Symposium: The European Community as an International Actor

The Single European Act and 1992: Legal Implications for Third Countries

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I. The Single European Act – A Legal Mystery

Law and political psychology are two of the various instruments used to reform societies. Both of these forms are at work in the Single European Act (SEA) which had and continues to have revolutionary effects. The now realistic vision of a unified internal market has created astonishing reactions – both inside and outside the European Community (EC). What are the reasons? Are these reactions justified legally, or must we look to political psychology to provide an explanation?

Inside the EC, the conclusion of the SEA has given rise to an outburst of economic and political activities. At the moment it appears that all European business strategies are oriented towards 1992. European institutions and national governments have come under pressure to follow this orientation and to speed up their decision-making on common rules for 1992.

Outside the EC, the vision of a "Fortress Europe" has emerged, with Europe hiding behind defensive walls of protectionism in order to retain the benefits and achievements of the internal market for itself. Does this vision stem from an unin-

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tentional misunderstanding or a deliberate misinterpretation of the SEA? Has it been crafted on purpose in order to eventually justify protective counter-measures against a gradually emerging competitor?

At present, this vision of a "Fortress Europe" is fading again.[1] But why? Because of fluctuations in economic interests or because of a better legal assessment of the SEA? Finally, can this shift be accounted for primarily through legal considerations or rather through a combination of political or economic strategies?

The creation of the internal market by the end of 1992 will be closely monitored by the EC's trading partners. The Community may well have to face new charges of protectionist ambitions and subsequent reproaches from abroad in the near future. Thus, a legal analysis of the SEA should try to clarify first and foremost its legal implications for third countries. Such an analysis, however, cannot identify the real motives and impulses behind the ongoing process of integration. It will be for disciplines other than the law to explain why Europe is reaching out for new economic frontiers.

The SEA entered into force on July 1, 1987. Its primary objective is to progressively establish an internal market within a five years period ending on December 31, 1992. The textual appearance of the SEA is as confusing as its legal content: an unusual numbering of articles up to "Art. 130 T"[2] in order to be squeezed systematically into the existing Community treaties. In addition, there are a great number of cross-references and twenty declarations annexed to the Final Act,[3] thus making the SEA a document of apparent compromises.

The legal content of the SEA seems equally ambiguous and confusing. Within the Community, it is common ground that the SEA attempts to overcome the countless crises which have accompanied the creation of the "common market" since 1951-57. Yet, the new concept of an "internal market", in which the free movement of goods, persons, services and capital shall be ensured (now Article 8A), has been met with less than unanimous enthusiasm among the Community institutions and the private sector. For same, especially for the European Parliament which had adopted a far-reaching Draft for a European Union Treaty,[4] the SEA is not inventive enough and represents nothing more than a fig leaf to cover up the lack of willingness to arrive at further progress.[5]

Five years are a short period of time. It is astonishing to see that many of the first reactions and predictions should have proved inadequate. Even the "Fortress Eu-

1 See *Financial Times* of 8 May 1989, 3, for an overview of KSITC Publication 2204 of July 1989 on "The effects of greater economic integration within the European Community on the United States", and the detailed report on "European Community: Issues Raised by 1992 Integration" by the Congressional Research Service, Washington June, 1989.

2 Articles cited without further reference are those from the EEC Treaty as amended by the SEA.

3 OJ (1987) L 169/20.

4 Draft of 14 February 1984, see F. Capotorti *et al.*, *The European Union Treaty* (1986).

5 Pescatore, 'Some Critical Remarks on the "Single European Act"', 24 *CML Rev.* (1987), 9, 15 (discussing a "fundamental credibility gap").

rope" charge levelled against the Community has ebbed off after the settlement of a number of transatlantic trade disputes and the successful Mid-Term Review of the Uruguay Round in April 1989.[6] In addition, the Trade Negotiations Committee responsible for the calendar of the Uruguay Round has fixed the date for the conclusion of this Round for December 1990.[7] For some time, it appeared to be impossible that the Uruguay Round would ever be terminated before the effects of what is now commonly referred to as «1992» would be felt in international trade relations. Now, however, it seems more and more unlikely that the creation of the internal market will, necessarily, lead to a higher degree of protectionism, the idea being that a European internal market does not of itself adversely affect agreements and negotiations under the aegis of the GATT. The EC Commission has declared that the internal market will be created in full respect of the EC's international obligations and that the level of protectionism will under no circumstances be higher than at present. In reacting to the accusations of creating a protectionist refuge, the Commission formulated the concept of "Europe – World Partner." This concept was confirmed at by the European Council meeting in Rhodes on 3 December 1988.[8].

The following analysis of the effects of the SEA on foreign trade relations may be premature or superficial in that it tries to approach this subject from a purely legal perspective from outside the institutional framework. Furthermore, the outcome of the present legislative and economic process is still fairly unpredictable.

Therefore, this analysis will start off on rather safe ground. The following Part II will simply scrutinize the text of the SEA for any element which may refer to or which may obviously have repercussions on the EC's foreign trade relations. Part III will then discuss the possible *legal* implications of the creation of the internal market for trade relations after 1992. In Part IV further *political and economic* implications of the SEA for third countries will be outlined, while the final Part V will be devoted to some thoughts on whether the SEA might serve as a model of world-wide trade relations. Given the fast development in the direction of the internal market, a number of questions and problems cannot be answered with certainty, leaving them for more detailed analysis in future issues of this Journal.

II. The SEA – Its Missing Reference to Foreign Trade Relations

The SEA intends to amend the three founding treaties of the European Communities and to link the rather loosely-knit "European Political Cooperation" (EPC) to the

6 See MTN.TNC/7 (MIN) of 9 December 1988 (Montreal), in 1 World Trade Materials (January 1989) 5 and TNC 9 April 1989.

7 News of the Uruguay Round (NUR 027) of 24 April 1989, issued by the GATT-Secretariat.

8 Bulletin 10/1988, 1.2.1. and 12/1989, 1.1.10. and COM (88) 650 final of 17 November 1988, 9.

Community's institutional framework. To the unbiased reader, the amendments could take the appearance of mere "window-dressing": Art. 8A introduces the notion of an "internal market", replacing the well-established one of a "common market" in Art. 2 of the original EEC Treaty. It is difficult to discern differences between these two notions.[9] Consequently, the SEA only purports to realize under a new flag the objectives which had already been set out in the founding treaties of 1951-57, by setting a definite date for the completion of the "internal market", i.e. 31 December 1992,[10] and by streamlining the decision-making process, that is by opening the field of harmonization to majority decisions in the Council (Art. 100A). A further reform consists in conceding the European Parliament (EP) a greater influence within the newly designed "procedure of cooperation" under Art. 149. And, finally, the conclusion of treaties of accession and of "association" – whatever that means – have become subject to the prior approval of the European Parliament.In addition, the SEA explicitly confers new legislative powers on the Community: in the field of economic and monetary cooperation, health and safety of workers, regional policy, research and technological development as well as environmental protection – legislative areas in which the Community had already taken actions on the basis of inherent powers or, more specifically, on the basis of Art. 235.

Clearly, the text of the SEA underlines the Member States' introverted intentions to achieve the internal market within the Community. No mention is made, for example, of a reform of the Common Commercial Policy (CCP) under Art. 110 et seq., or of its various instruments which could be applied to protect the internal market against third countries – with the exception of the amendment to Art. 28 which now empowers the Council, deciding by a qualified majority and no longer by unanimity, to alter autonomously the Common Customs Tariff.

Yet, there are three explicit, albeit minor references to foreign relations. *First*, the fifth paragraph of the *preamble to the SEA* refers to Europe's responsibility to speak with one voice and act in unity and solidarity in order to defend Europe's common interests. However, the preamble is not legally binding and may only help the interpreter in construing the SEA. It obviously refers to the incorporation of the

9 See C. D. Ehlermann, 'The Internal Market Following the Single European Act', 24 *CML Rev.* (1987), 361, 369.

10 In a Declaration annexed to the SEA the "Conference" concludes that the date of 31 December 1992 does not create an automatic legal effect. It will have to be seen whether the Court of Justice of the European Communities will ignore this Declaration when interpreting Art. 8 A for the period after 1993. This Declaration cannot be considered an integral part of the SEA. It has not been signed and was not subject to formal ratification. At most the declaration can form part of the "context" of the conclusion of the SEA in accordance with Art. 31 of the Vienna Convention on the Law of Treaties. In addition, Art. 31 SEA stipulates expressly that the Court of Justice shall exercise jurisdiction only with regard to Title II and Art. 32 SEA. This does not refer to the 20 declarations. For further discussion see Toth, 'The Legal Status of the Declarations annexed to the Single European Act.', 23 *CML Rev.* (1986) 803, and D. Simon, 'De l'Acte unique au marché unique, 10 *JDI* (1989) 265, 284.

EPC, as the fifth paragraph of the preamble underlines the importance of maintaining world peace and international security.

The incorporation in Art. 1(3) and Art. 30 SEA of the *EPC* may be considered a *second* element which bears on relations with third countries: this incorporation, however, does not add any new competence to the Community. It simply restates existing practices which have been developed by the Member States outside the formal structure of the EC Treaties. The relevant Art. 30 SEA is nevertheless likely to generate more consistency in the EC's external economic policy on the one hand and the more comprehensive foreign policies agreed upon in the framework of the EPC on the other hand – both branches being linked by the obligation of coherence in Art. 30(5) SEA.[11]

The *third* clause relating to foreign relations is contained in Art. 130R(5) which, in *environmental matters*, provides for a cooperation between the Community and its Member States on the international level "within their respective spheres of competence." This cooperation is not meant to bar Member States from concluding international agreements on their own (subpara. 2) as long as the Community has not enacted legislation or concluded international agreements in the field of environmental protection.[12]

On the whole, the SEA does not change the CCP as it has developed under the EEC Treaty. Since 1957, one of the primary objectives of the EEC Treaty has been to contribute to the progressive abolition of all restrictions on international trade (cf. 6th paragraph of the preamble to the EEC Treaty). Art. 110(1) expressly mentions the harmonious development of world trade. Since the end of the transitional period on 1 July 1968, the EC has started to act on behalf of its Member States within the framework of GATT and has concluded a number of GATT agreements.[13] This general orientation towards multilateral international cooperation has guided the Community in the negotiations during the Uruguay Round and was not reversed, redirected or in any way revised by the text or the motives of the SEA.

Finally, the White Paper of 1985,[14] in which the Commission laid down the prospects for a true internal market (two years before the SEA came into effect!),

11 See V. Constantinesco, 'Les compétences internationales de la Communauté et des Etats membres à travers l'Acte unique européen', in P. Demaret (ed.), *Relations extérieures de la Communauté européenne et du marché intérieur* (1986) 63, at 70; Art. 30(12) SEA provides for a revision of the incorporation of the EPC into the SEA by the end of 1992. At present it is not possible to predict the outcome of such a revision.

12 The dividing line between powers still belonging to the Member States and those now held by the EC is still unclear. The position taken in the text is shared , *inter alia*, by R. Kovar, Table ronde de la Faculté de droit de Strasbourg sur 'l'Acte unique', 14 March 1986; see also Constantinesco, *supra* note 11.

13 E.-U. Petersmann, 'The EEC as a GATT Member – Legal Conflict between GATT Law and European Community Law', in M. Hilf, F. Jacobs, E.-U. Petersmann (eds.), *The European Community and GATT* (1986) 23.

14 *Completing the Internal Market, White Paper from the Commission to the European Council*, 14 June 1985, COM (85) 310 final.

does not contain any reference to the CCP except for one short passage on the Communities' identity[15] which, however, could be understood as to give the Community a more "aggressive" approach *vis-à-vis* third countries. But in essence, the White Paper should be understood as spelling out the legislative programme for the completion of the "internal market." The SEA does not refer explicitly to this Paper, but the Conference of the EC Member States which concluded the SEA did so in one of the many declarations contained in the Final Act.[16]

Bearing in mind the brevity of these isolated references to the Community's external relations, the mere language of the SEA should hardly have caused so much concern in many countries outside of the EC. The Community will continue to be bound by its founding treaties and by its international obligations which – according to the doubtful, but widely accepted doctrine of the Court of Justice – take priority over any act of secondary Community law.[17] How then could – judged by its actual wording – the rather harmless SEA have come to be identified with the imagery of a "Fortress Europe"? Would it not be more reasonable to leave the debate to economists and politicians to come up with the final analysis of the external effects of the internal market after 1 January 1993?

Such an approach would overlook a number of genuinely legal implications for third countries which are inherent in the process of creating the internal market under the SEA. It is these *indirect legal implications* that shall be identified in the following section.

III. The SEA's Legal Implications for Third Countries

The completion of the internal market by the end of 1992 – and this does not appear to be an unrealistic goal at present (July 1989)[18] – will have external effects on third

15 "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",White Paper, *supra* note 14, para. 19.

16 OJ (1987) L 169/24 (Declaration on Article 8A of the EEC Treaty).

17 This doctrine of priority is a.o. either based on Art. 228(2). According to which agreements shall be binding on the institutions of the Community or on the necessity of coherence as Community, on its side, too has priority over national law. The relevant case law may be found in the *Schlüter* 9/73, [1973] ECR 1135, 1157, and *International Fruit Company* cases 21-24/72 [1972] ECR 1219; for further references see P. Brückner, in J.V. Louis, P. Brückner, *Le droit de la Communauté économique européenne, Vol. 12: Relations extérieures* (1980) 183, as well as M. Schröder, in H. Groeben *et al., Kommentar zum EWG-Vertrag* (3rd ed., Vol. 2) (1983), Art. 228, 27-30. The ECJ, however, has not explicitly stated as the questions of priority and has never annulled any rule of secondary Community law on the basis of a conflicting rule of international treaty law. Thus the debate is still open: for a critical assessment see Schröder and Hilf, 'The Application of GATT within the Member States of the European Community', in M. Hilf, F. Jacobs, E.-U. Petersmann (eds.) *supra* note 13, 153, 162 n. 40.

18 By July 1989, the Council and Commission have – each with increasing speed – adopted 159 acts of the some 300 legal acts listed in the White Paper of 1985; for an detailed overview see *Handelsblatt* of 11-12 August 1989, No. 154, 10.

third countries in at least *five different areas* which are related to (1) the internal market without any internal frontiers, (2) the enlarged internal competences given to the Community, (3) the more streamlined decision-making process, (4) the conclusion of future treaties of association and accession and (5) the integration of the EPC into the institutional framework of the EC.

1. The Internal Market

a) The Internal Market and ERTA: parallel external powers

In contrast to the CCP under Art. 110 et seq., which, according to the interpretation of the Court of Justice,[19] attribute an exclusive competence to the Community, the EC has to rely on merely concurrent competences in most other legislative areas. This rule applies also where matters coming within the scope of the Community's concurrent legislative powers concern relations with third countries. Applying the principles developed in the *ERTA* case,[20] as long as the Community does not use its internal powers under the EEC Treaty, it is still possible for Member States to exercise their foreign relations powers and enter into agreements with third countries or international organizations. Conversely, once the EEC has enacted internal legislation, the foreign relations power will have to be exercised by the EC as well. Member States may then no longer interfere in the internal policy-making process within the Community by concluding agreements with third countries whenever the EC has made use of its competence exhaustively.[21] The ERTA principles have, however, been interpreted restrictively in the Court's recent case-law[22] and still give rise to controversy in interpreting the doctrine.

19 *Donckerwolcke*, case 41/76, [1976] ECR 1921 at 1937.

20 *Commission* v *Council* (ERTA), case 22/70, [1971] ECR 796. For the most recent discussion see Gilsdorf, 'Portée et délimitation des compétences communautaires en matières politiques et commerciales', *RMC* (1989) 195 and the contributions of Lenaerts and Ehlermann to P. Demaret (ed.) *supra* note 11, 37 and 79.

21 For a detailed discussion of the controversy over whether the EC's powers have been used exhaustively or only selectively, leaving room for internal or external action by the Member States, see Lenaerts, 'Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de "preemption"', in P. Demaret (ed.) *supra* note 11, at 37, 43; see also H.-J. Glaesner, 'Les perspectives pour le développement futur d'une politique étrangère européenne: quelques considérations juridiques', in J. Schwarze (ed.), *The External Relations of the European Community, in Particular EC-US Relations: Contributions to an International Colloquium held in Florence on 26-27 May, 1988* (1989), 61, 63.

22 *Bulk Oil*, case 174/84 [1986] ECR 559, the Court upheld an internal quantitative restriction by the UK concerning the export of oil to Israel. The Court held that the EC Israel Agreement of 11 May 1975 had not ruled on that question and that the internal EC legislation on exports did not apply to the export of oil (Council Regulation No. 2603/69, OJ (1969) L 324/25); see Lenaerts' analysis, *supra* note 11, at 53, concluding that the Court opted for a case of "selective exclusiveness" in the field of the CCP; in addition, see the Declaration annexed to the Final Act to the SEA underlining the continuing validity of the ERTA doctrine. This Declaration would not have been necessary if some of the Member States had not intended to limit the scope of this principle at least with respect to the protection of the environment.

The creation of the internal market depends upon the prior adoption of a multitude of legislative acts stipulating common policies for the various sectors of economic activities. Once this legislative programme has been adopted , the Community will have become competent and responsible to deal with third countries and to enter into binding agreements. As a result the international role of the Community will be stronger by 1993 once the common policies necessary for the completion of the internal market have been adopted. In conformity with the Community's obligation under the GATT, the internal rules on the trade in goods will have to be dealt with separately from the trade in services, for which – so far – binding commitments still have to be negotiated in the Uruguay Round.

b) The Free Movement of Goods

Much of the internal legislative programme has to do with the free movement of goods (e.g. customs legislation, trade marks etc.). In principle, the implementation of the internal market rules will not affect the conduct of the external CCP, as it is laid down in the EEC Treaty – with at least one important exception which relates to Art. 115 EEC Treaty.

Under this Article the Commission can authorize Member States to take national protective measures in order to ensure that the execution of measures of commercial policy taken in accordance with the CCP is not obstructed by deflection of trade and does not lead to economic difficulties in any Member State if the measures taken differ from each other.

Thus a great number of quantitative restrictions have been authorized to be applied at the internal border between the EC Member States. The continuation of such national quantitative restrictions will be incompatible with the disappearance of physical, technical, financial and fiscal frontiers between the Member States. Consequently, the Commission is intent on putting an end to the system of authorized national measures. Since the entry into force of the SEA, the Commission has already succeeded in reducing the number of authorizations given under Art. 115.[23] At the end of 1988 there were still national restrictions in force which concerned 22 sensitive products (two-thirds of which were textiles) imported from some thirty countries.[24]

23 In 1979, there were still 260 national measures in force out of which 3/4 referred to textiles. In 1987, the Commission still authorized 157 measures: for further details see Cova, '1992 et les pays tiers', *RMC* (1988) 430, and Mattera, 'L'achèvement du marché intérieur et ses implications sur les relations extérieures', in P. Demaret (ed.) *supra* note 11, 201, 212. An even more restrictive policy has been announced by the Commission's Decision (EEC) 87/433 of 22 July 1987 on surveillance and protective measures which Member States may be authorized to take pursuant to Article 115 of the EEC Treaty, OJ (1987) L 238/26.

24 More details are given in C. Neme, '1992 et la clause de l'Article 115: A Quand une politique commerciale commune?', *RMC* (1988) 578.

It is difficult to predict when and under what conditions the Commission will be able to abolish all national quotas, which – in the end – would give a net-advantage to the respective third countries. It cannot be ruled out, however, that some "hard core" national quotas in industrial manufactures will have to be replaced by new community-wide quantitative restrictions – provided that these restrictions are justifiable under the GATT.[25] They could only be imposed for a limited period of time and only with a steadily decreasing effect. Much, however, will depend on the attitude of the respective third countries and whether their exporting industries are willing not to take advantage of the situation by abruptly increasing exports into the Community. Voluntary export restraints in certain sensitive areas could help the Community to overcome difficulties during the time which will be required to adjust the formerly protected national markets.[26]

The policy of phasing out the various measures under Art. 115 will particularly affect three areas. In the textile industry, which is governed by the Multi-Fibre Arrangement,[27] numerous national quotas exist and will have to be abolished by the end of 1992.[28] The realization of this objective is linked to the outcome of the ongoing Uruguay negotiations which could result either in a prolongation of the Multi-Fibre Arrangement (IV) or in the textile industry being reintegrated into the overa^5ll GATT system.[29]

Similar problems will have to be solved with regard to the Protocol on German Internal Trade, annexed to the EEC Treaty. This Protocol has thus far authorized each Member State to take "appropriate measures" to prevent any difficulties from arising out of the German Internal Trade. Such unilateral quantitative measures similar to those under Art. 115 will not be operative in a market with no internal frontiers. It will be the responsibility of the Federal Republic of Germany to adopt appropriate measures which can ensure that the internal market will not suffer any setbacks on account of the exchange of goods within the framework of the German Internal Trade.

An even more delicate situation will arise in the field of banana imports. Here a Protocol to the Lomé Convention (now Lomé III) guarantees bananas from certain ACP Countries free access to their traditional European markets (for example bananas from Cameroon, the Ivory Coast, Guadeloupe and Martinique to France).[30]

25 EC Member States which have no quantitative restrictions *vis-à-vis* third states would be opposed to any new community-wide import restriction as this would hinder the procurement of certain low-priced goods from third states.

26 Thus, the Commission envisions a transitory arrangement with Japan to limit its exports of cars to 10% of the European market once the national quantitative restrictions having been lifted: see Neme, *supra* note 24.

27 See Council Decision of 24 November 1986 extending the Arrangement Regarding International Trade in Textiles (MFA) until 31 July 1991, OJ (1986) L 341/33.

28 According to Neme, *supra* note 24, at 581, in 1987 105 (out of a total of 157) national measures had been authorized within the sector of textiles (in 1979, still 199).

29 See Tang, 'Textiles and the Uruguay Round of MTN', *JWT* (1989) 51.

30 OJ (1986) L 86, 1, 160 , Protocol 4.

These special preferences were upheld by special authorizations under Art. 115 in order to avoid the re-exportation of such bananas to other EC Member States for which the CCT on bananas is applicable (for example Benelux).[31]

Any Community-wide quota to be introduced before the end of 1992 would require Community-wide rules of origin. The traditional and basic rule is that a product is held to be of Community origin if the "last substantial process or operation that is economically justified" has taken place in the Community.[32] There are no indications that the EC intends to change this rule. The EEA does not refer to this question. However, given a great number of new products developed under new technologies, the Community will have to apply its rules of origin and will have to interpret these rules as, for example, what may be meant by "the last substantial process or operation" in the case of the production of chips or other products.[33] The ECJ, answering the question whether chips are of foreign or community origin, has laid down the limits for the EC Commission's powers to issue implementing regulations on the interpretation of the Council's Regulation No 802/68.[34] The language, at least, of the SEA, does not hint at any solution to the heated controversy over, for example, a product's required local content and thus to its origin. Again, a common understanding between the Community and its trading partners appears to be necessary.

Even if measures pursuant to Art. 115 will have been phased out by 1992, it is not yet clear whether and how Art. 100A(4) and 100B(2) will become operative. These rules allow any Member State to continue to apply national rules if the Council, by majority vote, either has decided on the harmonization of rules under Art. 100A(1) or has decided on a system of mutual recognition of rules for the period beyond 1992 (Art. 100B(1) and (2)). Such a differentiated application would have to be justified either on the grounds of "major needs referred to in Art. 36 ", or in terms of environmental protection or working conditions. Thus far, the Member States have apparently not invoked the unilateral escape-clause under Art. 100A(4)

31 According to Faber, 'Lomé Trade Preferences, the Uruguay Round and the EC Internal Market', *World Competition* (1989) 55, the Uruguay Round will lead *inter alia* to a general liberalization of trade in tropical products and thus to an erosion of the above mentioned preferences. Though it is an open question whether bananas will be affected by the Uruguay Round negotiations, the creation of the internal market will very much endanger the traditionally privileged trade relations. The Lomé IV Convention will probably have to replace the former preferential market access to the EC by measures of compensation (aid): See McMakon, 'The Renegotiation of Lomé: Inventing the Future', 14 *ELR* (1989) 140, 142, and Agence Europe, No 5094 of 21 September 1989, 9.

32 See Art. 5 of Council Regulation (EEC) No 802/68 of 27 June 1968, OJ L 148/1.

33 See, e.g., Commission Reg. (EEC) No 2071 of 11 July 1989 OJ L 196/24 defining rules of origin for certain photocopiers; see also Agence Europe No 506 of 20 July 1989 on Italian demands for a local content of 80 percent for cars to be considered Community products; see also case 26/88, *Brother Int.* v *Hauptzollamt Gießen* (still pending).

34 See ECJ 31 January 1979, *Yoshida* v *Kamer van Koophandel*, case 34/88 [1979] ECR 115.

EEC Treaty. But any future application may affect third countries and could be interpreted as a measure of nationally disguised protectionism.[35]

Apart from the gradual phasing out of national quantitative import restrictions, a special benefit for third countries and their exporting industries will emerge from the completion of the internal market in that the harmonization of technical standards and other rules will benefit the free movement of goods *irrespective* of their country of origin. For example, the Community has already extended autonomously the regulation introducing a Single Document for goods in transit to goods originating from third countries.[36] By Convention of 20 May 1987, the Community entered into an agreement with the EFTA countries on these rules and also agreed to a common transit procedure.[37] Art. 100B provides that the Council may decide on a system of mutual recognition of all standards which have not been unified by the end of 1992.[38] This means that all exports into the Community will have to observe either the newly harmonized rules or just the specific technical norms of any one of the Member States in order to be marketed throughout the Community. As a rule, Member States did not attempt to uphold discriminating norms and standards for goods originating from third countries when they were obliged to accept harmonized rules within the Community.

The benefit of a single set of norms and technical standards will descend as a windfall profit on third countries so that it would only be logical for the Community to ask its trading partners for equivalent advantages where they might not exist by the end of 1992.[39] Finally, the Community's foreign relations power in the field of technical norms and standards will have materialized by that time.[40]

35 It would be the Commission's task to confirm such unilateral measures after having verified that they do not constitute a form of disguised restriction on trade or arbitrary discrimination. In addition, the Commission or a Member State (but not a third country), derogating from Articles 169 and 170, can directly bring the matter before the Court "if it considers that another Member State is making improper use of the powers provided for in this Article." It is not yet clear whether a Member State would also acquire the foreign relations power parallel to the national measures. The language of Art. 100 A (4) only mentions the internal national provisions. C.D. Ehlermann *supra* note 10, at 88, clearly denies that such a parallel external power could exist. However, unless the EC has committed itself in its international relations, the respective Member State may enter into agreements with third states. It is inconceivable that unilateral measures taken under the authority of Art. 100A(4) would not equally affect goods from third countries which are imported into the Community.

36 Council Regulation (EEC) No. 1900/85 of 8 July 1985 introducing Community export and import declaration forms, OJ (1985) L 179/4.

37 See Council Decision of 15 June 1987 concerning the conclusion of the Convention on a common transit procedure, OJ (1987) L 226/1.

38 See Mattera, *supra* note 24, at 203, 215-17, 220; this principle is in line with the *Cassis de Dijon* judgment of the ECJ, case 120/78 [1979] ECR 649, as well as with the White Paper of 1985, *supra* note 15, under No 77.

39 See Krenzler, 'Zwischen Protektionismus und Liberalismus. Europäischer Binnenmarkt und Drittlandsbeziehungen', *Europa-Archiv* (1988) 241-248, at 243.

40 See the still mixed conclusion of the relevant codes of the Tokyo-Round, Mattera *supra* note 24, at 201, 217.

c) The Free Movement of Services

The free movement of services is another task high on the agenda of the Community's legislative programme for 1992. Save for some basic community-wide rules which have to be adopted for the various service sectors, such as banking and insurance, a system of mutually recognized rules and regulations will emerge. This legislative approach goes further than granting just "national treatment", and it would allow services originating in one Member State to be freely offered in any other Member State of the Community.

The SEA does not prescribe rules with regard to services offered from third countries. Rules of access to the internal market still need to be defined. The Act does not distinguish between persons or companies providing services inside the Community on account of their nationality. The question of access for financial services originating from third countries therefore remains open. Services have not been covered by any multilateral agreement and do not yet form part of the GATT's arrangements. Therefore, the Community is still free to regulate the operation of various service sectors on the emerging internal market. This will also involve a decision on how and under what conditions foreign operators should be given access.

A Commission's proposal of 1984 for a Second Banking Directive[41] stipulated that foreign banks should only be granted access by having their subsidiaries licensed when the foreign subsidiary's national government accords "reciprocal treatment"[42] to EC operators on its banking market. This "reciprocity" requirement as opposed to a demand for merely 'national treatment' worried in particular many commentators from third countries who feared, for example, that American banks would automatically be denied access to the frontierless and deregulated European market after 1992, since in the U.S. foreign operators, if licensed in one state, cannot do business in the other 49 jurisdictions because of the prohibition on inter-state banking and other restrictions.[43]

Meanwhile, the Commission toned down its requirements in a revised proposal which led to a "common position" of the Council in July 1989.[44] This position suggests that Member States should in general license any foreign operator without first establishing whether "reciprocal treatment" is guaranteed to Community banks.

41 Commission Proposal for a Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the activity of credit institutions, OJ (1984) C 84/1.

42 See Art. 7(5) of the Commission's proposal.

43 See Fine, 'The Second Banking Directive. A Practical Overview', *JIBL* (1988) 197, 199 and Horn, 'Bankrecht auf dem Wege nach Europa', *Zeitschrift für Bankrecht und Bankwirtschaft* (1989) 107, 113.

44 Published in *Zeitschrift für Bankrecht und Bankwirtschaft* (1989) 142.

Thus, no change in the existing rules is envisaged.[45] The Commission, however, would have to draw up regular reports on the degree of access granted to Community banks by the various foreign governments concerned. If it finds that third countries do not offer "effective access" for banks from Member States of the EC comparable with the conditions under which third country banks may operate within the Community, it will then open negotiations with a view to improving the access of Community banks on the foreign market.[46] The Community thus has moved to a compromise solution which seeks to strike a balance between outright demands for at least equivalent access which comes close to "reciprocal treatment", and just national treatment.[47]

In any event, the Uruguay Round will have to decide whether the internal market could serve as a model of a world-wide services regime. The Mid-Term Review Agreements of the Uruguay Round of 5-8 April 1989 state rather diplomatically that a system of "effective market access, including national treatment" for foreigners offering services should be agreed upon.[48] The SEA and its internal market favours, in general, a liberal approach. However, third states have to be aware that, in specific fields, exceptions to this general approach may occur at any time. This is, for example, the case in the field of television,[49] in which rules providing for a quota for films of European origin have been adopted.[50]

The foregoing considerations have shown that the final shape of the rules governing the internal market will also depend to a large extent also on the attitude displayed by the Community's trading partners towards offering equivalent and effective access to their markets. Moreover, the completion of the internal market will bring about an improved standard of competitiveness in some – until now heavily protected – Community industries by holding the prospect of economies of scale. To what extent this may have an effect on the EC's role on third markets and thus allow a more liberal Common Commercial Policy is not so much a legal as an economic question which will be discussed briefly in Part IV.

45 See Council Directive 77/780 (CEE), OJ (1977) L 322, 30.

46 According to recent estimates, the Commission would have to put 26 – mainly East Asian and South American – countries on such a list, as their markets are practically closed to foreign banks: see *Financial Times* 17 August 1989, 1.

47 For various and irritating notions of "reciprocity" which are used in the ongoing negotiations see the "Reciglossary" in *The Economist*, 8 July 1989, 37. C. Rhodes, 'Reciprocity in trade: the utility of a bargaining strategy', *International Organization* (1989) 273, argues that "reciprocity is useful in achieving cooperative outcomes." See also Bhagwati and Irwin, 'The return of the Reciprotarians – U.S. Trade Policy Today', *World Economy* (1987) 109, and forthcoming Curzon and Curzon-Price, 'The GATT, Non-Discrimination Principles and the Rise of "Material Reciprocity"' in *International Trade, Colloquy in Bruges* (Sept. 1989). For the concept of "reciprocity" and "Community preference" in the field of public procurement, see the most recent Directive adopted by the Council on 22 February 1990 (not yet published).

48 See News of the Uruguay Round, NUR 027 of 24 April 1989, 39 (MTN TNC/10).

49 It is understood that rules on goods (as under GATT!) as well as the expected rules on services are applicable to "films."

50 See the much disputed Council Directive on TV Broadcasting of 3 October 1989, OJ (1989) L 298/23.

2. New Competences for the EC: Parallel Powers

The SEA recognizes new areas of concurrent competences for the Community (environment, research, health and working conditions, regional and monetary policies). In all these fields, the Community had already taken action on the basis of Art. 235. The formal recognition of these competences by the SEA will make it easier for the Community to develop more coherent internal policies. Though the SEA does not mention the foreign relations powers in these fields, with the exception of the areas of research and environment, the Community will be able to cooperate in these matters as well with third countries as with international organizations. As has been noted above, internal powers conferred upon the Community imply parallel external powers. However, unless the Community has taken action under these implied external powers, the Member States still may conclude international agreements and negotiate in international bodies. They have to take into account any future activity of the EC in the sphere of its concurrent powers and have to provide, for example, together with a given third state that an envisaged bilateral agreement should not frustrate any future activity of the EEC in this field. This obligation follows from Art. 5(2) EEC Treaty. Finally, Member States are preempted only when the Community has exercised its external powers.[51]

Concerning environmental protection, for example, Art. 130R(5) explicitly authorizes the Community to conclude international agreements – "without prejudice to Member States' competence." This wording is rather obscure and has already led to diverging interpretations.[52] In addition, the Community may only use its powers under Art. 130R if it is found that the environment can be "better" protected by Community measures than by measures adopted by the individual Member States. With respect to third countries, it remains to be seen to what extent the Community will be able to negotiate agreements. According to Art. 228(1), international agreements are concluded by the Council, which implies the consent of the EC Member States. This consent may be more easily obtained if the Member States could be assured that the Court of Justice would give a narrow interpretation with regard to the preemptive effect of such agreement concluded by the Council. A pragmatic approach, including the negotiation and conclusion of mixed agreements, might eventually prevail even after 1992.

51 This division of powers in the external field follows from the case-law of the ECJ in the cases *ERTA*, *Kramer*, and in Opinion 1/76: for a discussion see the contributions of Ehlermann and Constantinesco in P. Demaret (ed.) *supra* note 11.

52 See D. Simon, *supra* note 10, at 302, and the contributions of C.D. Ehlermann and V. Constantinesco, *in* P. Demaret (ed.) *supra* note 11, 69 and 83. See also Grabitz and Zacker, 'Die neuen Umweltkompetenzen der EWG', *NVwZ* (1989) 297, 302.

3. Modifications to the Decision-Making Process

One of the major achievements of the SEA lies in a cautious reform of the decision-making process. Three aspects in particular may in the long run affect third countries.

The first concerns voting procedures in the EC Council. The SEA provides for more cases in which the Council may act by a qualified majority. This applies mainly to the field of harmonization of technical rules and norms which will bear directly on the future shape of the internal market (Art. 100A). The possibility of qualified majority decisions had already been envisaged in other provisions of the EEC Treaty – for example in Art. 113(4) for the CCP. Though the Council, in practice, has taken majority decisions in budgetary matters and foreign trade relations, it was, at least, reluctant to decide by a majority vote before the adoption of the SEA.

From a third country's point of view, the impact of the new and expanded voting practices may be felt mostly in decisions on such sensitive issues as the use of trade instruments,[53] in decisions relating to the trade negotiations within the GATT framework, or in any procedural decisions as part of the GATT dispute settlement procedures. In all these areas, the Council has, since the SEA took effect, shown less reluctance to practice majority voting.

Moreover, experience under the SEA has apparently confirmed the observation that it has become more and more difficult for one Member State to block majority decisions in the Council by using a veto. That has not only been the experience of the United Kingdom government,[54] but also of other Member States' governments who had to discover the impossibility of upholding an isolated veto in the face of a united block of eleven governments determined to arrive at a decision.

Yet, however efficient the decision-making process within the Council may have become, it still cannot be compared with the decision-making capacity the long-established national government enjoys. Even if the Council continues to apply majority voting, it is by no means clear whether – after 1992 – the free traders or the traditionally more protectionist oriented members will prevail.

A second important reform on the decision-making process relates to the growing influence of the European Parliament (EP) and the Commission. Under the new procedure of cooperation inserted into Art. 149, any proposal from the Commission will carry much greater political force by the time it has reached the Council than in

53 See Art. 12 of Regulation (EEC) No. 2641/84 (so called "New Instrument"), OJ (1984) L 252/1, and for the final decision on anti-dumping tariffs of Art. 12 (1) of Regulation (EEC) 2423/88 which provides for a qualified majority in the Council: OJ (1988) L 209/12.

54 See the opposition of the United Kingdom government to further moves toward monetary union and the final decisions of the Madrid summit on 26-27 June 1989, *Europa-Archiv* (1989) D 401.

the past.[55] While the cooperation procedure is not applicable to the CCP, it applies to harmonization measures under Art. 100A in which the EP together with the Commission may eventually force the Council either to accept a submitted proposal without modification or to take no decision at all. First experiences seem to support the assumption that this procedure, though rather complicated and hence not very transparent, is highly efficient and has afforded the EP and the Commission considerably more leverage in the Community's decision-making process.[56] In dealing with legislation for the establishment of the single market, the Commission accepted 77 per cent (462) out of 603 amendments adopted by the EP in the first reading, whereas the Council, for its part, approved about 50 per cent of the amendments (July 1987 – October 1988).[57] For third countries, the essential question has to be whether, in the end, their relations with the EC will benefit from the Commission's and Parliament's new powers in the sense of a more liberal trade policy that can fend off any protectionist pressures from less competitive industries within the EC Member States. The answer to this question, however, cannot be derived from a legal analysis of the SEA.

The third aspect of the revised decision-making procedures concerns the probable increase in executive powers to be transferred to the Commission under the amended Art. 145. In view of the large amount of legislation necessary for the completion of the internal market, a more decentralized method of legislation and law-enforcement will have to be designed. According to Art. 145, the Council is under a legal obligation to delegate to the Commission certain executive powers. In passing Decision No. 87/373 on the so-called "comitologie",[58] the Council recognized the Commission's elevated standing as one of the holders of executive power under Community law. At the same time, it nevertheless laid down institutional mechanisms which guarantee that Member States will be able to intervene in the Commission's decision-making process where conflicts arise.[59] In spite of this seemingly contradictory redistribution of powers, the Commission will henceforth be in a position to speak with significantly broadened executive authority when determining the day to day management of the CCP or detailed harmonization measures.

But vesting more executive powers in the Commission does not imply *per se* a substantial revision of the Community's trade policies in one way or another, since,

55 See Bieber, 'Das Gesetzgebungsverfahren der Zusammenarbeit gemäß Art. 149 EWGV', *NJW* (1989) 1395, 1402.

56 For a first assessment of the new procedure of cooperation see Blumann, 'Le pouvoir exécutif de la Commission à la lumière de l'Acte unique européen', *RTDE* (1988) 23-59, and Bieber, 'Legislative Procedure for the Establishment of the Single Market', 25 *CML Rev.* (1988) 711-714.

57 This statistic is analyzed cautiously by R. Corbett, 'Testing the New Procedures', *Journal of Common Market Studies* (1989) 359 (364).

58 OJ (1987) L 197/33.

59 The Court of Justice rejected – on procedural grounds – a complaint by the EP against the Council which was directed against the degree to which Member States can take part in the

as in the Council, various economic philosophies and political tendencies are represented within the ranks of the Commission. In contrast to the Council, however, the Member States' influence on the Commission itself is less strong, since the Commissioners are protected by a guarantee of independence under primary Community law.[60]

A clearer picture of how third countries might be affected by the reformed decision-making process under the SEA can be obtained by examining the modified rules which govern the negotiation and conclusions of accession or association agreements[61].

4. Accession and Association Agreements : A New Responsibility for the EP

Art. 237 and 238, as modified by the SEA, provide for the EP's express assent prior to the conclusion of any agreement of accessions or association. Initially, the EP's new involvement was held to be rather meaningless. Indeed, assuming that all EC Member States consent to the accession of a new Member State, it is difficult to conceive how the EP could block such an intended accession by refusing to lend its approval. However, the EP would certainly try to influence the conduct of the negotiations by attaching certain conditions to its assent.[62]

In the case of association agreements pursuant to Art. 238, the EP has already proven its political strength and independence by initially declining to give its assent to three protocols which were to be annexed to the Association Agreement with Israel.[63] Since 1 July 1987, the EP has debated 31 other proposals concerning agreements of association (up to December 1988).[64] In all these cases, the EP eventually gave its assent, but – as happened in the case of the agreement with Israel – it is likely that the EP will put to use its recently gained political prestige by making

Commission's decision-making: case 302/87, Judgment of 27 September 1988, not yet reported.

60 See Art. 10(2) subpara. 1 of the Treaty establishing a single Council and a single Commission of 8 April 1965.

61 Art. 130 N (2) and Art. 130 Q (2) require the application of the cooperation procedure under Art. 149 whenever international agreements in the field of research and technological innovation are to be concluded. For a discussion as to how this procedure of cooperation could influence the conclusion of an agreement within the framework of Art. 228, see V. Constantinesco, *supra* note 11, 74.

62 V. Constantinesco, *supra* note 11, 74 seems to express doubts whether it is the role of the EP or of any other national parliament to become responsible for international negotiations as "quasi-négotiateur."

63 See Decision on the Conclusion of a Fourth Additional Protocol to the Agreement between the European Economic Community and the State of Israel, OJ (1988) C 94/55. The protocols finally received their parliamentary assent on 12 October 1988, see OJ (1988) C 290/59: see Perrakis, 'Les relations extérieures de la Communauté européenne après l'Acte unique européen', *RMC* (1989) 488, 493.

64 See Corbett *supra* note 57, at 359.

such a vote conditional upon the observance of human rights and the adherence to a democratic foundation of government in the respective third countries.[65] However, it may already be foreseen that there will be political pressure by some EC Member States to base EC agreements more on Art. 113 and 114 which does not provide for any formal participation of the EP.[66] In addition, there is no reliable case-law as to the dividing-line between agreements on association and agreements on trade issues.

5. The Inclusion of the European Political Cooperation

The formal inclusion of the European Political Cooperation (EPC) into primary Community law[67] constitutes an attempt to render the EC's and the Member States' actions on the international plane more effective. To this end Art. 30(2A) SEA seeks to achieve a higher degree of coherence in the external policies of the EC and the EPC. Member States acting either through the EC Council or the EPC are under an obligation "to ensure that common principles and objectives are gradually developed and defined." A new *European identity* could emerge from this reform and could give further impetus to the actions undertaken by the EC in foreign affairs. Despite the linkage between the EPC and the EC, the legal quality of the EPC was not changed.[68] In the future, it will be impossible to join the Community without adhering to the EPC at the same time. No Member State can cancel the EPC unilaterally. Thus, Austria under the new regime of the SEA would not be able to become a member solely to the three Community treaties without accepting at the same time obligations under the EPC.[69]

In conclusion, one can identify as the SEA's main aim the construction of an internal market the results of which will be a growing economic interdependence between the 12 Member States. In other words, the SEA's thrust is not towards a reform of the EC's external relations, although implicitly it does carry a number of legal implications for third countries. These will follow either from the very creation of the internal market, the improved decision-making process, or from the inclusion of the EPC into the Communities' framework. The degree to which third

65 H.J. Glaesner, *supra* note 20, at 62, reaches a similar conclusion.

66 Instead, the EP is associated to the negotiating process on the basis of an informal inter-institutional arrangement, i.e. the so-called "Luns/Westersterp-Procedure"; see, S. Perrakis *supra* note 63, at 492.

67 See Art. 1(2) and 30 SEA.

68 According to Art. 30(2)(C) SEA, which confirms existing practices, Member States are only obliged "to give due consideration to the desirability of adopting and implementing common European positions" when formulating their national foreign policies.

69 See Krenzler, 'Die Einheitliche Europäische Akte auf dem Weg zu einer gemeinsamen europäischen Außenpolitik', *EuR* (1986) 384 (388). On the problems associated with Austrian neutrality see Hammer and Schweitzer, 'Das Problem der Neutralität. Österreich und die EG Beitrittsfrage', *Europa-Archiv* (1988) 501-510, who conclude that Austria's accession to the EC is generally compatible with her neutral status. The Austrian government should make a reservation expressing Austria's adherence to neutrality when applying for full EC membership. This the Austrian government did on 17 July 1989, Agence Europe of 17-18 July 1989, No 5059, 7.

countries will become the focal point of legally significant changes to the Community's external policies, emanating from the internal consolidation and reform, will be determined by their own attitude and conduct *vis-à-vis* the forthcoming internal market. It is not at all inconceivable that the SEA's internal liberalization achievements will have an external counterpart with respect to the EC's foreign trade relations. The EC's participation in the Uruguay Round will be the test case and demonstrate whether this proposition holds true.

Apart from these more legal observations there are a number of political and economic assessments, some of which conclude that the EC, after 1992, will concentrate its efforts on building the internal market and will, as a result, be inclined to become more protectionist. It is certainly not for a lawyer to comment on these assertions. Nonetheless, a few political and economic assessments will be mentioned briefly in the following part in order to stimulate further interdisciplinary debate.

IV. Political and Economic Implications of the SEA for Third Countries

As has been shown in the previous sections, neither the language of the SEA nor the Community institutions' official statements on foreign trade relations after 1992 could have provoked the "Fortressphobia"[70] which until recently was rampant in several non-Member States. Due to a general uncertainty as to the final form and content of the internal market, third countries and especially the neighbouring EFTA countries have to rethink their future trade relations with the internal market, currently under construction. They all have to design new strategies to match the presumably improved competitiveness of European industry and to decide whether to continue to operate from outside the Community or to prepare for operations from the inner boundaries of the future internal market. Sales of US multinationals' affiliate companies inside the EC are already six times higher than direct US exports to the EC.[71]

Less specific observations focus not only on the EFTA countries, but on all third countries with which the Community maintains trade relations. They have to decide whether to react with uni-, bi- or multilateral agreements and strategies. The EFTA countries are in a special position, as they are "European" states. For these countries accession to the EC consequently constitutes a valid alternative.

70 See N. Colchester, in *The Economist* (8 July 1989) 6.
71 P. Riddell, in *Financial Times* (8 May 1989) 3.

1. Is the Internal Market About to Become More Protectionist?

Speculation on the future level of protectionism surrounding the completed internal market runs high – especially amongst economists.[72] According to some of these views, the possible gain in competitiveness will not extend to every sector of industry and especially not in less advanced EC Member States. Nevertheless, demands for continued or even higher protection will have to confront pleas for a reduction of tariff or non-tariff barriers in order to open up world markets for the more competitive industries.

Other arguments of rising protectionist tendencies in the EC relate to the vagueness in the Commission's White Paper on domestic subsidies and the continued preferences for domestic industries in the field of public procurement.[73] All these tools of protectionist policies could be used to compensate for both the agreed standstill during the Uruguay Round and any new international agreements entered into by the Community.

However, subsidies handed out by individual Member States are not the issue of the SEA. The unchanged rules in Art. 92 et seq. EEC Treaty continue to be applicable as well as the relevant rules of the GATT Code on Subsidies which concern subsidies both of national and Community provenance.[74] As for public procurement, the internal policy of the EC is directed towards a wide opening of national markets. It is the declared objective of the Community to negotiate with third countries a mutual opening of markets for public procurement within the GATT framework.[75]

Another concern focuses on the possible absorption of the Community's political energies by the creation of the single market, thus leaving not enough room and attention for the current multilateral trade negotiations. According to some inside observers, the Uruguay Round has come to be dominated by initiatives from the United States, while the other contracting parties simply sit back to observe first and react later.

In the case of the EC, one of the reasons for its more defensive attitude is to be found in its decision-making process which is far less efficient than the one practiced by other individual contracting parties.[76] One could ask of course if it is not in the first place the Community's priority to create and stabilize the internal market before embarking on a new project of opening up world markets elsewhere?

72 See Hamilton, 'Protectionism and European Economic Integration', EFTA Bulletin 4/87, 6 From a legal point of view it is impossible to assess the economic effects of trade policy measures adopted on the basis of the various trade instruments.

73 Bulletin EC, supp. 6 /88, Communication of the Commission of 11 October 1988 on public procurement in sectors which had been exempted so far from the liberalizing EC directives (water, energy, transport and telecommunication).

74 See Art. 7 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, BISD 26S/67.

75 See Bulletin EC, supp. 6/88, 63 and 76 as well as the discussions within the Uruguay Round on the Government Procurement Code in the MTN Agreements and Arrangements Group.

76 See *supra* note 54 and accompanying text.

Yet, it appears that the major negotiating tasks of opening up markets both inside and outside the EC are intrinsically linked to each other. From a world-wide perspective the EC is still the one trading block that relies most heavily on a prospering world trade to which it contributes more than 40%. Although the SEA does not refer to external policies, every step in the completion of the internal market will inevitably be accompanied by considerations on its possible external effects on industries whose survival hinges on good trade relations with third countries. For the Uruguay Round the final conclusion has been set for the period of 26 November to 8 December 1990.[77] This chronological separation from the final completion of the internal market by the end of 1992 may well be indicative of how much the Community's trading partners have become confident that the internal market will not be more protectionist than the present-day EC and, more importantly, that it will allow the EC to act in conformity with any agreement on world trade liberalization which would materialize from the Uruguay Round.

2. The Effects on EFTA Member States

The EFTA Member States, the Community's European and most important trading partners, are closely linked to the Community by bilateral preferential Free Trade Agreements, and will be confronted with the dilemma of whether to acceed to the EC or to stay outside. Since an accession to the Community is discussed as a feasible solution to the problems posed by the internal market in only two countries,[78] a further analysis of viable alternatives for some or all EFTA Member States is clearly called for.[79]

The Joint Declaration of Luxemburg of 9 April 1984, adopted by the foreign ministers of the EC and the EFTA Member States as well as the EC Commission, proclaimed the aim of creating a " dynamic European Economic Space." Similar to the "European Union", this new concept lacks any precise substance, but sets out a political objective for whose attainment common procedures have been agreed upon. Since 1984, a number of working groups have taken up sensitive economic issues in the EC EFTA relations, some of which have already resulted in common agree-

77 See *supra* note 7.

78 Austria deposited its EC membership application on 17 July 1989. Norway is considering a decision on a possible accession, but not before the year 1993. The discussion in Switzerland is centered on alternative strategies which will not lead to a formal accession. For an overview of the discussion in the various EFTA countries see Kohl, 'Von der Süderweiterung der EG zur EFTA-Erweiterung? Die Vorreiterrolle Österreichs', *Europa-Archiv* (1988) 359-371; on the attitudes in Switzerland with a particular reference to the aftermath of the referendum on the UN membership see Landau, 'Das Verhältnis der Schweiz zu den Vereinten Nationen und zur Europäischen Gemeinschaft', *Europa-Archiv* (1988) 359-368.

79 See Nell, 'Stratégie des pays de l'AELE face au marché interne de la CE: de la voie universelle à l'adhésion', *RMC* (1988) 571; R. Senti, *EG, EFTA, Binnenmarkt* (1989) 138, and *Schweiz-EG* (1988) 25, discussing alternatives for Switzerland.

ments between the EFTA Member States and the EC.[80] The EFTA Council has been studying the means of a "structured partnership" which could even lead to an institutional framework with delegated executive powers[81] to decide on important harmonization measures.

The various alternatives to accession may be classified according to whether they bind the EFTA Member States to the EC process of completing the internal market by way of uni-, bi-, or multilateral agreements.

a) Unilateral measures may be taken autonomously by each EFTA Member State. Using this system of "mirror legislation", EFTA Member States may want to adopt the same rules which have been introduced in the EC – including their future amendments.[82] This concept would assure all EFTA Member States of their autonomy. However, the content of the relevant rules would not reflect the particular country's specific needs, as the latter cannot be taken into consideration for lack of an agreed form of institutional cooperation with the Community institutions. In addition to this loss in sovereignty, EFTA Member States will have no guarantee that the EC will give recognition to the rules and standards adopted autonomously by the EFTA Member States. It goes without saying that the unilateral approach will not turn out to be very satisfying unless a guarantee of reciprocal recognition can be obtained from the EC.

b) Bilateral agreements between the EC and individual EFTA Member States may be concluded either in the field of specific economic policies or on specific trade issues. Such "bridging arrangements" will provide a completely reciprocal treatment, as in the case of the Agreement between the EC and Switzerland on specific aspects of direct insurance (except for life insurance) signed in October 1989.[83] Given the multitude of legislation still necessary to implement the internal market, it would perhaps be more reasonable to reach a more general agreement, possibly an umbrella agreement (Mantelvertrag) which sets out the conditions under which Community legislation would be adopted by the respective EFTA Member State.

Such an umbrella agreement could take into account the specific needs and political circumstances of each EFTA Member State. On the one hand, it would have to

80 See the Joint Declaration of 15 June 1988 of Tampere mentioning agreements on the notification of new technical rules, on the mutual recognition of testing procedures, on common rules of origin, on the elimination of export restraints, on certain aspects of customs legislation as, e.g., the Convention on the Simplification of the Formalities in Trade in Goods, *OJ* (1987) L 134/1. For further issues under discussion see *Europa-Archiv* (1988) D 572 and *Europa-Archiv* (1989) D 429.

81 See the Communiqué of the EFTA Council Meeting on 13-14 June 1989 in Kristiansand (Norway), *Europa-Archiv* (1989) D 426; for the respective positions taken by the various working groups see Agence Europe No 5124 of 2-3 November 1989.

82 Krenzler, 'Zwischen Protektionismus und Liberalismus. Europäischer Binnenmarkt und Drittlandsbeziehungen', *Europa-Archiv* (1988) 241-248, at 248.

83 Agence Europe No 5108 of 11 October 1989, 7/8.

lay down minimum requirements for the direct applicability of all rules agreed upon. On the other, it would have to arrange for dispute settlement procedures which would guarantee the effective and reliable application of all rules covered by such an agreement. In order to ensure that the specific objective of paying due attention to the EFTA Member States' interests can be attained, such an umbrella agreement would have to install some form of an inter-institutional cooperation. Even better would be a pre-institutional cooperation in order to guarantee that the single EFTA Member State may be allowed to participate in the rule-giving process within the EC. But once the EC would have adopted a specific legislation, as for example under Art. 100A or in the field of services, the EFTA Member State would not be able to negotiate the content of such legislation any more. However, such a "structured partnership", as it is now being envisaged in the EC EFTA relations,[84] would require a joint strategy by all EFTA Member States, culminating in a permanent multilateral framework, if it were to reach a satisfactory level of effectiveness.

c) A multilateral approach, which is favoured by the EFTA Council,[85] could produce EC EFTA agreements either on specific sectors[86] – or an all-embracing treaty creating a customs union or even further an economic union between the EFTA and the Community.[87] Agreements on services, capital, or the free movement of workers could follow. This approach would amount to forging simultaneously the European Economic Space and the internal market.

Yet, a multilateral agreement that would allow the abolition of border controls for at least industrial goods, would entail far-reaching changes in the internal legislation of an EFTA Member State.[88] A customs union would mean, first of all, that the EFTA Member States would have to follow the EC's Common Commercial Policy. They would have to apply not only the Common Custom Tariff, but also any non-tariff barriers erected against imports from third countries into the EC. Secondly, EFTA Member States would have to apply the various preferential association agreements concluded by EC, e.g., with the ACP states, and the more informal agreements on export restraints which exist between the EC and other trading partners. Given the bulk of legislation vital to an effective customs union, any multilateral agreement would have to include a rudimentary set of common institutions with the purpose of guaranteeing at least prior consultation. Only by creating such a multilateral "structured partnership" could the European Economic Space be attained.

84 See the Conclusions of the Meeting of the EFTA Ministers and the Vice-President of the Commission of 14 June 1989 in Kristiansand (Norway), *Europa-Archiv* (1989) D 428.

85 See Communiqué of 13-14 June 1989, Meeting in Kristiansand, *Europa-Archiv* (1989) D 426, under 7.

86 See *supra* note 80.

87 Agence Europe 26 July 1989, 9. See also R. Senti, *Schweiz-EG* (1988) 34, and 'Switzerland in the European Integration Process', Contribution to be published by the Royal Institute of International Affairs, London 1989/1990 under the title "The Wider Western Europe."

88 See Senti, *Schweiz-Eg*, *supra* note 87, at 34, and Hamilton *supra* note 72.

It is difficult to imagine how a more extensive system of interferences with the EC's decision-making process, such as a system of prior consent by the EFTA countries, could be workable. The impossibility of implementing such a scheme becomes all the more obvious if one looks at the various common policies provided for in the EC founding treaties as a whole. The EC's Common Commercial Policy, for instance, forms a constituent part of the EEC Treaty and connects foreign trade relations to the whole process of economic integration. As such it has to be seen as an integral part of the Community's legal system, which guarantees to every Member State the uniform and effective application of the entire EC law. But EC Member States continue to have different commercial interests and priorities. A specific policy under the CCP is often geared to the interest of only some of the Member States. The solidarity of less interested Member States can only be secured by the strict application of all other policies agreed upon under the EC Treaties. This solidarity would almost certainly be endangered if certain policies became the subject of prior approval by EFTA countries which are not interested in other EC policies. Furthermore, all EC Member States rely on the respect and observance of the entire Community law, since the Court of Justice has the power to interpret and ensure the uniform application of all Community law throughout the EC.

In consequence, the envisaged European Economic Space will scarcely be realized by an "overall" multilateral approach extending beyond the outlined concept of a structured partnership. It will be more realistic for both the EC and the EFTA Member States to try to reach agreements on specific sectors. Once again, the future shape of the EC's foreign economic relations will bear the imprint of third countries' attitude to the internal market. Much will also depend on whether EFTA Member States are prepared to recognize the indispensable role of the law as the necessary foundation for any closer cooperation in trade relations. The acceptance of, for example, the principle of direct applicability and binding dispute settlement procedures presupposes to a certain extent a loss of autonomy or sovereignty. The only available alternative would be an exclusion from the dynamic evolution of the internal market and the ultimate retreat into following the relevant EC rules unilaterally without being able to influence their content.

V. The SEA – A Model for World-Wide Trade Relations?

The SEA and the completion of the internal market are attributable to many factors which reflect a unique European economic and constitutional history. Hardly any other region of the world has experienced as dramatic an erosion of national economic sovereignty and the growing of reciprocal interdependence as the European continent. Needless to say that the SEA, responding to the specific needs of European integration, cannot be a perfect example for other regions in the world.

However, two aspects of recent European integration merit further analysis. First, the SEA was passed against the backdrop of an existing supranational legal structure which assured all of its participants of the strict observance of rules and procedures agreed upon. The international trade order still lacks a similar system which could furnish this degree of legal certainty and reliability in order to become effective. Second, from a European point of view, the SEA could well turn into a successful example of the regionalization of world trade. If so – what will be the destiny of the world's multilateral trading system?

1. The Role of Law in the Process of European Integration

Law and political psychology: the apparent success of the SEA is to be found in both. Integration through law remains at the foundations of the EC, at least with regard to its internal relations. But in addition to a sound legal footing, it has taken a large amount of political determination to fill the legal structure with substance. Community law alone was not able to prevent the many crises during the first 30 years of the history of European integration. However, without a reliable system of law, guaranteeing that reciprocal expectations will be met by means of an effective judicial control, the Community and its Member States could not have agreed on the creation of a liberalized internal market without frontiers. Political psychology in itself might bring about short-term effects. Any long-term results, however, which are pivotal to ensuring the economy's timely adjustment, can only be achieved by using a firm and reliable legal framework.

Will this undeniable experience from the internal integration process guide the Community in its conduct of foreign trade relations with third countries? Will the internal liberalization unavoidably inspire the Community to follow a similar approach in international relations – this following from the preamble to the EEC Treaty and the objectives of the CCP as defined in Art. 110 ?

The concept of parallelism between internal and external trade policies is, at least, unhistoric. The constitutional law of many countries tells us that the main function of the constitution consists in outlining the foundations for a stable internal legal order. Constitutional law hardly ever limits executive authority to conduct foreign affairs vesting it with large discretionary powers. Frequently, parliaments have little influence on the determination of foreign policies, nor may courts exercise any effective judicial control.

Interestingly, the constitutional law's traditional self-restraint in foreign affairs has been challenged recently in view of the ever increasing importance of the fundamental rights of the citizens.[89] The rights of property, of the free choice and exercise

89 See Henkin, 'Human Rights and United States Foreign Policy', in J. Jeckewitz *et al.*(eds.), *Festschrift K. J. Partsch* (1989) 233.

of a profession, or of non-discrimination may not be unduly restricted by states' actions in the field of foreign affairs.[90]

Also important is the growing interdependence of the economies of all states. Within the EC Member States are aware of the strong impact which the process of integration has had on the respective national constitutional orders. Under national constitutional law the transfer of powers and governmental functions to the EC would have been held inadmissible if the respect of basic constitutional principles and rights would not have been guaranteed with respect to the process of integration.

These considerations do not yet apply, however, to the international trade order as constituted under the GATT and other bi- and multilateral agreements. The world's trading partners are still very reluctant to sign binding arrangements for the settlement of disputes and for the protection of fundamental rights of individuals.[91] Neither the Court of Justice of the European Communities nor the courts in other jurisdictions have held – with a few exceptions – GATT law to be directly applicable.[92] The dispute settlement procedure within the GATT continues to be based on consensual solutions to be found for the relevant interstate disputes.

Recent developments, however, have mirrored a growing concern about the international trading system's fragility. *Ceterum censeo*: one of the major reasons explaining this feature of the international trade order remains the lack of efficient judicial control of signed international agreements and the lack of enforcement of rights of the individual with respect to foreign trade matters. It is promising, though, to note the current preoccupation with a more efficient legal framework for the international trading order. Important indications are

- the topics agreed upon for negotiations in the Uruguay Round, especially the improvements of the rules on dispute settlement which have already been earmarked for provisional application from 1 January 1989 onwards.[93] The Mid-Term Review Conference expressly recognized the improved dispute settlement system as

90 See Petersmann, 'Wie kann Handelspolitik konstitutionalisiert werden? Verfassungsrechtliche Bindungen der Außenhandelspolitik', 44 *Europa-Archiv* (1989) 55, at 56, 58.

91 For further discussion see Hilf, 'International Trade Disputes and the Individual: Private Party Involvement in National and International Procedures Regarding Unfair Foreign Trade Practices', in H. Hauser (ed.), *Protectionism and Structural Adjustment* (1986) 279.

92 For exceptions in US Law see Hudec, 'The Legal Status of GATT in the Domestic Law of the United States', in M. Hilf, F. Jacobs and E.-U. Petersman, *The European Community and GATT* (1986) 187. Courts in Italy have abandoned their affirmative jurisprudence as to the direct applicability of GATT law, following now the line of the ECJ in its judgement of 16 March 1983, case 267-269/81 [1983] ECR 801 (SPI and SAMI); see Panebianco, 'Die Anwendung des GATT im italienischen Recht', in M. Hilf and E.U. Petersmann, *GATT und Europäische Gemeinschaft* (1986) 313. The ECJ's case law has provoked both a number of fervently supporting and highly critical comments: see the summarizing assessments by J. Burgeois and P. Pescatore, in P. Demaret (ed.), *supra* note 11, 177 and 228.

93 See GATT-Focus News Letter, 62 (1989) 1; see the contributions of M. Hilf and E.-U. Petersmann, in E.-U. Petersmann and M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* (1988) 33, 285 and 323, as well as the Appendix at 499.

a central element in providing the multilateral trading system with security and predictability;[94]

- the growing practice in bilateral agreements to include binding forms of judicial dispute settlement such as the relevant rules in the American-Canadian Free-Trade Agreement[95] or the arbitration clause in the EC Switzerland Agreement on Insurance signed on 10 October 1989,[96] and
- the detailed rules on binding dispute settlement in the multilateral Convention on the Law of the Sea of 1982.[97]

It may be worth noting that on 22 June 1989, the ECJ, in the first case decided on the basis of the New Instrument – FEDIOL III[98] –, has – at least in an indirect manner – applied and interpreted GATT rules in order to uphold the Commission's decision *not* to take protective measures. The Court reasoned that the contested practices of Argentina in the field of export of soya meal did not violate the relevant GATT rules (Art. III, XI, XX and XXIII). The ECJ justified the application of GATT rules by arguing that the Council regulation on the New Instrument expressly refers to "rules of public international law or to other generally accepted rules."[99] Because of this express reference to the rules of international trade law, the Court of Justice felt to be bound to apply GATT and other international trade law in order to establish whether the Commission had acted in accordance with these provisions referred to in the New Instrument being part of secondary Community law. This, in terms of international trade law, precedential case demonstrates that even the GATT with its many generalities is precise enough to be interpreted and applied by courts and that judges are not overburdened by complex economic assessments when dealing with GATT disputes.

Thus, the European experience with the rule of law as a decisive factor in economic integration may contribute to a more rule-oriented approach in world trade relations. At present, the Community certainly has no reason to repent, having bound its protective New Instrument to the observance of international legal obligations. It is only to be hoped for that this example will be followed by the EC's trading partners. One of the issues in the Uruguay Round could be to oblige the contracting par-

94 See MTN. TNC/7 (MIN), 26, in World Trade Materials (Vol. 1) (January 1989) 30.

95 Parker, 'Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement', *JWT* (1989) 83. For a critical evaluation of the Canada-U.S. Free Trade Agreement from a European standpoint see Bierwagen and Hegemann, 'Das Freihandelsabkommen zwischen Kanada und den Vereinigten Staaten. Eine Bestandsaufnahme aus europäischer Sicht', *RIW* (1989) 33-42; see also Walton, 'International Trade, U.S.-Canada Free Trade Agreement', 29 *HarJ.Int'l L.* (1988) 572-580, taking a generally positive view of the agreement.

96 See Agence Europe No 5108 of 11 October 1989, 7-8.

97 See Jaenicke, 'Dispute Settlement under the Convention of the Law of the Sea', *ZaöRV* (1983) 813.

98 Case 70/87, not yet reported; for a first comment see Bronckers, 'The Potential and Limitations of the Community's New Trade Policy Instrument', *Report for the Colloquy of Bruges on The New Trends in EC and US Trade Laws* (September 1989) 18.

99 See Art. 2(1) of the New Instrument, Regulation No 2641/84 of 17 September 1984 OJ L 252/1.

ties to insert into their domestic law provisions which guarantee an effective application of the rules of international trade law. On a more limited sector such a provision can already be found in Art. X(3)b) GATT. Another solution could be to provide for a procedure to ask for preliminary rulings by GATT institutions as to the interpretation of GATT rules.[100] A more stringent dispute settlement procedure resulting in more precise and predictable solutions for trade disputes would be one of the preconditions for a more effective framework of world trade.

2. The SEA and the Regionalization of World Trade

European integration, as it is conceived by the SEA, has encountered suspicions and fears abroad of a forthcoming "fortress" closing in on itself behind walls of protectionism. As mentioned in Part IV there are a number of possible developments which point to the opposite direction: given the experience of creating the "common market", the internal market with its liberalizing and deregulating objective will, from the third countries' vantage-point, be more trade-creating than trade-diverting. In any case, final conclusions may only be possible in the period after 1993. Too much depends on the attitudes adopted by third countries in response to the internal market and the final results of the Uruguay Round. If the future world trade order was to become subdued by protectionism, the EC as a region most dependent on international trade, would be its first victim.

The SEA makes a further attempt at integrating the European region. The principles underlying the creation of the European market are very similar to the GATT's basic notions on world trade. Art. XXIV GATT acknowledges the desirability of closer integration, provided that no new trade barriers between the contracting parties are raised (para. 4).[101] It has never been conclusively stated by the Contracting Parties of GATT whether the EC fulfills all the requirements of Art. XXIV GATT.

Meanwhile, other regional free trade areas are being contemplated.[102] A rather astonishing example is the concept of an American-Japanese Free Trade Area which would no more be regional, but transcontinental comprising two of the largest economic powers. Given the text of Art. XXIV GATT, there would be no obstacle to the creation of such a FTA. Art. XXIV (3)(a) GATT refers explicitly to "adjacent territories" which may agree on certain advantages to facilitate frontier trade. Art. XXIV (4) GATT, in contrast, only mentions "countries." However, it is debatable

100 For more detailed proposals see Hilf, 'Settlement of Disputes of International Economic Organizations', in E.-U. Petersmann and M. Hilf, *The New GATT Round* (1988) 285, 319.

101 It is the basic philosophy of Art. XXIV GATT that the creating of unified markets will almost lead automatically to a general expansion of world trade: see R. S. Imhoff, *Le GATT et les Zones de libre-échange* (1979) 35.

102 For an overview of the free trade areas examined under Art. XXIV GATT see Imhoff, *supra* note 102, 109. The more recent projects concern *inter alia* the establishment of common mar-

whether the underlying principle of Art. XXIV (4) GATT focuses exclusively on specific regional agreements of closer integration. At any rate, a substantial deterioration of the multilateral trading system cannot be ruled out when two of the major pillars of the system "write the rules off in a corner alone."[103]

It will be the task of future contributions to this Journal to judge whether the final outcome of 1992 had indeed liberal and trade-creating effects *vis à vis* third countries which allowed for further agreements on closer integration to follow the European model and to avoid its shortcomings.

ket for East Africa and Eastern Europe; for the latter see Agence Europe No 5153 of 14 December 1989, 16, concerning a single market within the COMECON by 1995.

103 See 'Pros and Cons of Initiating Negotiations with Japan to explore the Possibility of a U.S.-Japan Free Trade Area Agreement', USITC Publication 2120 of September 1988, in World Trade Materials (Vol. 1) (January 1989) 49. See also C. Cova, *supra* note 23, 431, qualifying the respective project as a warning against a possible "Fortress Europe."