIC LEGAL FRAMEWORK OF THE EUROPEAN COMMUNITY

The EC Treaty has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules must be resolved by applying the principle that Community law takes precedence.[8] In other words, the EC Treaty does not provide the supremacy of Community law over national rules, but the European Court of Justice recognizes the supremacy of Community law.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the Member States to the Community, the Member States have limited their sovereignty rights, albeits within limited fields, and have thus created a body of law which binds both their nationals and themselves.[9]

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing

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BROOKLYN JOURNAL OF INTERNATIONAL LAW 199 (2004).

7. *See* Amichai Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 COLUMBIA JOURNAL OF EUROPEAN LAW 388 (2006).

8. Case 14/68, Walt Wilhelm, 1969 ECR 1.

9. Case 6/64, Costa v. ENEL, 1964 ECR 1251.

common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.[10]

The European Economic Community constituted a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[11]

To sum up, the EC is a supranational organization[12] and has its own governmental institutions [13] – European Parliament, Council, Commission, and European Court of Justice – have power to enact legally binding acts on the Community.[14] According to Article 249 EC Treaty, in order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions; a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States; a directive shall be binding, as to the result to be achieved, upon each Member State to which it is

10. Art. 2 EC Treaty.

11. Case 26/62, van Gend & Loos, 1963 ECR 1.

12. *See* Arnold, *supra* note 2, at 50.

13. The Council represents the interests of the Member States. The European Parliament represents the nationals of the Member States in their capacity as citizens of the Union. The Commission has the sole right to initiate legislation at the Community level, except in certain specific policy areas unrelated to the internal market. Each Community legislative action must be based on one or more of the specific provisions of the EC Treaty that confers a legislative competence on the EC institutions. These provisions define the permissible objectives of Community legislative instruments and specify the kinds of instruments that may be adopted and the procedures that must be followed in adopting them. *See* Andrea M. Corcoran & Terry L. Hart, *The Regulation of Cross-Border Financial Services in the EU Internal Market*, 8 COLUMBIA JOURNAL OF EUROPEAN LAW 228 (2002).

14. *See* Daniel G. Radler, *The European "Community Trade Mark": Is It Worth The Bother?*, 1 MARQUETTE INTELLECTUAL PROPERTY L. REV. 183 (1997).

addressed, but shall leave to the national authorities the choice of form and methods; a decision shall be binding in its entirety upon those to whom it is addressed; recommendations and opinions shall have no binding force. Therefore, the Community law and legislative acts are directly applicable to all Member States.

According to Article 220 (1) EC Treaty, the European Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed. In addition the task assigned to the Court of Justice under Article 234 EC Treaty, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[15]

The European Court of Justice held that directly applicable rules of Community law "must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force" and that "in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures ... by their entry into force render automatically inapplicable any conflicting provision of ... national law."[16]

The EC trade policy has continued to be characterized by activism, innovation and leadership, has been supported by a strong social and institutional reform agenda, and consciously pursued in a way that serves and promotes sustainable development globally.[17] Globalization has led to the EC more actively participating in the interaction with other states in the international community. Environmental degradation and consumer

15. Case 26/62, van Gend & Loos, 1963 ECR 3.

16. Case 106/77, Simmenthal II, 1978 ECR 629.

17. *See* WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW BODY: TRADE POLICY REVIEW 3 (Oct. 1, 2004).

protection often have become international issues. It is inevitable to have international standards in determining whether a trade measure violates multilateral agreements within the WTO.

The aim of the common commercial policy is "to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers."[18] Article 133 EC Treaty regulates the basis for the EC trade policy, according to which any measure to be taken with the common commercial policy is proposed by the European Commission and decided by the Council. The Commission ensures the uniform representation and exercise of EC trade policy at both bilateral and multilateral level, assisted by a consultative Committee composed of representatives of the Member States, which meets every week. The 10 new Member States began to take part fully in the work of this Committee already on April 2003. The Treaty of Nice introduced a substantial reform of Article 133 EC Treaty, aimed at adjusting Article 133 EC Treaty and the scope of the common commercial policy to an additional number of policy areas, so as to reflect the increasing broad reach of current trade policy. The Treaty of Nice introduced also steps to ensure the application of uniform rules and procedures related to conclusion by the EC of agreements in the field of trade in services and the trade-related aspects of intellectual property rights. The EC and its Member States continue to act together on issues for which they share competence, such as the conclusion of agreements regarding trade in social, cultural, educational and health services which would go beyond the Community's internal powers in these areas. The revised Article 133 EC Treaty therefore improves the formulation and implementation of trade policy in the EC by means of a clarification of powers and procedures, and through greater uniformity and flexibility.[19]

III. THE RELATIONSHIP BETWEEN THE EC AND THE WTO

The WTO is a very important international organization for the world trade after the Uruguay Round.[20] The source legitimacy of the WTO is consent of its member states.[21] Hence, the implication of membership in the WTO has vertical and horizontal effect. The vertical effect is related to the relationship between the WTO and each member state. The horizontal

18. Art. 131 (1) EC Treaty.

19. *See* WORLD TRADE ORGANIZATION, *supra* note 17, at 7.

20. *See* Barton, Goldstein, Josling & Steinberg, *supra* note 1, at 6.

The GATT 1947 has basically no change and is called GATT 1994 as substantive rules of the WTO. GATT 1947 and GATT 1994 are legally distinct, but they are substantively identical.

21. Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 693 (2005).

effect is related to interstate relations.[22] Obviously, the increasing interdependence and globalization of the international system are more and more important. Trade liberalization is the main goal of the WTO. The combination of reciprocity with non-discrimination has created a liberal and law-governed trading system.[23]

The original Member States of the EC and even other Member States were Contracting Parties of General Agreement on Tariff and Trade (GATT) 1947. The GATT 1947 was only a provisional agreement. The Contracting Parties of GATT 1947 did not ratify it. The relationship between GATT and the EC was very ambiguous. The European Court of Justice rejected the direct effect within the EC. The provision of GATT was not capable of conferring on citizens of the Community rights which they can invoke before the courts.[24] The European Court of Justice was of the opinion that GATT was based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements.[25] The European Court of Justice changed its legal opinions in the early 1990s. If the EC legislature adopted a measure and that measure was meant to implement a particular GATT rule, or if it is referred to a specific GATT provision, namely the GATT rule or provision has been integrated into the EC regulation, the European Court of Justice can apply it. Only these limited instances, GATT had direct effect within the EC.[26]

WTO obligations have been recognized as an "integral part of Community legal order" inside the EC and have been incorporated into the domestic laws of many WTO member states. However, the European Court of Justice has concluded from the intergovernmental structures and reciprocity principles of WTO law that the "purpose of the WTO agreements is to govern relations between states or regional organizations for economic integration and not to protect individuals" who cannot rely on them before the courts and … any infringement of them will not give rise to non-contractual liability on the part of the Community."[27] The EC has exclusive competence for matters under GATT 1994, but competence is shared with the Member States on matters under the GATS (General Agreement on Trade in Services) and TRIPS Agreement (Agreement on Trade-related Aspects of Intellectual Property Rights).[28]

The GATT 1947 was a core of international economic institution after

22. *Id.* at 694.
23. *See* Martin Wolf, *Globalization and Global Economic Governance*, *in* Oxford Review Economic Policy Vol. 20, No. 1, 75 (2004).
24. Joined Cases 21-24/72, International Fruit Company, 1972 ECR 1219.
25. Case 266/81, SIOT, 1983 ECR 731; Joined Case 267-269/81, SAMI, 1983 ECR 801.
26. Case C-69/89, Nakajima All Precision Co. v. Council, 1991 ECR I-2069.
27. Case T-201/00, Biret, 2003 ECR I-10497.
28. Opinion 1/94 (WTO), 1994 ECR I-5267, paras. 98 & 105.

the Second World War. The GATT 1947 recognized the special form to promote the free regional trade – customs union and free trade areas in Article XXIV. According to Article XXIV GATT, the members of customs union and free trade areas are relieved from the obligation to extend the preferential treatment granted within the customs union and free trade areas to non-members. The European Community is a form of customs union consistent with Article XXIV GATT. The distinction between the internal and external dimensions of the customs union is that the character of intra-Community relations is a complete liberalization of trade, as a result of the abolition of all barriers to imports and exports.[29] Customs Union achieves a high degree of trade liberalization between the parties at the expense of differential treatment of their trading partners.[30] The European Community shall have its own legal personality.[31] The end-result was Article XI of the Marrakesh Agreement establishing the WTO stating that the contracting parties to GATT 1947 (including all the EC Member States) and the European Community shall become original Member States of the WTO.[32] As a consequence, both Member States and the EC are simultaneously formal WTO Member States. Although customs union is an exception of the Most-Favored Nation principle, the provisions of the WTO bind both the EC and its Member States.

The individual Member States of the EC coordinate their positions, and the European Commission alone speaks on behalf of all Member States at key WTO meetings, representing a common position of all the EC Member States.[33] The EC is obliged in trade policy to multilateral institutions and multilateral solutions. To this end, the EC has been active in its efforts to maintain the primacy of the multilateral trading system, and to enable the WTO to respond to current and future challenges. In the WTO, the Commission speaks on behalf of the EC with one voice, and consults actively with the Member States.

IV. THE EC'S PARTICIPATION IN THE DISPUTE SETTLEMENT SYSTEM OF THE WTO

The EC plays a leadership role among WTO Members due to its significance in global trade and the global economy. The EC frequently has recourse to the WTO dispute settlement mechanism. It has participated actively in the dispute settlement system as a complainant and

29. Case 225/78, Bouhelier, 1979 ECR 3151.

30. *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU 31 (Oxford: Oxford University Press, 2004).

31. Art. 281 EC Treaty.

32. *See* WTO, THE URUGUAY ROUND RESULTS 6 (The Legal Texts, Geneva, 1995).

33. *See* F. JAWARA & A. KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS 23 (New York: Zed Books, 2003).

as a respondent. There are a large number of cases such as EC/US export subsidy benefits,[34] EC/US certain steel products,[35] "bananas" case,[36] "hormone-treated beef" case,[37] and GSP scheme case[38] within the WTO dispute settlement mechanism.

The beef hormones dispute between the USA and the EC is a good example to explain the conflict of interests among producers and consumers within the EC. Since 1968, intra- and extra-EC trade in beef and veal had been regulated in the framework of the Common Agricultural Policy. Its main features were a closed market system with guaranteed prices, direct subsidy payments, and a variable system of protection against extra-community competition. Since the end of 1985, the EC has banned the use of hormonal substances for purposes of growth promotion in beef production. In contrast, the United States has permitted the controlled use of growth hormones. The EC's hormone ban was extended to imports from third countries in 1989. American meat producers began to experience annual losses in the order of US $ 130 million per year. The major US meat producers filed a claim with the US government against the EC's hormone ban in 1987 because the EC's policy was an unfair trade practice against the USA. The EC's hormone ban has led to one of the longest transatlantic trade disputes. This dispute had moved through the WTO dispute settlement mechanism.

The United States successfully challenged at the WTO an EC's ban on beef injected with natural and synthetic growth hormones. The ban directly responded to widespread fears of citizens about the risks represented by such hormones. A WTO panel found that the EC's ban on hormone – injected beef violated the Agreement on the Application of Sanitary and Phytosanitary Measures because the EC had not provided a risk assessment that dealt specifically enough with the risks posed by the use of hormones in a manner inconsistent with sound veterinary practice. The WTO Appellate Body upheld this result.[39] The EC enacted Directive prohibiting the use in Livestock farming of certain substance having a hormonal action. This Directive took effect on January 1, 1988 and prohibited imports into EC Member States of any meat produced from animals that has received growth hormones. Consequently, virtually all beef imports from the USA had been banned because most American cattle are raised with the use of growth hormones. The USA carried the issue into the General Agreement on Tariffs and Trade (GATT) to settle

34. WTO document WT/DS/108.
35. WTO document WT/DS/248.
36. WT/DS 27/52, WT/DS/200.
37. WT/DS 26/21, WT/DS 48/19.
38. WT/DS 242, WT/DS 246, WT/DS 209.
39. WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products, WT/DS 26/AB/R, WT/DS 48/AB/R (Feb. 13, 1998).

the dispute, but unsuccessful. The EC claimed that its ban was not discriminatory because it affected meat produced within the Community as well as imported meat. The non-binding nature of the dispute settlement process enabled the EC to block any progress on the issue.

The European Parliament voted unanimously in June 1996 to support the ban.[40] European consumer interest groups were successful in pushing EC bodies towards more stringent regulations, even though scientific evidence for health risks associated with the use of growth hormones was thin at best. A broad and stable coalition supporting a growth hormone ban emerged, comprising consumer interest groups, national and supranational regulators, and traditional farmers. The unresolved hormone dispute led to that GATT contracting parties decided to install new restrictions on non-tariff barriers to trade and extend the dispute settlement mechanism to a form like a court during the Uruguay Round of 1986 - 1994. It was to reach a decision in the hormone case on the basis of the new Agreement on the Application of Sanitary and Phytosanitary Measures. Sanitary and phytosanitary measures must correspond to the internationally binding standards of the Codex Alimentarius.[41] The panel decided that the EC's import ban on hormone-treated meat violated the Sanitary Code and was an illegal non-tariff barrier to trade. The EC appealed against this penal decision and the WTO's Appellate Body also decided that European import ban violated the SPS Agreement due to insufficient risk assessment.[42] Although the Member States of the EC are the WTO's members, the legal issue was related to the EC's legislature and the EC was with one voice while the WTO dispute settlement proceeding.

Even in the practice of the European Court of Justice, the European Court of Justice does not want to weaken by judicial means the EC's negotiating position in international fora.[43] The most important commercial partners of the EC did not make the WTO agreements enforceable in their own legal systems, therefore it did not wish to tie the hands of the Community legislature or executive.[44] However, the European Court of Justice complies with the doctrine of harmonious interpretation to the WTO. The European Court of Justice takes account of the WTO when interpreting Community legislation. "The primacy of

40. *See* RAJ BHALA, INTERNATIONAL TRADE LAW 1677 (New York: Matthew Bender 2d ed., 2000).

41. The SPS Agreement regards the standards released by the Codex Alimentarius Commission as the material basis for dispute settlements. Regulations deviating from the Codex are regarded as non-tariff trade barriers unless they are justified in the context of the SPS Agreement.

42. *See* WTO Appellate Body Report 1999: 253.

43. *See* Delphine De Mey, *The Effect of WTO Dispute Settlement Rulings in the EC legal order: Reviewing Van Parys v Belgische Interventie-en Restitutiebureau (C-377/02)*, 6(6) GERMAN L. REV. 1032 (2006).

44. *See* BARNARD, *supra* note 30, at 33.

international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must be interpreted in a manner that is consistent with those agreements."[45]

V. CONCLUSION

It is no doubt that the only EC voice was designed to have a global echo in the field of the common commercial policy. The international identity of the EC has been generally acknowledged due to its formal membership in the WTO. In the recent WTO dispute settlement proceedings, it was obvious that the EC as a whole was an active global actor in the international trade. The EC's strong global position results from its supranational competence in the field of common commercial policy. The EC will remain its global position in the future.

We may not underestimate the EC's capacity as a major political on the international scene and its ability to focus on a common goal and to speak with one coherent, consistent voice at the negotiating table. The EU's enlargement has entailed the external Europeanization and impact on third countries. The enlargement has enhanced the EU's external solidarity and stabilized the EC's negotiating position within the WTO. The EU will be able to adopt strong common position on trade.

45. Case C-280/93, Germany v. Council 1994 ECR I-4973.

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