ARTICLES

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Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans**

I. Fortress Europe Under Legal Scrutiny

At first Europeans seemed somewhat flattered when their project of completing the internal market by 1992 was interpreted as in reality aiming at erecting a fortress. After many years of "eurosclerosis," with Japan and the four little dragons getting all the attention of the economic world, it was comforting to be again taken seriously, if not now, at least by 1992. Meanwhile, however, the underlying charge of protectionism began to prevail over respectful recognition of future strength. Fortress Europe now definitely looks less attractive. Europeans find themselves being talked into a defensive position prompting all sorts of additional demands, up to the suggestion made by the Secretary of the United States Department of Commerce Robert Mosbacher that, in the further planning of the 1992 project, the United States be given "a seat at the table, or one behind it."[1]

The Commission of the European Communities (henceforth "EC" or "Community") repeatedly feels a need to explain the beneficial, or at least unobjec-

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1. Fin. Times, Feb. 16, 1989, at 1, col. 3.

tionable, effects the numerous pieces of proposed legislation have on non-Member States. A press release of the Commission of October 19, 1988, summarizing such comments was entitled "Europe World Partner" and expressly disclaimed any intention of building "fortress Europe."[2] Yet so far, neither did the new term make its way into the media, nor has the debate on the matter as such been closed. It may therefore seem appropriate, in contribution to the broader political and economic debate, to offer some legal considerations on the impact the completion of the internal market is likely to have on non-Europeans.

For the sake of brevity "non-Europeans" in principle are to include nationals of those European States that are not Member States of the EC. However, the focus of this article will be neither on them, in view of all their particular bilateral relations to the EC, nor on the socialist States or on the States of the Third World but on what could be expected to be the perspective of the United States and possibly Japan as the EC's triad market competitors. The fortress charge is not directed against the common market as it stands now. Elements of its protectionist presence, such as the common agricultural policy, will therefore be passed over in silence. It is the project of completing the internal market that has given rise to the controversy. That project will first have to be explained in Section II. Section III will try to identify, under the heading "Walls and Moats," some permanent features of a possibly more protectionist future. Thereafter, Section IV will discuss the possibility of a more frequent use of the "Mortars and Cannons" of trade policy. The summary in Section V will come back to the usefulness of the present debate.

II. Completing the Internal Market

The concept of the internal market is inherent in the dynamic character of the Community as "an ever closer union among the peoples of Europe" described in the preamble of the EEC Treaty of 1957. On the one hand, therefore, "[t]he Treaty clearly envisaged from the outset the creation of a single integrated internal market."[3] The completion of the internal market, on the other hand, marks an enhanced intensity of integration in comparison with the "Common Market," which was to be established under article 2 of the Treaty in its original version. The new dimension of European integration is defined by article 8a, added by the Single European Act as of July 1, 1987, in the following words: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."[4]

2. Europe 1992: Europe World Partner, Commission Information, P-177 (Oct. 19, 1988).

3. Completing the Internal Market, White Paper from the Commission to the European Council, June 14, 1985, COM (85) 310 final, para. 4 [hereinafter White Paper].

4. Single European Act of February 17, 1986, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES [O.J.] L 169/1 (1987).

The free movement of goods, persons, services, and capital was already granted under the EEC Treaty since January 1, 1958, allowing for certain additional delays that, however, have all lapsed a long time ago. Yet today private persons continue to wonder why they still have to make a customs declaration when they take more than a minimal allowance of goods from one Member State to another, and business complains about the high additional expenses to be incurred in intra-Community cross-frontier transactions. The new efforts are directed at bridging that gap between law and reality. The project is aptly described in those most pragmatic terms of article 8a envisaging an "area without internal frontiers."

There are shortcomings indeed of today's Common Market that need to be remedied by the future internal market: The free movement of goods across intra-Community frontiers is diluted, other than by indirect taxation, by numerous agreed and tolerated exceptions, such as national quotas, which will be discussed in the following section. Further inland, administrative registration requirements for new products sometimes give room for illegal discrimination as will be explained with respect to pharmaceutical products. Freedom of services, if it is to become effective, has yet to be implemented, as the example of the envisaged single banking license will demonstrate.

Completing the internal market is an exercise in common sense. The elimination of internal frontiers stands for a real life test of the establishment of the various freedoms. Even though the concept is only directed at eliminating foreign related controls, the very fact of eliminating them will bring about what has been called a competition of standards.[5] That competition, as any other, is decided by the market, and the market will often, though not always, have a preference for less rather than more regulation. Integration therefore is closely linked to overall deregulation.

A program appealing to both European integrationist and economic deregulators can these days be expected to develop considerable momentum. The half-time report of November 1988 stated that 90 percent of the necessary legislative instruments have been filed by the Commission with the Council of Ministers. The Council has adopted, or formulated a common position upon, more than 40 percent of those proposals.[6] The Commission envisages for itself and for the Council to have completed their legislative work by the end of 1990. That would give the twelve Member States two years to implement, and transfer into national law, the 279 pieces of legislation presently considered necessary for the completion of the internal market.

5. H. Giersch, Eurosklerose, *Europhorie oder Revitalisierung der europäischen Wirtschaft*, in DIE EUROPÄISCHE GEMEINSCHAFT IN DER WELTWIRTSCHAFT 43, 61 *et seq.* (1987).

6. Completing the Internal Market: An Area Without Internal Frontiers, Report of the Commission, November 17, 1988, COM (88) 650 final, paras. 8 and 9 [hereinafter Commission Report].

In the White Paper of 1985, the project of the internal market was explained as if it were a most introverted venture. The only mention of the outside world is contained in one single sentence of the fifty-five-page document: "Moreover the commercial identity of the Community must be consolidated so that our trading partners will not be given the benefit of a wider market without themselves making similar concessions."[7] That phrase, though not insignificant, does not fully explain the impact of the completion of the internal market on non-Europeans. In the following section some examples will be discussed to characterize the more permanent effects the 1992 project might have on trade relations with third States.

III. Walls and Moats of a Future Fortress Europe

A. Replacing Member State Quotas

Frontier posts checking private and commercial traffic, the most visible shortcoming of today's common market, are mainly needed to give evidence of actual export of goods exempted of value added tax in the Member State of origin and subject to that tax in the Member State of destination. The plans to remove such fiscal frontiers are not yet sufficiently advanced to allow an assessment of the external effects—if there are to be any since, in relation to third States, the country of destination system could be continued no matter which system is adopted for intra-Community trade.[8] The following discussion will therefore focus on an element of the internal market project that, though less conspicuous in the context of frontier controls, clearly raises the question as to whether the Community is about to put up a wall of quantitative restrictions so far surrounding only the one or the other Member State.

Unlike a free trade area the European customs union guarantees free movement not only of the goods produced in a Member State but, on equal terms, of those goods exported into a Member State from a non-Member State. That principle, laid down in article 9(2) of the EEC Treaty, presently suffers from a number of exceptions usually authorized by the Commission under article 115 of the Treaty.[9] In those cases Member States check imports from another Member State to determine whether the product to be imported was originally imported from a third State and is subject to a national quota restricting the total imports from that third State. Thus Italian customs officers would be permitted to make sure that imports of Japanese cars from Germany are within the quota agreed upon by Japanese car manufacturers in favor of Italy, but not Germany,

7. *See* White Paper, *supra* note 3, para. 19.

8. For a survey, see: TAXING CONSUMPTION, OECD 111 *et seq.* (1988); Fin. Times, Aug. 22, 1988, at 12, col. 3.

9. For an explanation of the quota system, see J. Usher, *The EC as a Single Unit in Foreign Trade*, in CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW 22, 39 *et seq.* (D. Perrott & I. Pogany eds. 1988).

under a voluntary restraint arrangement to that effect.[10] Similar Member State quotas exist regarding other goods that Far Eastern companies have been so frighteningly successful in manufacturing and marketing even though the total number of products subject to such measures at the end of 1988 only amounted to twenty-two, as was stated by the Commission in its half-time report.[11]

The recent controversy over local content requirements is just a corollary of the quota system:[12] As of what amount of British content would a car manufactured by a Japanese company in Britain cease to be a Japanese car and become a British car that, of course, could not be made subject to any Member State quota? Similarly, are cars produced by a Japanese company in California American cars that are not subject to a quota or Japanese cars that are subject to a quota? The answer to those questions will have to be given under the terms of the respective voluntary restraint arrangement, under the pertinent instruments of Community law, and under the national law of the respective Member State insofar as it is compatible with prevailing Community law.

The Community seems determined to abolish all Member State quotas by 1992 in order to remove that particular reason for a continuance of frontier controls.[13] One way of doing this would be to phase out all quotas. In that case third States would have no reason to complain. The remaining inside walls would be removed with no outer walls being erected in their place. However, old habits die hard. Already in its White Paper of 1985 the Commission pointed to the possibility of replacing the one or the other Member State quota by a Community-wide quota.[14] For the purposes of the internal market that latter system works equally well, but not so for the outside world. For third States it might mean loss of access to Member State markets that were freely accessible before in exchange for gaining access to other markets that had previously been off limits.

The net result of abolishing Member State quotas, in the words of the Commission, "is bound to be a reduction in the current level of protective measures."[15] Whether that will indeed be the case will depend on how future Community-wide quotas compare with former national quotas. It is difficult to foresee, at a reasonable degree of accuracy, at what level, if at all, future Community-wide quotas will be set. States that are today protected by low national quotas, on the one hand, might fear to get the bulk of future imports under a Community-wide quota since they are least adjusted to world market standards and hence might feel tempted to lobby for low quotas. Third State

10. *See generally* Fin. Times, June 25, 1988, at 2, col. 1; Sept. 6, 1988, at 4, col. 6; Oct. 5, 1988, at 22, col. 1.

11. Commission Report, *supra* note 6, para. 44.

12. *See generally* Fin. Times, Dec. 7, 1988, at 4, col. 1; Feb. 10, 1988, at 9, col. 1.

13. *Cf.* White Paper, *supra* note 3, para. 35.

14. *Id.* para. 36.

15. Commission Report, *supra* note 6, para. 21(d).

exporters, on the other hand, might prefer to make use of existing market networks and therefore spend the Community-wide quota on sales to those markets where they are strong already, which would eventually allow the setting of quotas at a more generous level. Yet neither the possible business strategies nor the likely reactions of political decision makers can be predicted from the perspective of legal analysis.

From a legal perspective it may be pointed out first that replacing Member State protection by Community-wide protection is contrary to the deregulatory philosophy of the 1992 project and second that a net result of less, rather than more, protectionism would be in line with present efforts to do away with grey area measures undertaken in the ongoing GATT negotiations.[16] A more specific consideration is: Present measures all rest on the consent of the foreign exporting State or its industry. Such consent to "voluntary" restraint need not be given at all times. Japan especially could consider giving up its low profile posture and taking regular recourse to GATT dispute settlement should it feel pressured into restraints through questionable threats of safeguard or antidumping measures. As a political point it may be added that any desire on the part of the Community to consider taking such measures could be removed if Japan were to ease access to its own markets. All in all, the height of the walls and the breadth of the moats seem to depend on the conduct of more governments than just those presently charged to be building fortress Europe.

B. Fighting Discriminatory Registration Requirements

Market access for pharmaceutical products, as it is closely linked to social security systems and health policy, remains heavily regulated. Some Member States make registration not only subject to safety control but also to price control or profit control. All over Europe commercial success in the market depends on whether a new product is declared eligible for a refund under social security or health insurance regulations. Such a regulatory framework, not surprisingly, offers opportunities for discriminatory practices.[17]

Some Member States are known not to resist those temptations. Thus applicants, facing delays between two weeks and two years, may find themselves exposed to requests for an increase of local content by the State of registration. Many manufacturers of pharmaceutical products seem to have accommodated such requests by establishing and enlarging production facilities, for instance, for the pressing and packaging of pills at a scale well beyond commercial

16. *Cf.* Trade Negotiations Committee Meeting at Ministerial Level, Montreal, Dec. 1988, GATT Doc. MTN.TNC/7(MIN) (Dec. 9, 1988).

17. For a report on discriminatory practices in the pharmaceutical industry, see Economists Advisory Group Ltd., *The Cost of Fragmentation in the European Community's Pharmaceutical Industry and Market*, in 15 Research on the "Cost of Non-Europe," Basic Findings 12, 79, 120 *et seq.*, 136 (1988).

practicability. As a result, the pharmaceutical industry within the Common Market is reported to be working at less than 50 percent of its manufacturing capacity.

The situation described above could hardly be called an integrated European market. To make it such, measures are underway already. One of them is the proposed transparency directive,[18] which sets the maximum delay for the authorization of new products at ninety plus ninety days: In the absence of a response by Member State authorities within a total of 180 days, the introduction of the product to the market will, once the directive has entered into force, be permitted by automatic operation of the law. To be sure, Member State authorities could within those 180 days simply give a negative response in order to avoid any effect of authorization. In that case the proposed directive provides that negative decisions have to be fully reasoned and must be open to judicial review. The proposed scheme of strengthening due process elements in authorization procedures will help to enforce the prohibition of discrimination (article 7, EEC Treaty). Demands for local content could henceforth be fended off if ever they were used as a ground, openly or under some pretext, to refuse the registration of new products.

To what extent would non-Europeans benefit from the new law? Present discriminatory practices address themselves to manufacturers located in other Member States and in non-Member States alike. In an attempt to foreclose such practices, the procedural law set up by the proposed directive does not distinguish between EC manufacturers and non-EC manufacturers of pharmaceuticals. Yet does the substantive law contained in articles 7 and 30 of the EEC Treaty allow for a discrimination of non-Europeans? Article 7 does not prohibit discrimination against those companies that neither have their seat in, nor are incorporated under the laws of, one of the Member States of the Community (article 58, EEC Treaty). Furthermore, quantitative restrictions in the trade of goods are, under article 30 of the EEC Treaty, prohibited only among Member States.

However, it has to be remembered that most of the large pharmaceutical groups headquartered outside the European Community, mainly in Switzerland and in the United States, have already established subsidiaries within the European Community. Those subsidiaries enjoy the same status under EC law as do pharmaceutical companies located within the EC that are controlled by EC shareholders. Non-EC-based pharmaceutical companies, which do not yet have a subsidiary within the Community, are free to set up a subsidiary and to channel applications for authorization of new products through such subsidiaries. In practice, therefore, non-Europeans may at any time provide themselves with the

18. Amended proposal for a Council Directive relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion within the scope of the national health insurance system, COM (88) 231 final, O.J. C 129/14 (1988).

same standard of protection under the substantive law of the Treaty enjoyed by the Europeans. Residual rights under international law (GATT, Friendship, Commerce, and Navigation Treaties indirectly binding the EC) need not be considered, all the more so since discriminatory practices, once eliminated among Member States, are unlikely to occur vis-à-vis third States. Non-Europeans are likely to benefit from the measures outlined above.

Other measures, however, such as the health control aspect of registration, might still contain elements of differential treatment: Even if, under the "new approach" to harmonization,[19] EC-based companies were to be granted recognition of the health certificate at the time of the first registration in one Member State, such recognition would not apply to registrations in a non-Member State; nor would an EC-based company be entitled to have its products registered in such other State. Recognition in those cases could only be provided for by mutual agreement with the respective State on a basis of reciprocity. The reciprocity criterion characterizes liberalization in banking as well. Its merits will therefore be discussed in the next subsection.

C. Reciprocity in Banking Services

Under the proposed Second Banking Directive of February 16, 1988,[20] a bank established as a legal entity in one Member State will in the future no longer need an authorization to offer a set of banking services as defined by the directive, either directly or through a branch, in any other Member State. Thus a bank duly established in one Member State would be entitled to offer a range of banking services in other Member States that might be wider than is permitted both under the law of the home Member State and under the law of other host Member States. As a result, a competition of standards will develop. Member States can be expected to deregulate domestic banking law, if only to provide equal treatment to local banks when they compete with foreign banks that enter the domestic market.

The single banking license with its Community-wide effect will be offered to foreign-owned banks subject only to reciprocity (article 7 of the proposed directive). At the occasion of the first application to open a bank as a foreign-owned legal entity within any Member State of the Community, it will have to be determined whether the home State of the shareholders grants reciprocal treatment to shareholders of each Member State that would want to establish a bank in the form of a legal entity in the foreign State.

19. Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, O.J. C 136/1 (1985).

20. Proposal for a Second Directive on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, COM (87) 715 final, O.J. C 84/1 (1988).

Despite the great number of non-EC banks already operating within the Common Market, the reciprocity requirement is not meaningless. Banking operations are usually channeled through a branch or representative office within the Community. Such branch or representative office, unlike a subsidiary of a non-EC bank, will not be endowed with a Community-wide banking license. Some remarks by the then Commissioner de Clercq suggest that the reciprocity requirement will also have to be met by foreign-owned banks already duly established as subsidiaries within the European Community.[21] Such retroactive effect, however, clearly does not follow from the present wording of the proposed directive and would hardly be in accordance with articles 7 and 58 of the EEC Treaty. Also, the Commission itself seems to read the directive in the way explained here since, in anticipation of the entry into force of the proposed directive, the Commission recommended Member States to make present applications for new licenses depend on criteria of reciprocity.[22] Indeed, Japanese banks are reported to be rushing into the Community to establish subsidiaries that would eventually come within the purview of the directive.[23]

The reciprocity requirement is not a newcomer in EC banking law. Branches of banks based in a third State were not entitled to equal treatment within the Community, as granted under the preceding Banking Directive of 1977, unless the Community had concluded an agreement to that effect, "on the basis of the principle of reciprocity," with the respective third State.[24] Though not new, the reciprocity requirement now bars access to the greater benefits of the Second Banking Directive. The critical response it has drawn should be to no one's surprise. M. Peter McPherson, the then acting Secretary of the United States Treasury, asked the Community not to seek reciprocity on a "mirror image" basis but on a "national treatment" basis, and summarized his views as follows: "In short, reciprocity that seeks identical treatment in different countries is a retreat back to protectionism."[25]

Before commenting on the controversy, it may be confirmed that the Community, if it had had national treatment in mind, would have said so. "Reciprocal treatment" under article 7(5) of the proposed directive aims for more, probably not for mirrorlike identity but equivalent treatment to be granted to Member-State-based banks that wish to operate in the home States of non-EC banks. The exact standard of equivalence is apparently left to the appreciation of the Commission in the particular case.

21. Fin. Times, July 13, 1988, at 1, col. 3.

22. Fin. Times, June 6, 1988, at 1, col. 3; *cf.* Fin. Times, Oct. 20, 1988, at 1, col. 7.

23. THE ECONOMIST, Oct. 8, 1988, at 97.

24. Article 9(3) of the First Council Directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, 77/780/EEC, O.J. L 322/30 (1977).

25. Remarks by M. Peter McPherson, Acting Secretary of the Treasury, to the Bankers' Association for Foreign Trade, Washington, D.C. (Sept. 8, 1988).

The reciprocity requirement clearly erects a wall around the banking market of the Community but the principle as such, if confined to national treatment, seems acceptable even to the United States. Does the standard of equivalence make it a protectionist move?

The General Agreement of Tariffs and Trade, as it presently stands, does not cover trade in services at all. States are free whether or not to accord national treatment in banking, insurance, or any other kinds of services. Yet liberalization of trade in services is one of the major issues of the negotiations in the Uruguay round.[26] Would it be wise for the Community, in view of those negotiations, to throw away the bargaining chip of demanding equivalent treatment and just retain the claim for national treatment?

There is more to that question than just negotiating tactics of asking for more in order to reach something tolerable: The services sector, not only in banking, is heavily overregulated. International competition can only develop if it proceeds from a regime of mere nondiscrimination, i.e., national treatment, to setting off a wave of deregulation by combining mutual recognition of home country control with liberal common standards. Can the Community be blamed if it draws that lesson from its own experience and insists on more than just national treatment?

The debate on reciprocity in banking is not terminated, and the debate on other services has just begun. In banking, it may well happen that reciprocity is toned down or even dropped as demanded by some representatives of the City of London.[27] Yet cross-border banking does not only offer access to worldwide business, which financial centers of a deregulated market may attract, but also to a lot of local business. Also in line with the consideration of the White Paper quoted above,[28] the Community may therefore prefer to grant access to the banking business as a whole only if its banks are accorded equivalent rights. Be this as it may, refusing to grant unilateral concessions, during trade negotiations, hardly supports a charge of outright protectionism.

III. Europe's Mortars and Cannons

Walls and moats as discussed above can be expected to be in place for quite some time, providing constant protection against the import of goods and services. Cannons and mortars are only to be fired occasionally when actual or potential invaders are spotted by those defending the European market. The present planning of the internal market does not include any armament projects. The focus will therefore first be on reviewing the existing arsenal of trade policy measures and then on discussing the question whether the Community is likely to make greater use of those weapons after 1992.

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26. *See supra* note 16.
27. Fin. Times, Aug. 20–21, 1988, at 20, col. 3; Sept. 24, 1988, at 22, col. 1.
28. *See supra* text accompanying note 7.

Generally speaking, the instruments of EC trade policy are but a poor imitation of those developed and in constant use in the United States. Antidumping and antisubsidy legislation, as recently revised in Council Regulation 2423/88,[29] is very similar indeed to the United States model. Such legislation has been employed frequently against Japan, the newly industrialized countries of East Asia, and State trading nations. It is argued, but difficult to prove, that countervailing duties are sometimes threatened or imposed for no valid reason and may even prompt accommodating action on the part of foreign enterprises by way of voluntary restraint arrangements and the like.[30] If the charge is correct, the answer would be to make judicial review more easily available and more effective. As a result it should be possible to confine the scope of application to genuine cases of dumping or subsidization. After a series of typewriter cases brought before the Court of Justice were lost, Japan asked for, and the EC agreed to, the formation of a GATT panel to review the legality of the EC approach to antidumping.[31]

In parallel with section 201 of the United States Tariff Act, EC law provides for an emergency break as authorized by the escape clause contained in article XIX of the GATT.[32] Council Regulation 2641/84[33] is the counterpart to section 301 of the U.S. Trade Act. It relates to "the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices" and is generally called the "New Commercial Policy Instrument." "Illicit" is defined by reference to "international law" and to "generally accepted rules." As an example of the latter one could refer to GATT law in relation to such States as have not become a contracting party of the GATT itself or have not accepted a particular GATT code. In contrast to United States law, the EC regulation only authorizes measures to be taken in conformity with international law, which means that, as regards GATT members, the Community is merely entitled to initiate dispute settlement proceedings under article XXIII of the GATT.

The New Commercial Policy Instrument has rarely been applied. In the AKZO-DuPont case, the EC complained that AKZO was subject to measures

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29. Council Regulation (EEC) No. 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, O.J. L 209/1 (1988).

30. Forrester, *EEC Trade Law and the United States*, in 1987 FORDHAM CORP. L. INST. 469, 503–06 (B. Hawk ed. 1988).

31. Brother Indus. Ltd. v. Commission & Council, Judgments of Oct. 5, 1988, Cases 56/85, 250/85, 260/85 and 106/86, 273/85 and 107/86, 277 and 300/85, 301/85 (not yet published); Fin. Times, Oct. 6, 1988, at 3, col. 7; Oct. 20, 1988, at 1, col. 7.

32. Council Regulation (EEC) No. 288/82 of 5 February 1982 on common rules for imports, O.J. L 35/1 (1982).

33. Council Regulation (EEC) No. 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, O.J. L 252/1 (1984).

under section 337 of the Trade Act. That rule, in the view of the Commission, amounts to a quantitative restriction discriminating against foreign exporters whose procedural rights are considered inferior to those of domestic competitors allegedly infringing intellectual property rights. The report of the GATT panel came down in favor of the EC but has yet to be adopted by the Contracting Parties.[34] In another case, Indonesia adjusted its copyright protection law after the initiation of proceedings under the New Commercial Policy Instrument.[35] Finally, there is a case pending before the Court of Justice in which a Community trade association brought a complaint against the Commission for failure to act against Argentina.[36]

The arsenal of trade measures described above is not truly impressive. The rules on antidumping may be just comparable in effectiveness with those of United States law. Yet, the New Commercial Policy Instrument, in its requirements and in its remedies, falls short of its United States counterpart, and an EC equivalent to section 337 of the Trade Act is missing. Since no enlargement of the measures of trade policy is being planned, the protectionism charge stands or falls with the prospect of a more or less frequent use of the existing instruments by 1992.

To be sure, the project of the internal market has a potential of economic growth as most aptly described in the Cecchini Report.[37] Despite all differences of language and culture the internal market of 320 million people will for the first time open up opportunities for economies of scale and for flexible business strategies that can be considered to match those of Europe's American and Japanese competitors. Once the social costs of the expected restructuring have been met, the Community of the internal market might face future trade disputes in a more relaxed manner than the present fragmented Common Market.

Yet will such increased leverage translate into a greater inclination to make use of measures of trade policy? To a large extent the answer depends on factors that can hardly be predicted, among them the future conduct of the other side. One legal point may, however, be made: The principal decisions under all the trade policy instruments have to be adopted by the Council of Ministers. The Council should not be mistaken for a government of a nation State. It is a conglomerate of twelve such governments that, based on different economic philosophies and

34. Commission Decision of 12 March 1987 on the initiation of an international consultation and disputes settlement procedure concerning a United States measure excluding imports of certain aramid fibres into the United States of America, 87/251/EEC, O.J. L 117/18 (1987); Fin. Times, Feb. 1, 1989, at 6, col. 5.

35. Commission Decision of 11 May 1988 terminating the examination procedure concerning the unauthorized reproduction of sound recordings in Indonesia consequent to the Republic of Indonesia's undertaking to give sound recordings by nationals of Community Member States the same protection as sound recordings by Indonesian nationals, 88/287/EEC, O.J. L 123/51 (1988).

36. FEDIOL v. Commission, Case 70/87, O.J. C 96/8 (1987).

37. *Studies on the Economics of Integration*, in 2 RESEARCH ON THE "COST OF NON-EUROPE," Basic Findings (1988).

composed of different political parties, often have quite different priorities of industrial policy in mind when it comes to taking specific decisions in a trade conflict. The 1992 project will not affect the institutional constraints of European decision making. Even though there is a potential for more endurance in trade conflicts, the odds are against using it.

V. A Useful Debate

The review of the fortress charge revealed a number of issues that indeed merit attention. Yet a common thread of international-mindedness can also be discerned: The Community respects its commitments of international law. It allows that respect to be checked under internationally agreed procedures, and it is ready and eager to have those commitments expanded, albeit on the basis of reciprocity. Such reciprocity of interests and obligations, in the past a reliable basis for bringing about and honoring international law commitments, is likely to serve well future needs of international trade relations.

The foregoing is not meant to be the final word, which would, anyhow, only cover a limited aspect of political reality. On the contrary, as democratic experience shows, problems are solved by discussing them. The 1992 project raises the problem of Europe's future role in international trade. The multilateral trade system must not be allowed to disintegrate into—there would never be just one fortress—a system of competing fortresses, also called regionalism. The European Communities should therefore welcome the debate. The debate has to continue.