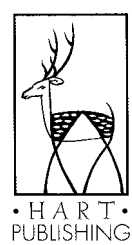
INTERNATIONAL TRADE AND ECONOMIC LAW
AND THE EUROPEAN UNION

International Trade and Economic Law and the European Union

SARA DILLON
PhD (Stanford), J.D. (Columbia),
Associate Professor of Law,
Suffolk University Law School, Boston, Mass



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Foreword

With the accession of China, and the successful launch at Doha of a new round of international trade negotiations (however fraught with contradictions the opening ministerial declaration), it would seem that the World Trade Organisation (WTO) is here to stay. Whatever doubts there may have been after the Seattle Ministerial debacle of late 1999 with respect to the long-term viability of WTO law have apparently been put to rest after the events of September 11, 2001. At moments of global crisis, economic integration re-emerges as a symbol of stability. The more difficult question, however, is what form this economic integration should take.

With the anti-globalisation movement in a state of some confusion in the wake of September's events, the WTO's Doha conference moved forward, and an uneasy basis for future action agreed upon. It would be folly, however, to imagine that the intellectual difficulties presented by WTO law—with its unsettling relationship to national regulatory goals—have also disappeared.

As trade negotiations proceed under the new round in the months to come, there will be an urgent need for far greater numbers of people than heretofore to involve themselves in shaping global trade law. The outcome of the new round should be, and hopefully will be, the result of more complex intellectual and political inputs than was the case with the Uruguay Round Agreements, the substantive law of which came into force in 1995, generating controversy and street conflict in the years that followed.

The Doha Ministerial Declaration reflects in places the variegated protests that hounded trade meetings in the late 1990s wherever they occurred, prominently mentioning the special difficulties of developing countries, trade and environment concerns, and the matter of an improved "dialogue with the public".[1] There are indications of a general commitment to further liberalisation in the areas of agriculture, investments, and trade in services; also to taking up the issue of a "multilateral framework to enhance the contribution of competition policy to international trade and development". Commentators are already making predictions as to where the concessions and climb-downs will come from; will the EU hold firm on agriculture? Will the developing countries give in on the introduction into WTO law of new subject areas?

There are also signs that the most high-profile of the contentious WTO issues will be addressed in the spirit of preserving the WTO as a whole; notably, the fact that a separate Declaration on the TRIPS Agreement and Public Health calls for an interpretation of the Agreement on Trade-Related Aspects of

[1] Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

Intellectual Property (TRIPS) to allow for the granting of compulsory licenses for patented drugs in the event of national public health emergencies.[2] There is little question but that many WTO insiders would like to move on from this persistent controversy, which has had the effect of characterising the entire WTO as harsh and unfair in the public mind.

It is unclear at this juncture the degree to which the issues around which anti-globalisation protests have taken place over the last several years will be reflected in the actual WTO negotiating agenda as it takes shape in the near future. To the extent that the interests of developing countries (not to mention disparate groups within those countries), environmental activists, labor advocates, and anti-debt campaigners pursue very different, and sometimes conflicting, agendas, the possibility of fundamental reform of the global trade regime is correspondingly lessened.

This book suggests that the EU model of economic integration offers a far more fruitful and complex human endeavour than what has been seen from the WTO thus far. But as we enter the new negotiating round, it is important to consider that the ultimate shape of WTO law is still to be determined. What GATT/WTO law has undertaken so far—including its purposes, methods and achievements—is the principal subject of this book.

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[2] WT/MIN(01)/DEC/2, 20 November 2001.

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Part I
Global Context

1

Introduction: The Problem of Europe in a Globalised World

THE POSITION OF the European Community in the unfolding narrative of international trade and economic law in the period since the end of World War II is unique, and uniquely problematic. In many ways, the integrationist ambitions of the EC have tracked those of the world trading system, previously embodied in the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organisation (WTO). As the scope and ambition of the global trading regime expanded, so the EU moved closer towards the establishment of a "European economy".

The EU is, along with the United States, one of the two "titans" of the GATT/WTO system. While the WTO is the single most important external entity with which the European economy must come to terms, so too is the EU seen as one of the most formidable players at the WTO. The number of scholars literate in both systems, and able to analyse their relationship, remains strikingly small. As the world trading system extends its reach into new subject areas, as it continues its drive towards genuine judicial procedures, and as WTO disputes proliferate and gain in complexity, there is an increasingly urgent need for the system to be made more intellectually accessible. Unfortunately, the voluminous quality of the panel and Appellate Body decisions, and the forbidding technicality of the underlying agreements, has meant that the "audience" for this subject remains the academically intrepid, despite the ever more profound effects of the WTO on our lives.

It is with this in mind that this book has been undertaken. As the trading system becomes more truly "legal", there is a clear necessity to subject its terms to academic scrutiny. Unfortunately, it often proves exceedingly difficult to find the right guide to such a study. I have approached the book on the theory that there are those who, even if well versed in economics and/or in international law, nevertheless find the "law" of the WTO too impenetrable, and thus tend to turn away from the task of mastering it. The contrast between scenes of protest on the streets of cities where economic summits take place, and the process of reading a WTO panel report, is stark; academic explorations of WTO law tend to be ponderously self-referential, and much of the protest against it mainly visceral.

In fact, despite its numbingly technical appearance, contemporary trade and economic law is an engaging reflection of the major themes of our time. The

degree to which we decide to cede national sovereignty to international trade institutions, particularly the WTO, will determine the overriding values of our world for decades to come. It is impossible to form an accurate sense of whether this is a direction we should take, if we do not have ready access to this developing area of the law, and the opportunity to place it in historical context.

In addition to accessibility and intelligibility, there has been a profound failure to generate a conceptual framework for even considering the desirability or otherwise of recent developments in international trade law. It is absolutely natural for there to be a comparison drawn between the EU and the WTO, since these two systems provide contrasting models of economic integration. But as I will attempt to show, there is far more to compare in this regard than the techniques of economic de-nationalisation employed by the two systems. The EU provides the only contemporary evidence that in fact complex, multi-dimensional, supranational regime-building is possible. The principal point is not the relative stringency of the two systems *vis-à-vis* national regulatory freedom; rather, it is the degree to which supranational governance might dare to embrace both the public and the private interest. In this regard, the academic community, and that still small group of scholars with access to the legal techniques employed by both the EU and the WTO must begin to analyse in terms capable of resonating in a larger intellectual world. The WTO is the largest and most important set of trade obligations with which the EU must deal; at the same time, the EU is the most important counter-model with which the WTO must deal. Both models must be re-evaluated in light of their underlying rationales; yet it would appear that most discussion still focuses on the legal symbols tossed up on the shore by each system. Understanding of the WTO system in particular must be re-connected to the world in which it operates. Only in that way can we understand what the EU has to offer an evolving global governance, and only then can we see what the EU stands to lose from too close an encounter with the WTO as it is presently configured.

In key ways, the relationship of the EU to the WTO system is more subtle and complex that that of the US to the WTO. On the one hand, there are two distinct schools of thought in Europe as to whether the developing European entity should be increasingly based on free trade/neo-liberal principles, or instead remain firmly in the tradition of "social Europe". (It is surely the case that the neo-liberal wing, though, stops far short of advocating the sort of "law and economics" vision so popular in American law schools. While many might advocate a leaner and more competitive Europe, socially conscious policy is so entrenched in even the European right wing that its complete demise is unthinkable. This is a factor that is insufficiently understood in the US.) Having struggled for decades with stubborn Member State allegiances to national economies, and the wish of the Member States to protect national social and cultural features against the demands of Community law, the EU as a whole is now faced, and faced dramatically, with the problem of how to configure itself within the WTO order. What effect will the EU's participation in the WTO have on its

internal regulatory values? And, even more interestingly, can Europe be—or does it wish to be—a genuine counterweight to the US in the construction of real and effective global legal values?

In terms of the recent past, the question might be posed: Did the creation of the European Single Market take as its main purpose the more effective protection of a Europe already enormously changed by the demands of that market; or, alternatively, was the Single Market programme merely a step along the path towards a truly efficient, "reformed" Europe, whose ideals will come to resemble more closely those of the WTO? In the EU, internal stringency in economic integration has not necessarily translated into greater adherence to free trade principles at global level. To paraphrase the European Court of Justice, the EU is not simply about economics; indeed, it is possible that its central internal economic requirements, necessary for integration, have had as their main purpose the preservation of non-economic values. But there is no easy formula for determining what the EU "wants to be", and what relationship with the larger trading world will assist in the achievement of such a collective goal, assuming it can be identified.

While the United States reacts more vocally to fears of losing "national sovereignty" to the WTO, it is clear that the EU is not in a position to emphasise loss of sovereignty, having invested decades in downgrading the concept of national sovereignty. Unlike the case of the European debate over the WTO, the question of whether the United States is somehow standing in the way of America's transnational businesses by WTO-illegal forms of protectionism is not really a major issue. One reason for this is that the US has for much longer taken market-based values as its mainstream creed; it is not especially traumatised by the thought of the WTO imposing a greater degree of market discipline. Its objections are political, perhaps best understood by analogy to national security concerns. What's more, the American states have hardly considered themselves in the guise of sovereign rivals to the United States—at least not in the modern period. In that sense, the US has little to fear from the discourse of "sovereignty".

This also means that while Europe can protest that its own vision of a socially protective and humane life for its citizens is threatened by the excesses of WTO, there is perhaps less conceptual resistance than in the United States to the notion of the supremacy of external rules, rules based on abstract ideas of the market, rather than more complex inputs, including social policy. In a continuing historical parallel, both the EU and the WTO are still "in evolution", while by contrast the United States is more conceptually static, and will likely be far less affected in its central character by its relationship with the WTO. The United States is not a rival model of integration to the WTO; the EU is. (The North American Free Trade Association (NAFTA) could hardly be said to qualify, as important as it is in raw economic terms.)

So one underlying question posed here will be whether the EU is, through the agency of WTO law, seeking to maintain the notorious "fortress Europe" of

social protection and purposive inefficiencies, or whether on the contrary the WTO could or should become Europe's ongoing opportunity to move from internal integration to a super-state characterised by citizens' "rights to free trade". Without attempting to reach a definitive conclusion on this vital topic, this book will propose to introduce the reader to the nature of this massive legal presence called the WTO, and to its precise relationship with the EU, historically and to come.

Popular discussion of the EU and the WTO as systems have often centred around the problems of legitimacy and the democratic deficit. It is hardly surprising that as a supranational entity gains the power to essentially invalidate a national law or regulation, not to mention the tradition bound up in that law or regulation, the general population will question the source of this power and its rationale. Such questions cannot be answered by hermetically sealed analyses of either EU or WTO law; neither can a satisfactory answer come from abstract economics. The EU, for all its deficiencies, has had an actual response: it can claim at least to have delivered peace and stability, a high level of social and environmental protection, as well as economic rights and freedoms. The EU legal system also early on created an alternative route to influence for citizens, bypassing the national state; the EU was able to marshal resentments against individual Member States held by citizens of those states. Concrete requirements emanating from the EC, such as equal pay for equal work, made sense as obvious benefits available from the centre. And for the elites of the Member States, the EC system made available new and previously unimagined avenues for career advancement and influence.

As to justifications for the WTO's new powers (as of 1995), justifications are thinner on the ground, and tend to be without content that can be recognised and understood by persons outside economics, transnational business, or trade law studies. It does not appear that the trade sceptics will be satisfied by reference to incremental changes taking place in the reasoning of the WTO's Appellate Body; a larger, more systemic, more "real" justification alone will suffice.

There *is* no public interest dimension to WTO; at best, the WTO bodies (the panels and Appellate Body) can decide, or not, that a national public interest measure with restrictive trade effects is consistent with WTO law (for reasons to be explored at length throughout this book). The EU, by contrast, is a multi-dimensional political and economic project, with binding law in many areas of concern to the non-economic aspects of life. This multi-dimensional quality acts as a recognition that economic integration in and of itself creates dangers for social and other protections developed over time within the confines of the nation state. It is part of the logic of economic integration that economic and social losers may be created; it is also apparent that the "race to the bottom" in terms of regulatory structures is a natural product of integration across national borders. It is plain that there was an acute awareness among the drafters of the modern European project that economic integration posed dangers to protections that had been developed at national level; hence the requirement that prior

to accession, candidate countries would receive funding to bring their economies up to a certain standard (cohesion); and also that they would create a broad range of legislation that would qualify them for membership. This must be contrasted with the willy nilly integration that is taking place at global level, where only economic law is binding, and laws protecting other and more vulnerable aspects of human life are aspirational.

It could be said that the EU offers the only concrete proof that multi-dimensional integration is in fact possible; to that extent, it offers the best model for a different and enhanced idea of global governance. While the EU had everything to do with devising the current shape of the WTO (which serves the EU's interests *vis-à-vis* developing countries), it will also have everything to do with the WTO's future development. It is possible that the principal EU institutions believe that European standards in consumer, environmental and social protections, as well as human rights, can withstand the pressure exerted by the WTO and the liberalising tendency it represents, and that it is not in the overall interests of European business to advocate for labour, social or environmental protections at global level. It is also the case that if the EU does not shoulder this task, there will likely be no progress towards a complex global governance agenda. What could occur in its stead, though, by default, is a grand disaffection of citizens in many countries, and a consequent rollback of the drive to globalisation begun in 1995.

Legal academia in Europe is very conversant with the concept that liberal economics has been "constitutionalised" in the Treaty of Rome, and solidified in the interpretations by the European Court of Justice of the Treaty's provisions. The result of this constitutionalising is of course that these principles cannot be undone by "short term" majoritarian impulses. There is naturally less confidence as to whether it is safe or desirable to extend this status to include global trade principles as well. Should European citizens be seen to have a "legal guarantee" of economic freedom, even if this conflicts with the notion of a social Europe? Should economic freedom be placed on a par with human rights?

Much depends of course on how tightly Europe's major trading partners (notably the US) decide to embrace WTO law; also on what those partners insist upon in the upcoming round of WTO negotiations. As indicated, however, this comparison between Europe and its partners is not a perfect fit, since the effect in Europe of greater efficiency, along with inevitably less emphasis on social protection and planned markets, will be significantly greater. And it may be that Europe can find a middle ground, neither completely committed to competitive values, nor completely protectionist, but selective in its approach to the global rules. This leads us to the question of whether those rules in fact allow for such selectivity. And that in turn is a question that cannot be answered unless one fully understands the trade rules, and the disputes that they are, at an ever increasing pace and volume, generating. And the disputes are at the heart of the narrative of the domestic versus the global; local or regional legislation as opposed to trade rules.

There are many descriptions of the world trading regime in the abstract. The purpose of this book is to make that trading system more concrete and legally transparent. In particular, the nature of the WTO disputes in the post-Uruguay Round world demonstrate the dramatic conflict between national (or supranational) regulation and trade rules, although, due to the technocratic nature of WTO panel discourse, these profound legal/historical issues are not readily apparent, even to an informed readership.

The watershed date for global trade law was 1 January 1995, in that the Uruguay Round Agreements, including the Agreement Establishing the World Trade Organisation, came into effect. Before that date, the old "GATT" system could have been accurately described as an arm of "international law", in its reliance on diplomacy and willing state compliance. However, with the adoption of the Uruguay Round Agreements, bringing enormous subject areas of national economic regulation under GATT/WTO discipline, as well as subjecting the whole to a new and far more binding dispute resolution system, the regime took on unique properties not easily conceptualised within any one legal category. The WTO is certainly not just "international law" in the conventional sense. Neither is it the multifaceted supranational creature described by the European Court of Justice in *Costa* v. *ENEL* Case 6/64, [1964] ECR 585. If there is a world government, it has only a Department of Commerce.

As will be explored below, the Uruguay Round negotiations, spanning 1986 to 1994, brought such economic sectors as services, investments, agriculture, intellectual property and textiles into the global rule-based trading system. The single most important change was in dispute settlement, in that an adverse ruling against a defending member country by a panel or by the new Appellate Body could not be avoided, as panel rulings had been in the past. From 1995 onwards, in the event of an adverse decision, that ruling has had to be complied with, or substantial amounts of money foregone. The prevailing party can now withdraw concessions in the event of non-compliance, as long as the amount of the "sanction" has been approved by the WTO. This change from diplomacy to a more recognisably judicial system, with binding consequences, has been described over and again. Indeed, WTO studies have been characterised by far more attempts at description than comprehension or contextualisation.

Despite criticisms of the form of remedy available (trade sanctions as the principal and paradoxical remedy in the quintessential free trade regime), the WTO system has nevertheless become a system based on enforceable penalties; it was after 1995 a system with legal teeth.[1] Regardless of the sensitivity of the national legislation being challenged, no matter the political cost at home, the system could now demand compliance. It is unlikely, though still possible, that this newly "binding" aspect of the global trade regime will be reversed, street protests and dissatisfaction notwithstanding. The constituencies most critical of

[1] Steve Charnovitz, "Rethinking WTO Trade Sanctions", 95 *American Journal of Int'l Law* 792–832 (Oct 2001). Note to trade sactions underlying free trade.

the WTO—because of its lack of transparency, threats to the global environment, indifference to labour concerns, and harsh effects in developing countries—are disparate and disunified, and hardly capable of undermining the superior lobbying position of international corporations arguing in favour of further legal steps in the direction of a global market. On the other hand, legal rigor demands intellectual justification going beyond market considerations, as discussed above.

"TRADE RIGHTS AS EUROPEAN RIGHTS"

The most extreme, and certainly the wittiest, version of this doctrine appeared in a book several years ago by Kees Jan Kuilwijk, who likened the EC's passage through stages of development to that of Dante's spiritual journey.[2] In Kuilwijk's vision, "after centuries of seemingly interminable struggle", a "ray of hope" appeared with the foundation of the EC. The common market was consolidated during the Single Market programme of the late 1980s, but could not reach its proper zenith without fully providing for "free trade rights" to European citizens. This could best be effected through decisions of the European Court of Justice, Kuilwijk argued, giving full direct effect to GATT law.[3]

The opening up of "fortress Europe", according to Kuilwijk, would make a "true level playing field" for European companies and allow European consumers "true freedom of choice".[4] The third stage, which will involve a full implementation of GATT/WTO law by the EC, requires the "divine guidance" of the European Court of Justice. As Kuilwijk put it, "the neglect of GATT law is an internal problem which can be solved only internally.[5]

Under this view, the EC is a neo-liberal way station, and restrictions on "trading rights" by the Court of Justice are the equivalent of restrictions on human rights. As will be discussed in chapters 11 and 12 below, the Court of Justice has long affirmed rights to property, trade and business within the Community, but always legally circumscribed by the greater general interests of the Community as a multi-faceted entity. Kuilwijk pointed out that there are a number of similarities between GATT and the EC; inevitably so, in that the General Agreement provided one of the main models on which the EEC Treaty was based. Both systems are founded on the "rule of law", and principles of non-discrimination in trade.[6] Kuilwijk did acknowledge that "the objective of the EC Treaty transcends that of the GATT", and quotes the Court of Justice in *Van Gend en*

[2] Kees Jan Kuilwijk, *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights* (Beuningen Center for Critical European Studies Series, 1996).

[3] See Judson Osterhoudt Berkey's critique of Kuilwijk's book, in "The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting", *Jean Monnet Program Working Papers* No. 3/98, Harvard Law School (1998).

[4] Kuilwijk, *supra* n. 2, at 26.

[5] *Ibid*. at 28.

[6] *Ibid*. at 45–46.

Loos to the effect that the Community constitutes a "new legal order", distinct from what had come before.[7] But even while making reference to Pierre Pescatore as to the "originality" of the European "task", Kuilwijk did not satisfactorily treat the problem of the interaction of sectoral concerns: how should trade principles and "rights to trade" be reconciled with concerns for the protection of labour, environment and social policy? And how can a court charged with the protection and vindication of all parts of the Treaty be expected to lead the charge in the full and total embrace of a GATT/WTO law that might well threaten many aspects of the full European "project"?

While it is true that rights to property, business and trade are important rights, they are likely to occupy a position of opposition to other kinds of rights; other rights have tended to be protected as a result of controls being placed on property rights. It is insufficient to say that the European Court of Justice should provide for the full integration of GATT/WTO law into the legal system of the Community, without coming to grips with how the Court might balance this innovation against the tradition of protection for non-economic values within the EU. Kuilwijk wrote that

> "There is still a widespread misunderstanding that GATT law requires the Members to give up their own economic or social policy objectives. GATT law only restricts, and in some cases prohibits, the use of trade policy instruments which are generally considered to be harmful to the domestic economy".[8]

He went on to say that GATT law ranks trade policy instruments in line with the "economic theory of optimal intervention".[9] That is to say, when government intervention is needed for the sake of a social policy goal, for instance, interventions as close as possible to "the distortion in question" will be the most efficient; whereas the more trade-distorting solutions call forth limitations in the form of GATT law. "GATT law", Kuilwijk wrote, "offers numerous ways to pursue economic and social policy in a responsible and effective manner".[10] However, this insight is not terribly useful in devising EU-wide solutions to the problem of beef hormones, the banana trade, or GMOs. And going far beyond this, there are the indirect threats posed by globalisation to high standards of labour and social protection; what in GATT/WTO law can possibly provide guarantees for these non-economic values? It does not seem that it is open to the European Court of Justice to consider economic rights in isolation from the complex inter-connectedness of the EC/EU treaties and secondary European legislation, as well as long-term political goals, which inevitably provide subtext and context.

Kuilwijk also wrote, powerfully and compellingly, that the Court of Justice should realise that the Community public interest is an "amorphous concept",

[7] Kuilwijk, *supra* n. 2, at 46.
[8] Kuilwijk, *supra* n. 2.
[9] Kuilwijk, *supra* n. 2.
[10] *Ibid*. at 239–240.

one which "cannot exist independently from the disclosed preferences of private traders in the Community".[11] He rejected the notion that the public interest is a truth which can be discovered "regardless of the equal rights and individual preferences of the citizens".[12] But this, in one sense, begs the question; who shall decide the nature of the public interest, and the nature of the relationship between laws made in the public interest and laws made at the GATT/WTO, is precisely what is being argued over at street level around the world, albeit in an often uninformed fashion. Kuilwijk argued, apparently seriously, that the Community can intervene on behalf of some, but certainly not all, its constituents (for instance, farmers, but not consumers); thus, it should relinquish this doomed task to the invisible hand.[13] This seems to acknowledge that the EU could not fully embrace GATT/WTO law, by granting it direct effect, without at the same time ceasing to be the multi-faceted "intervenor" that it has attempted to be.

An array of European scholars have blended together the processes of European and global economic integration, pointing to a simultaneous rise of "deregulation, market economies, protection of human rights and democracies".[14] But it is crucial to note that the EU was not formed by a process whereby the protection of economic and non-economic values simply emerged from the activity of the market. Perhaps it is understandable that the 1990s fostered a view that democracy and human rights were automatically spawned from market economies, that issues of war and peace would be settled through the operation of the market, and that the only necessary element was the firm establishment in law of free trade principles and rules. But despite its underlying free-trade ethos, the system of European integration clearly did not evolve without significantly restraining market impulses at many stages. Economic integration through shared liberal principles might well be the necessary pre-condition for the creation of a general world peace of the kind posited by Professor Petersmann. However, the ideal citizen who is the subject and object of the constitutionalisation process is surely not named "modern homo economicus".[15] With a general focus on the development of the common market, and in the general belief that politics follows economics, it is easy to overlook the massive expenditure of human resources represented by the non-economic protections offered by the EU as a system.

These protections may not be perfect, but they were planned, and executed with an unparalleled determination. The EU limited the concept of competition to actual economic activities, and worked to prevent competition between Member States based on a race-to-the-bottom. This the global system has not

[11] Kuilwijk, *supra* n. 2.
[12] *Ibid*. at 257–258.
[13] *Ibid*. at 349.
[14] See, for example, Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations", (Winter 1997) 17 *Journal of International Law and Business* 398.
[15] *Ibid*. at 401.

come to grips with, and appears to have no organised intention of coming to grips with in the near future. However, reminders will continue to appear in the form of noisy confrontations, now taking place with regularity.

It is not the case that these issues have been lost on recent scholarship; indeed, there have been admirable attempts to link globalisation with fair and balanced development, as well as with environmental and social protections.[16] However, a serious problem with these attempts is that they lack realistic prescriptions regarding how to achieve the link. It would seem that unless the seriousness of purpose that created the EU is present at global level, objections to the one-sidedness of binding economic law will remain aspirational. Certainly the UN has identified the opportunities and pitfalls of globalisation, and suggested ways in which the beast might be tamed in the service of humanity.[17]

Professor de Waart was correct when he noted that the introduction of a social clause in international trade relations "is revealing as it is met with opposition by both poor and rich countries". Poor countries, he said, are concerned about interference in their internal affairs, whereas the wealthier countries do not wish to see any restrictions on the market.[18] Professor Weiss stated much the same thing about opposition by poorer countries to linking labour protections to trade agreements, as they suspect this to be a "protectionist ploy".[19] In many ways, this often cited opposition of developing countries to inclusion of labour or environmental standards is the hardest obstacle to the creation of a complex, fair and sensible global regime. Again, the EU example is instructive. The inclusion of such standards involves wealth transfers, and large-scale investment not based purely on market considerations. It is likely that there is no political will to bring this about at global level, even within the EU. However, not to bring this about, and to hope for the best from the operation of international markets as currently regulated, is to court the failure of globalisation as a process.

METHODOLOGIES OF INTEGRATION: THE EC AND THE WTO

In the wake of the breakdown of the WTO's first Millennium Round talks in Seattle, the WTO has been experiencing a crisis of legitimacy. Political constituencies from around the world, each with important stakes in various kinds of national regulation—environmentalists, labour advocates, rural development groups, and so forth—have called the WTO legal structure into question,

[16] See, notably, *International Economic Law With a Human Face*, F Weiss, E Denters and P de Waart (ed.) (The Hague: Kluwer Law International, 1998).

[17] See *ibid*. at 10. Weiss and de Waart claim that "international economic law is beginning to turn its faces to humanity in the best tradition of Roosevelt's freedoms from not only fear but also want".

[18] Paul J I M de Waart, "Quality of Life At the Mercy of WTO Panels: Article XX An Empty Shell?", in Weiss, Denters and deWaart, *supra* n. 13, at 109.

[19] Friedl Weiss, "Internationally Recognised Labour Standards and Trade", in Weiss, Denters and deWaart, *supra* n. 13, at 89.

albeit in a disjointed fashion unlikely to greatly influence its future development. For a system on the defensive, the strikingly technocratic approach taken in so much international trade scholarship is particularly unsuited to answering these challenges, or suggesting meaningful reforms.

By contrast, the framers of the original EC system were acutely aware that economic integration was a means to an end: peace through overcoming the impulse towards economic rivalry. The war and peace dimension, and the grand assumption that politics would not only follow but also inform economics, has allowed for the development of EC law in such diverse areas as labour protection, social equality, consumer and environmental protection, and lately human rights more explicitly. The European system was able to create a direct link between citizens and the Community institutions; in many and complex areas, the benefits on offer from the Community could often surpass those available from the nation (member) state.

Perhaps the most distinctive aspect of European integration is the manner in which Europe has pursued enlargement. Far from an *ad hoc* tacking together of uneven and unequal national economies in the service of a free trade ideal, the European system demands the most painstaking, and expensive, form of pre-accession convergence imaginable. European integration and expansion are not based on the notion of comparative advantage—alone, or perhaps even at all. European integration has not relied on the doctrine of welfare maximisation, although improving standards of living has been one of many key justifications for the development of the EC. Rather, as a matter or policy, the EU has insisted upon a multi-faceted, multi-sectoral legal development that attempts to mimic the complexities of the nation state. The EU has been able to absorb cultural and economic contrasts because of this elaborate process of legal convergence through years of assisting in the adoption of the entire *acquis communautaire* by new entrants to the Community.

It is clear that if the sole justification for the European project were seen as economic in nature, this could hardly be so. (Admittedly, the limits or perhaps the ultimate confirmation of this theory arises at the borders of traditional "European" territory, and its implications for a barrier based mainly on race and religion, under the guise of a "shared cultural tradition".) It can be assumed that generations of European policy-makers have perceived grave dangers to existing Member States *and* new entrants to the Community should this process of pre-accession convergence not occur.

Although the pre-accession process for aspiring EU members could appear as a kind of penance (witness the impatience with which some applicants have awaited a final timetable for entry), it can also be assumed that the process of advance convergence is for their benefit. Without experiencing a big bang, and without inviting massive political resistance, aspiring members can work in an orderly, detailed manner, negotiating on items of particular concern, to make the internal legal changes necessary for smooth entry into the Community system. Tellingly, Europe also makes available significant funding for projects

that will assist in allowing these new states to reach European standards in environmental and social protection, and for the modernisation of industry. This represents an investment in long-term stability.

Seen from the point of view of existing Member States, there is a clear intention to avoid a race-to-the-bottom scenario, as discussed above. Haphazard enlargement and integration could potentially endanger standards within the Community by creating unwanted competitive pressure in areas well established as being part of the Community acquis. Indeed, what is most striking about this process (particularly when compared with the creation of NAFTA, not to mention the establishment of the WTO) is its thoroughness and level of detail. This economic and political investment is proof of the danger inherent in thoughtless expansion, and is proof of a European commitment to economic integration that actually works at many levels in the long term. Anything less, one can assume, would not be "good enough" for the EU. To say that it is essentially the task of states to deal with non-economic issues, while undermining the influence of the state through the process of transnational law-making, is disingenuous.

In contrast is the process that led to the establishment of the WTO at the end of 1994. Many commentators have discussed the fact that the WTO and the entire range of the Uruguay Round Agreements had to be accepted by would-be WTO members in their totality; the "all or nothing" quality of the new WTO. This was to be the end of the former "GATT *a la carte*". It also meant that a huge variety of countries with dissimilar interests and needs were required to take on a wide range of new substantive laws, without regard to the domestic impacts of any particular agreement. Thus, if a developing country remained firmly opposed to the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement), for example, in order to be a participant at the WTO, that country would nonetheless have to accept TRIPS in its entirety.

It is curious that for the EU, the pre-accession process is an absolute requirement; whereas at global level, there has been almost no discussion of the dangers of imposing broad areas of substantive law on countries of often profoundly conflicting interests. It could be argued that the WTO has no political aspirations comparable to those of the EU; for that matter, neither does NAFTA. This is no wish at WTO level to create a world citizenry; there is no inclination towards global free movement of persons, at least on the part of the major trading nations. Also, representative governments made the decision to proceed despite the apparent dangers, and dissatisfactions can be dealt with during the upcoming round of WTO negotiations. If this is so, is there any basis for saying that the EU and WTO systems are enjoying a gradual convergence?

Professor Weiler posits the "emergence of a nascent Common Law of International Trade",[20] although it would seem that his principal emphasis is on

[20] J H H Weiler, "Cain and Abel—Convergence and Divergence in International Trade Law", in *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford: OUP, 2000).

comparison between the techniques of the EU, GATT/WTO and NAFTA techniques of economic integration. Surely whether or not an individual state is allowed latitude in regulatory autonomy can only be evaluated in light of the overall validity of the transnational/supranational regime. In other words, it is a very different matter to examine the degree of regulatory freedom left to the European Member States, as opposed to that left to WTO members. It is precisely because the EU is more than a "free trade system" that only a part of its methodology bears comparison with the WTO; the early activism of the European Court of Justice can only be seen in the context of an overarching, even sometimes unarticulated, drive towards a very large project encompassing the various sectors and layers of social organisation. An historical examination of the techniques of economic integration will show any system more or less stringent over time—now favouring the transnational regime, now easing up and allowing more freedom to the constituent states. However, that the WTO has taken on such an authoritative role, without the corresponding complexity, is what causes the true crisis of legitimacy—a legitimacy impossible for the WTO itself to salvage or solve from within.

An enormous problem in the academic discourse surrounding WTO studies, and infecting comparisons between the WTO and EU, is that the most important questions do not primarily involve markets as markets—but rather, market forces and their effects on constituencies. A constituency losing out due to a rule of economic integration has no interest in a long-term or abstract justification for that historical movement. The EU has at least given serious thought and taken legal moves to deal with the losing constituencies deriving from economic integration. This the WTO has not done, and this the academic community must confront.

It would seem that more is required to establish legitimacy in "adjudicating competing values" than fair procedures, coherence and integrity in legal interpretation and institutional sensitivity.[21] Long before one reaches that point, there is a problem to do with the regime's very source of power itself. Pre-1995 GATT law was characterised by the fact that when a particular country found the compliance with an adverse decision too politically difficult, the adverse ruling could be ignored. Quite obviously, this meant that the confrontation between political constituencies and the free trade rule was not taken to the bitter end in hard cases. The bitter battles were state-to-state, contracting party to contracting party. This was never true in the Community system, because the system showed an early intention to uphold Community principle over national need, but then to deal with legitimacy issues by offering substitute benefits, even to losers. This was not always a smooth ride; there have been periods of retrenchment in the development of Community law. But the general approach

[21] See Robert Howse, "The Early Years of WTO Jurisprudence", in Weiler (ed.) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford: OUP, 2000) 35–70; 41–42.

has remained consistent, and this should not be confused in any way with the much narrower concerns of the GATT/WTO system. It has been suggested that the critics of the WTO are perhaps not so much motivated by "a reaction against the legal rules of international trade themselves, but the institutional and interpretative behaviour of the official guardians of those rules",[22] but it seems only common sense that there is a broad, substantive justification that the system's critics find lacking, that has little to do with the quality of the Appellate Body's decisions.

The inertia characteristic of the pre-WTO global trading system was overcome in extraordinary fashion during the Uruguay Round because of the political strength of transnational market players. This new system can only, in turn, be altered by a similarly powerful set of forces, and this may not be possible to achieve. It remains to be seen whether the EU has the will to impose a more complex agenda on global legal relations, by bringing together a disparate set of actors whose common element is fear of the purely market character of the WTO. It is hardly a question of being in favour of or against the global trading system; it is rather a question of recognising the reality and staying power of resistance to the singularly market emphasis of the WTO.

EU IDENTITY IN THE DEVELOPMENT OF GLOBAL GOVERNANCE

It is worth noting that at least at the level of rhetoric and policy development, the EU is attempting to "complexify" the process of global integration, based on its own past and model of inputs. Recently, a working group participating in the creation of the White Paper on Governance generated a report called "Strengthening Europe's Contribution to World Governance".[23] Despite an unavoidable quality of abstraction, the report made a number of important points concerning the EU identity within the construction of a global legal regime. The report stated that within the EU

> "it has been possible over time to persuade Member States to pool sovereignty and thus to incur a direct 'loss' in exchange for the broader benefits to be reaped from integration".[24]

The working paper also stated that the demands of anti-globalisation protestors could be seen as

> "a call to return to a more integrated world-view that Aristotle would have found familiar, so that such a desire for more coherent policy-making should not be controversial in principle".[25]

[22] See Howse, *supra* n. 18.

[23] White Paper on Governance, Working Group No 5, "An EU Contribution to Better Governance Beyond Our Borders" (May 2001).

[24] *Ibid*. at 35.

[25] *Ibid*. at 13.

It cautioned, however, that "coherent policy-making is not easy: it faces resistance to new approaches, the lack of analytical tools and the lack of political leadership in changing old ways".[26]

At least one could say that the EU has an instinctual drive towards complex global system-building, and not only at the level of rhetoric. Whether there is an intention to attempt genuine "global governance" is debatable. The posture of the EU in WTO negotiations is far less remarkable than its advance statements would lead one to believe. While a multi-dimensional EU is essential and fundamental, it would seem that a multi-dimensional world order is expendable when EU-wide interests are threatened; nevertheless, such ideas as "sustainability impact assessments" and good global governance are abstract but resilient notions in the discourse of the EU institutions.

In that regard, the structural foundations of the recently agreed "Conotou Agreement", successor to the Lomé Conventions, are instructive. The Agreement has been criticised for containing laudable objectives, but failing to address the distinct needs of the developing world as a bloc, since it will in effect replace the traditional European emphasis on the ACP countries as a group, instead creating numerous individual free trade pacts with individual countries in the developing world. From the EU's point of view, this new emphasis is on "partnership" rather than the traditional paternalism. What is of interest from a global governance point of view is the strong political dimension of the Agreement, and the multi-dimensional approach taken to solving social problems and human rights matters through economic integration. A basic feature of the Agreement is that starting in 2002, the parties will commence negotiations to create individual "economic partnership agreements", to take effect in 2008.[27] Interestingly, a further objective of the EU is to bring its trade-related international development policy in line with the demands of the WTO, and no doubt to avoid disputes of the sort that arose in relation to bananas.

Article 1 of the Cotonou Agreement calls for an "integrated approach" that takes account of "political, economic, social, cultural and environmental aspects of development". It also emphasises involving the private sector, and creating conditions for "an equitable distribution of the fruits of growth". The language of the EU itself—including references to "social cohesion" and an active "civil society", with sustainable management principles informing "every level of the partnership"—is also much in evidence. Article 4 insists that various "non-State actors" will be involved in development strategies and will be provided with financial resources—again, in terms of regime-building strategy, similar to the methodology of the EU itself.

[26] *Ibid*. at 13.

[27] For strong criticism of the Cotonou approach, see Tetteh Hormeku and Kingsley Ofei-Nkansah, "Thematic Reports 2001: The Cotonou Agreement", Instituto del Tercer Mundo—Social Watch, *at* http://www.socwatch.org.uy/2001/eng/Thematic_reports/cotonoue_agr_2001.htm.

Article 9.2 of the Agreement states that

> "respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement".

How strict a condition this language is intended to place on participation remains to be seen; it does, however, provide an interesting paradigm for integrating trade and other non-economic conditions, here termed "essential" and "fundamental". Article 13 tackles such wide-ranging issues as fair treatment of immigrants, poverty reduction, and access to educational facilities for ACP students. It is clear that complex global governance would ultimately require wealth transfers; it is possible that in the future international trade agreements, such as the WTO agreements, will have to "earn" the participation of developing countries through technology transfer, and investment aimed not so much at preventing "distortions" as in equalising the global playing field.

Such an approach may come to be seen as practical and realistic, rather than fanciful. Indeed, on 30 July 2001, the Director-General of the WTO issued a warning to WTO members that continued failure to reach consensus on the agenda for the upcoming trade negotiations, in the light of the "earlier failure in Seattle", may well lead to a questioning of the WTO as a forum for negotiation. He warned that the WTO could enter a "long period of irrelevance".[28] With developing countries threatening to veto the entire process if their concerns are not met, it would seem that the WTO stands at a crossroads; the Uruguay Round was a one-time event, with the unknown leading to ambiguous compliance, even by those whose interests were not apparently being served. Conflicting interests are a fact, not a political position.

It could be said that the Cotonou Agreement is excessively interventionist at the level of rhetoric, and that massive funding would be needed to make such far-flung aspirations real. However, it is at least impressive to read that "[t]he central objective of ACP-EC cooperation is poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy (Article 19)." The economic sections include provisions on macroeconomic reform as well as microeconomic assistance. Article 25 on "Social sector development" calls for assistance to health care and housing projects, under the guise of "cooperation". There are provisions on environmental co-operation and gender equality, legal reform and institution building. It is striking that the WTO system has not involved any wealth transfers beyond what is ideally supposed to occur in the process of international trade liberalisation. One returns to the issue of whether economic integration is possible or desirable in a situation of entrenched and ongoing dissimilarity of economic and social development; the EU system has answered that in its

[28] Doha WTO Ministerial 2001: Statement by the Director-General, 30 July 2001, at http://www.org/english/thewto_e/mini…n01_dg_statement_gcmeeting30july01_e.htm.

approach to accession; the WTO system is in the throes of dealing with the question, though no answer is yet apparent.

While it is not at all clear whether the Cotonou Agreement can achieve its lofty goals, there is a certain sanity to its structure that the WTO system could learn from. Article 36 makes clear that one of the principal objectives is to conclude new trade agreements that will be compatible with the WTO. The EU is not rejecting the WTO system, and indeed is working to WTO-proof its international trade and aid policies. Non-reciprocal trading arrangements will be denied to countries that have reached higher levels of development; the EU will no longer treat all ACP countries as one bloc. As mentioned above, there will be a "preparatory period" between 2002 and the end of 2007 wherein the parties will be in the process of negotiating country-specific trade agreements. Article 37.3 states that

> "the preparatory period shall also be used for capacity building in the public and private sectors of ACP countries, including measures to enhance competitiveness, for strengthening of regional organisation and for support to regional trade integration initiatives, where appropriate with assistance to budgetary adjustment and fiscal reform, as well as for infrastructure upgrading and development, and for investment promotion".

This is not mere idle speculation on the likely beneficial effects of "more free trade;" rather, at least in outline form, the Agreement offers a blueprint for "capacity building" in the developing world. It may be that what the WTO lacks most sorely is not so much more transparent procedures, as a clear and practical plan for capacity building aimed at the poorer members. This would make possible the introduction of environmental and labour standards, since the developing world will not agree to these changes without a clear indication of targeted wealth transfers. Those who are convinced that trade liberalisation alone will deliver this multiplicity of benefits will be opposed to complicating the global regime in this manner. However, as even the WTO's Director-General seems to indicate, the current configuration of conflicting national interests is leading to stasis and threatening the world trade system itself. For the system to continue and legal development to continue, substantive provisions addressing and altering the clash of interests is probably inevitable.

To this extent, no analysis of international trade law as such, in comparison with the internal trade aspects of the EU, can capture the nature of the current legitimacy crisis gripping the WTO in particular, and offer new modes of understanding the EU's methodology. It is not really open to the WTO to merely "engage with" the world's multiple political, social and cultural constituencies. The crisis, as this work sees it, is in the disproportion between the legal powers of the WTO, as opposed to the far less definite international structures meant to deal with health, labour and human rights. Thus, the WTO's Appellate Body, for instance, almost certainly does not have the power or capacity to provide a "perfect example of the interplay between external

and internal legitimacy".[29] Allowing *Amicus* briefs submitted by NGOs is not sufficient recognition of the outside world. Indeed, the future will in all probability reveal that the issue is not whether or not the WTO recognises those constituents making up the outside world, but how the main players in the development of global governance create new legal structures to take into account these constituencies. It has been my contention that the EU is best positioned to guide this work, as it seems most capable of thinking in these regime-building terms, and best able to communicate with players clearly at odds with one another.

A principal motivation for the writing of this book is the conviction that the field of international trade studies is too small and too insular; that there should be a new field of legal studies created round the notion of "legal aspects of global governance". In this way, the structural differences between international trade law and other sectors of law can be examined. That is why it is so crucial for WTO panel reports to be written in human form, made accessible, far shorter, far less reliant on unreadable technical jargon, more analogously to judicial decisions, and for more law students to be brought into the field. For many years, there was an entrenched belief that international trade law, notably GATT law, was based on immutable principles (such as "comparative advantage"), and that this arcane branch of legal knowledge was best left up to insiders and experts. This worked reasonably well, until the 1995 shift, much discussed, from diplomacy to legalism. All the shift really means is that the consequences of adverse panel and Appellate Body decisions are no longer avoidable in the manner of diplomacy. Rather, there are real penalties and genuine financial consequences. This has inevitably brought to bear an intensity of questioning that did not exist before. Nevertheless, the discourse of the academic writing on the subject has remained in large measure locked in a dull technocratic box, with the panel reports in particular nearly a parody of the turgid and unreadable. By contrast, the European Court of Justice, dealing with similarly technical and difficult economic issues, has consistently been almost poetic. But this is not praise reserved only for the ECJ; the same could be said of nearly any good court in any jurisdiction. It must be said, there is no need for the panel reports and Appellate Body reports, the essential decisions of the WTO, to go on presenting such a forbidding face to the world, daring students to enter, deterring the imaginative and the interdisciplinary to stay, to analyse, and to influence.

It is not uncommon for panel reports to spend many pages parsing the meaning of a small phrase; and the entirety of the pleadings by both sides are likely to be intertwined with the core reasoning of the decision. It is not the case that WTO subject matter is uniquely difficult; it is, however, uniquely isolated from other human concerns. Thus has developed a legal discourse that, consciously or unconsciously, cannot be perused by ordinary, even highly educated, mortals.

[29] See J H H Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" Jean Monnet Program Working Papers, No. 9/00, Harvard Law School (2000).

This has the effect of further limiting the circle of those familiar with WTO law, and intensifying the gap between those who protest and those who explicate the system. It also tends to reinforce a scholarship dominated by description, as opposed to contextualisation.

By virtue of being "closed", the modern nation state managed to deliver certain benefits to its citizenry. In the twentieth century, along with the nationalistic nightmares brought about by inter-state rivalry, relative labour and capital immobility led to demands for redistribution as compared with the early days of the Industrial Revolution. It should go without saying that transnational economic integration can hardly succeed if it is perceived as eliminating many of those hard-won social benefits. In this lies the most impressive achievement of the EU, whatever its negative consequences might be: it has succeeded in economic and political integration, without allowing backsliding from the social attainments of the twentieth century.

The lesson of the history of EU legal developments, as well as the recent breakdown in the forward march of the WTO, may be that economic integration does not exist in isolation from other sectors of law dealing with non-economic values. There can probably be no ongoing WTO, with dispute resolution continuing to threaten national regulatory values, unless non-economic values are somehow factored into a global system in a more "legal", more compelling manner than is currently the case. It may be said that the WTO has no interest in reducing the regulatory autonomy of individual members, but this is not the perception for many of the world's peoples. Public interest theories and practices need not be the sole preserve of the nation; nor of the region, as with the EU. Nor can economic theory genuinely substitute for the public interest at global level.

If one considers a notion such as the "Community interest", a concept that reappears on a regular basis in the reasoning of the European Court of Justice, and in turn transcribes this notion onto a global regime, one gets a sense of what might be needed. It is to be hoped that the debate will soon shift from determining who is a "critic" and who a supporter of the WTO system, to something far more complex, and at the same time far less impenetrable. For the record, it should be stated that this work would like to be part of the drive towards the creation of a global system; it does not advocate localism or unilateralism in trade matters. It does not deny the power of the market. The point, however, is that there is a problem with the fact that true legalism at world level involves only trade concerns. The fact that Article XX of the GATT may be interpreted by the WTO's Appellate Body to allow more national regulations to be declared GATT/WTO-legal than heretofore is not a solution to this essential disproportion.

HOW THIS BOOK SHOULD BE READ

The intention underlying the writing of this work was to present the clash between national regulation and international trade rules in a dramatic, or at

least narrative fashion that would be of interest to all those who care about the construction of transnational regimes. In addition, the hope was to demonstrate how the EU offers a separate, though in many ways closely related, model for economic integration; and further to show how, in embracing and rejecting the GATT/WTO, Europe has the power to influence the future development of global trade law as no other existing nation or group of nations can.

It is not easy, especially for law students, to find a more or less comprehensive work on the subject of WTO law as it actually is, that at the same time bears some relationship to other areas of law and society. In fact, it may be that the principal reason Professor Robert Hudec became such a central figure in trade law studies was that he was able to make GATT law come alive through discussions of individual trade disputes in language that appealed to thinking people and non-specialists. It must be said that it is impossible to determine whether or not the WTO system is performing a valid service to global welfare without understanding what it is in fact doing. Whether or not the WTO has something of value to add to the European legal regime is similarly a question that depends on whether one believes the EU has somehow failed to reach the heavenly stage posited by Kuilwijk, discussed above.

Needless to say, each topic taken up in this book could provide the basis for much more discussion than is found here. For instance, "trade and intellectual property" could also encompass an investigation of the European intellectual property regime; the extent of harmonisation, differences from TRIPS and so forth. However, it seems that what is most urgently lacking at this moment in global development is a coherent framework for understanding the globalisation process, for assessing its characteristics and offering alternative intellectual modes for approaching the next trade round.

In this light, I have attempted to present recent legal developments at GATT/WTO level as an overarching strengthening of trade rules as against national discretion. This is not to suggest that national discretion has always been exercised wisely; but rather to examine the specific manner in which the GATT/WTO system is now empowered to invalidate national laws that do not meet the standards developed since the inception of the General Agreement in the 1940s, and also those renewed and expanded after 1995. There are no doubt those who would quibble with the use of the word "invalidation", since, after all, it is impossible to actually coerce a member country into compliance with a WTO ruling. However, the economic costs of non-compliance are undoubtedly high, even if the edifice rests on mutual consent to recognise the WTO system as a valid and functioning one. Should the conflicts in worldviews and essential national interests become too acute, it is certainly still possible that the WTO system will lose that basic component of credibility, relevance and viability. The EU, despite the waxing and waning of the impulse towards greater integration, has managed to avoid a fatal crisis in its years of operation, and seems set to survive into the foreseeable future. As it generates more instruments of integration—such as the single currency—and as it enlarges to the East, this ability of

the EU regime to endure will undoubtedly come to be seen, if it has not already, as self-evident.

This is not to say that the EU is beyond reproach; rather, it is to recognise that in light of the need for peace within Europe, and the decision to base this new era on the structure of a common market, the EU was able to offer general compensation in many fields for the loss of national autonomy and discretion. The WTO is not yet able to offer such a justification, except in the minds of certain economic theorists or specialists in international trade law. It is to a new generation of readers, intrigued by the possibilities of integration, but willing to imagine other legal models in the construction of global governance, that this book is primarily aimed.

STRUCTURE AND PURPOSE OF THE BOOK

The main purpose of this work was to set out the story of the manner in which the WTO has scrutinised national and EU law; then to examine the legal relationship of the EU to the external trading world, followed by a discussion of the reaction of the European Court of Justice to granting GATT/WTO law direct effect within the European legal regime. The objective was not to provide an exhaustive list of legislative responses at EU level to GATT/WTO law, since this has been carried out by others. Rather, the not very modest intention has been to map out a new way of understanding the relationship between these two regimes, at a time when reaction to globalisation is at times violent. The spectacle of a European Member State's police force turning against anti-globalisation protesters is, to say the least, a historically interesting and important phenomenon.

The book first examines the nature of early GATT law and takes up several key disputes from the early years of GATT. Once the GATT's central methodology is established, later chapters explore developments in recent GATT/WTO law, beginning with intellectual property and trade. Since the issue of patent protection for pharmaceuticals reaches into the problem of public health in the developing world, this has been one of the flashpoints for resistance to full implementation of WTO law by developing countries.

The next chapter, on free trade in investments, also looks at the general question of freedom for developed countries to invest in developing countries, and the nature of conditions and restrictions traditionally placed on such investments by developing countries. The next topic, trade and environmental protection has, along with the public health debate, been one of the most contentious. The chapter covers some of the most high profile of the recent trade and environment disputes, including the *Beef Hormones* and *Sea Turtles* cases. The chapter on trade in agricultural products examines questions relating to this idiosyncratic area of trade; the separate and different approach traditionally taken towards primary products in the world trading

regime, and recent attempts to bring these products within the scope of GATT/ WTO "discipline".

The chapter on safeguards explores the subject of national opt-outs, and examines the nature of the GATT/WTO emergency safeguard provision after 1995. The conclusion is that this is not a very attractive or realistic option for WTO members seeking to protect themselves and their domestic constituencies against low-cost imports. The section on the textile trade suggests that this is one of the areas of genuine benefit to developing countries resulting from the Uruguay Round negotiations; with the caveat that the labour conditions in this industry world-wide are very problematic. The chapter on trade in services looks at why integration of markets in services involves alterations in domestic market organisation at a far deeper level than integration through freer trade in goods. Because of the interesting and important use of the General Agreement on Trade in Services (GATS) in the *US–EC Banana* dispute, a discussion of that case is located in this chapter.

The final chapter on WTO law specifically deals with the matter of national anti-dumping law. It is suggested that with restrictions having been placed on so many avenues to protectionism through the new substantive agreements created during the Uruguay Round, as well as due to the new and more genuinely binding dispute settlement procedures, national and EU anti-dumping law is an area where members retain an unusual degree of discretion in reacting to low-cost imports, even though the use of national anti-dumping instruments is ostensibly restricted by the fairly elaborate WTO rules designed to prevent protectionist reliance on anti-dumping measures.

The latter sections of the book are devoted to the topics of European external trade relations generally; and the role of GATT/WTO law within the European legal regime. The reasoning of the Court of Justice in denying GATT law direct effect within European law is given special attention. It is hoped that it will have become clear what would be at stake were the Court to give the GATT such a privileged role *vis-à-vis* Community regulation from within. Defending EC law before a WTO panel is one matter; striking down Community law because of its inconsistency with GATT/WTO law as an internal matter is quite different.

FOCUS ON THE DISPUTES

In recent times, there has been an enormous amount of discussion concerning the power of an unaccountable, unelected set of persons in Geneva to strike down domestic regulation, on the one hand; and on the other, a great deal of writing describing in enormous detail the slightest changes in the relationship between the WTO bodies and certain key provisions of WTO law—notably Article III on national treatment. This book, by contrast, places its emphasis on the working out of the specific trade disputes that have come before the WTO, comparing them to the earlier GATT disputes and also demonstrating