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10-16-2020

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Trans-Atlantic Market Protectionism & the Implications of Brexit

By Sarah Barrett*

I. INTRODUCTION

In the current geo-political climate, trade has become an issue of contention. There is much debate regarding trade policy and how it relates to international diplomacy. Many trade practitioners have an interest in exposing themselves to comparative trade policy, specifically regarding how legal systems and legal backgrounds can affect trade negotiations, as this will enable them to better predict the reactions of foreign governments to different stimuli.

After exploring disparities in the trade policies of the U.S. and the European Union (EU), as well as the differences in each institutional structure and legal cultures, this Article will conclude that as unifiers of their constituent states, the U.S. and the EU reflect similar market protectionist trade policies as a result of their status as powerful market conglomerates. However, because the U.S. is a more permanent union, the U.S. federal government is less likely to feel pressured to cater to the requests of each individual state. Whereas the EU, because it faces the possibility of members withdrawing, is more likely to implement greater protectionism to encourage member retention.

II. MARKET PROTECTIONISM

a. Market Protectionism Defined

According to one standard dictionary definition, market protectionism is “the protection of domestic businesses and industries against foreign competition by imposing high tariffs and

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restricting imports.”¹ It requires the union of 1) an anti-competitive trade measure with 2) a self-preservative motive. The anti-competitive measure is almost always either an imposition of high duties on imported goods or the imposition of quotas to limit the number of imports. The motive for these measures is usually a government’s desire to protect its own products, thus “improving the competitive position of local economic actors, just because they are local, vis-a-vis their foreign competitors.”²

Every country has a unique approach to market protectionism, but protectionist measures usually consist of tariffs or non-tariff barriers. A tariff is “A duty imposed on imported or exported goods under such a schedule or system.”³ A non-tariff barrier is “an official policy, other than a tariff, that restricts international trade” such as by limiting imports or exports.⁴ Non-tariff barriers include the above-mentioned import quotas, anti-dumping regulations (duties imposed on imports of such a quantity that they threaten the stability of the domestic market), countervailing duties (duties imposed on goods that have been subsidized by foreign governments such that they undercut local prices), health and safety regulations, export subsidies, and other import restrictions.⁵ The effect of each of these measures is to give domestic products a comparative advantage in the domestic market.

b. Factors Leading to Implementation of Market Protectionist Practices

Protectionist policies are intended by their nature to encourage domestic production by discouraging foreign imports. Factors leading to this policy include: 1) the infant industry argument (where a government seeks to provide temporary protection to emerging industries so

¹ *Protectionism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

² Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

³ *Tariff*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁴ *Antidumping duty, countervailing duty*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵ *Nontariff barrier*, BLACK’S LAW DICTIONARY (11th ed. 2019).

that they can adapt, and strengthen their internationally competitive position),⁶ 2) spillover effects-laws that shift costs in order to favor a government's own citizens and disproportionately affect external interests,⁷ 3) national security concerns,⁸ 4) the unequal exchange perspective (the view that relationships between advanced and underdeveloped economies reflect mercantilist and capitalist expansion),⁹ and 5) situations in which fair trade and state interests diverge from global income maximization.¹⁰

c. Competing Policies

Nonmarket protectionism, the opposite of market protectionism, is the policy of free trade with low tariff barriers. The theory behind this policy is that trade liberalization through fewer protectionist practices will result in the greatest amount of wealth-generation, because open markets allow producers to niche their production and therefore achieve the greatest amount of comparative advantage over their competitors.

Federated entities, whether they are a weak or strong, always have some interest in preserving their internal industry from international competition, even if it is legitimate competition.¹¹ However, to the extent that any policy measure is protective of domestic industry, it is also restrictive of trade in general. Restriction of trade generally leads to a decrease in overall wealth, though there is an argument that it also can lead to unemployment from collapse of

⁶ Robert McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 539 (1993).

⁷ Samuel Issacharoff & Catherine M. Sharkey, *Symposium: Emerging Issues in Class Action Law: Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370–72 (2006).

⁸ Even the U.S., considered to be the most open and free market, has moved towards a policy of economic protectionism based on national security concerns. See Stephen Sothmann, *Let He Who is without Sin Cast the First Stone: Foreign Direct Investment and National Security Regulation in China*, 19 IND. INT'L & COMP. L. REV. 203 (2009).

⁹ Joel Ngugi, *Forgetting Lochner in the Journey From Plan To Market: The Framing Effect of the Market Rhetoric In Market-Oriented Reforms*, 56 BUFF. L. REV. 1 (2008).

¹⁰ Dan Danielsen, *Economic Approaches to Global Regulation: Expanding The International Law and Economics Paradigm*, 10 J. INT'L BUS. & L. 23, 33 (2010).

¹¹ Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW J. INT'L L. & BUS. 315, 326 (2005).

noncompetitive industries. Therefore, policymakers are faced with a decision: to prioritize maximization of wealth or to preserve culture, jobs, and interests of voting constituents.

III. BACKGROUND ON U.S. AND EU SYSTEMS

a. U.S. and EU Legal Structure

Comparative trade policy requires an examination of the respective legal systems in order to determine how these structural differences can affect views on and approaches to international trade regulation.

i. U.S. and EU General Legal Systems

Both the U.S. and the EU look to common law (though common law has little influence in the EU and will have less if the UK leaves), statutory law, and treaties as sources of international trade law. The following is a consideration of the U.S. and EU systems in more detail, and the legal influences on their institutional structures relating to trade policy.

The U.S. Commerce Clause is the relevant U.S. Constitutional provision allocating power to regulate interstate commerce exclusively to the federal government and specifically to the legislative branch.¹² Congress has exercised this power by legislating acts such as the Reciprocal Tariff Act,¹³ the Trade Agreements Extension Act (1948),¹⁴ the Trade Agreements Extension Act (1958),¹⁵ and the Trade Expansion Act (1962).¹⁶ Congress has delegated some of its commerce power to the executive because the executive has a cabinet that can more effectively research and prepare trade-related issues for international negotiation. According to one scholar, “over the past few decades, Congress has continued to enact various provisions governing the negotiation and

¹² U.S. CONST. art. 1, § 8, cl. 3.

¹³ 19 U.S.C. §1351(a) (1903).

¹⁴ Trade Agreements Extension Act of 1948, 62 Stat. 1053.

¹⁵ Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673.

¹⁶ Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

implementation of trade agreements... but has not delegated to the President a general authority to modify tariff rates” outside limited situations.¹⁷

On the other hand, while the EU was designed to mirror the U.S. as the world’s most successful federal republic, there are certain key differences. Like the U.S. Congress, the European Commission controls legislative initiatives and has important executive powers regarding international trade policies.¹⁸ The relevant provisions allocating this inter-state power to the European Council is Art. 291 of the Treaty of the Formation of the European Union, which was first implemented in 1957.¹⁹ In considering trade policy issues, the EU governing bodies must maintain a “balance in the process of negotiating and concluding international agreements.”²⁰ The EU does this by having certain bodies, namely the European Council and Council of Ministers, which function to represent the interests of the Member States individually, and another body, the European Commission, which functions to represent the supranational interests of the Union as a whole.

The EU was formed in the 1950s by the Treaties of Rome. These treaties were intended to remove trade barriers among member states and guide creation of a common market. Reflecting the success of the European Union administration, per capita GDP has increased in the entire Eurozone since formation of the European Community in 1951, but experienced exponential growth after the formation of the EU proper in 1993.²¹ The EU is a cooperative system in which

¹⁷ Caitlain D. Lewis, CONG. RESEARCH SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 3 (2016).

¹⁸ European Parliament, *Fact Sheet*, <http://www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission> (last visited Dec. 1, 2019).

¹⁹ Consolidated Version of the Treaty on the Functioning of the European Union art. 291, Sept. 5, 2008, 2008 O.J. (C 2) 1.

²⁰ Devuyt, Youri, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J. INT’L BUS. & L. 259, 268 (2013).

²¹ The World Bank, *GDP per capita – European Union* (2018), <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=EU>.

member countries agree to surrender a degree of sovereignty in exchange for economic and political integration.²² It allows for the pooling of resources and for collective decision-making on issues such as agriculture, consumer affairs, culture, environment, energy, transportation, and trade. The EU was not meant to replace individual existing states; in fact, member countries maintain a significant amount of sovereignty.

However, the UK has been a persistent objector to several EU policies in order to retain more national sovereignty. For example, the UK did not sign the Schengen Agreement on visa-free travel, and it kept the British pound instead of switching the Euro.²³ The trade ramifications of the UK's exit from the EU will depend on whether negotiators agree to a soft Brexit (maintaining free movements of goods) or a hard Brexit (imposition of tariffs on both sides). The EU has some incentive to try for a hard Brexit in order to maintain its legitimacy by making an example out of the UK, but additional tariffs are likely to have a negative effect on both economies.²⁴

ii. Role of Treaties

One major decision-making function of federations is implementing external policies such as treaties. With respect to treaties, countries can be monist, where treaties are “automatically incorporated into domestic law,”²⁵ dualist, where treaties are “ineffective unless domestic law is adapted to incorporate or conform to international law,”²⁶ or some combination of the two. Trade treaties play an important role in both the U.S. and EU systems. The power to make and/or

²² Federico Pasini, *Economic Stability and Economic Governance in the Euro Area: What the European Crisis Can Teach on the Limits of Economic Integration*, 16 J. INT ECON. L. 235 (2013).

²³ Marie-Laure Basilién-Gainche, *The EU External Edges: Borders as Walls or Ways?*, 2 J. TERRITORIAL & MAR. STUD. 97, 99-101 (2015).

²⁴ Steve Mccorriston & Ian M. Sheldon, *Economic Nationalism: US Trade Policy vs. Brexit*, 14 OHIO ST. BUS. L.J. 64, 97 (2020).

²⁵ *Monism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁶ *Dualism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

implement treaties is a significant portion of trade policy power because the amount of U.S. gross domestic product that has ties to international trade has grown in recent years.

The U.S. is a mixed system in that it directly implements self-executing treaties but requires Congressional implementation of non-self-executing treaties. In the U.S., the Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."²⁷ In the U.S. treaty system, most scholars agree that "because the President has the power not to ratify a treaty even after the Senate's consent has been given, the President must have the parallel authority to withdraw that ratification regardless of the Senate's position."²⁸ As an example, President Trump has chosen to unilaterally withdraw from the Trans-Pacific Partnership in early 2017 without the approval of the Senate and this decision has been given legal effect.²⁹

In the EU, for a treaty to be implemented, the European Council must issue a mandate calling for entry and then the European Commission is "responsible for negotiating international agreements."³⁰ The agreements are then submitted to the Council, so that all national interests are represented when the proposed treaties are vetted.³¹ In sum, there is no unilateral power of an executive branch to enter a treaty without assent of all of the member states in the EU.

iii. U.S. and EU Voting Rules

A second major decision-making function of federations is voting on internal policies (domestic legislation). For domestic legislation to be implemented in the U.S., it must pass a

²⁷ U.S. CONST. art. II, § 2.

²⁸ There is some scholarship suggesting that the President does not have the power to unilaterally withdraw from treaties, though much of it is now decades old. *See, e.g.,* Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008). *See, e.g.,* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 217 (2d ed. 1996).

²⁹ Mireya Solís, *TRUMP WITHDRAWING FROM THE TRANS-PACIFIC PARTNERSHIP* (Brookings Institution 2017).

³⁰ Consolidated Version of the Treaty on the Functioning of the European Union arts. 207, 218, Sept. 5, 2008, OJ (C 2).

³¹ Consolidated version of the Treaty on European Union art. 15(2), 2012 OJ (C 326).

majority vote in both houses of Congress. However, in the EU system, decisions of the Council of the European Union to enter a treaty generally require a supermajority vote. The Lisbon Treaty states that “qualified majority voting,” which can require either 55% of member states, representing 65% of the EU population or 72% of member states and EU population, is to be the default requirement for the Council.³² However, the EU Treaty's flexibility clause, Article 308, permits the EU to act (subject to a unanimous vote of the Council) to achieve a EU objective where the Treaties have not provided the necessary powers.³³

The effect of the EU supermajority requirement is that the Council as a whole is incentivized to satisfy all member states, far more so than in the U.S. where the administration can focus more on the aggregate good than on appeasement of individual states. In contrast to the EU system, U.S. state governments qua state governments do not have representation in Congress. Rather, their citizens elect individual representatives (i.e., the Senate and House of Representatives). This indirect representation acts as a level of state removal from direct influence on trade policy. For these reasons, the U.S. can afford to implement trade-liberalizing policies that may not be universally popular, while the EU is constrained to the individual interests of its state governments.

iv. U.S. and EU Exit Rules

The U.S. Supreme Court ruled in *Texas v. White*³⁴ that the U.S. is an “indestructible union”³⁵ and that the Constitution did not permit states to unilaterally secede from the United States, and that the ordinances of secession adopted before the Civil War were “absolutely null.”³⁶

³² Consolidated Version of the Treaty on the Functioning of the European Union art. 205(1), 2012 OJ (C 326). Most Council decisions are specified in the EC Treaty as either requiring either a qualified majority vote or unanimity.

³³ Stephen C. Sieberson, *The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit*, 14 COLUM. J. EUR. L. 445, 450 (2008).

³⁴ 74 U.S. 700 (1868), *overruled in part by* Morgan v. United States, 113 U.S. 476 (1885).

³⁵ *Texas v. White* 74 U.S. 700, 726 (1868).

³⁶ *Id.* at 727.

The Civil War was evidence that the U.S. does not tolerate secession and will use force to preserve the union. It would be very difficult for a member state to leave the U.S., and it has not been possible thus far in history.

By contrast, the EU has explicit exit rules laid out in Art. 50 of the Treaty of Lisbon.³⁷ This treaty both made the EU's central institutions more powerful and gave members an official mechanism to leave.³⁸ Therefore, it is legal for a member of the EU to leave without being in any kind of substantive violation. In fact, the UK decided to exercise this right when in 2016 UK voters voted to leave the EU in a movement termed "BREXIT."³⁹

The effect of having an exit right is that member states may be tempted by the possibility of making a better trade deal on their own rather than as an aggregate. This is in contrast to the absence of an exit provision in the U.S., which undermines any possibility of a better individual deal. Therefore, the EU exit rules tend to champion protectionism over free trade because individual EU member states that want to pursue protectionist policies can pressure the EU to adopt them by the threat of withdrawal from the EU. Meanwhile the U.S. exit rules (or lack thereof) allow for a more liberalized approach to trade without fear of factious division.

b. U.S. and EU Historical Trade Practices

i. Historical Trade Policies

At the formation of the U.S., the second statute enacted by the first Congress was the Tariff Act of 1789, which imposed 8.5% tariffs on all imports.⁴⁰ This was to provide funding for the newly formed government. The next notable change occurred in 1930 with the passage of the

³⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C306) [hereinafter Treaty of Lisbon].

³⁸ *Id.*

³⁹ Jan Miller, *Brexit: Art 50 is Triggered*, 167 NLJ 7740, p4 (1) (2017).

⁴⁰ 1 US CUSTOMS AND INTERNATIONAL TRADE GUIDE § 2.01 (2019).

Smoot-Hawley Tariff Act of 1930, deemed the “zenith of U.S. protectionism.”⁴¹ Four years later Congress passed the Reciprocal Trade Agreements Act that “resulted in negotiated tariff reductions and continuing trade liberalization throughout the postwar period.”⁴² This general trend toward trade liberalization has continued until the most recent presidential administration.

Conversely, the EU Constitutional Treaty (2004) provides protection against liberalization when national interests are at stake.⁴³ This is because unanimous voting is necessary to pass a trade resolution, meaning that any one individual state has a blocking right that can be used to prevent legislation liberalizing trade. Many European countries have a strong interest in preventing liberalization in trade on a product of cultural importance, so that they can protect their domestic industry. For instance, France, a major player in the EU has fought to keep its veto rights on trade in cultural goods.⁴⁴ This allowance for protection of national interests in the EU Constitutional Treaty is an important obstacle to trade liberalization because many goods can be considered “of national interest.”⁴⁵ However, according to one commentator, the UK “tried to neutralize what [it] saw as the potential negative effects of the EU on [its] own position by refusing to adopt the euro, but still joined the European Economic Cooperation free trade area.”⁴⁶

ii. Historical Outcomes

The effect of the Smoot Hawley Act was to worsen the economic situation of the U.S. and its trading partners and to “deepen the Great Depression by reducing the buying power of consumers, whose income was previously reduced by already-existing depressed economic

⁴¹ Peter Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37 VAND. J. TRANSNAT'L L. 897 (2004).

⁴² Douglas Irwin & Randall Kroszner, *Interests, Institutions, And Ideology In Securing Policy Change: The Republican Conversion To Trade Liberalization After Smoot-Hawley*, 42 J. L. & ECON. 643 (1999).

⁴³ Rafael Leal-Arcas, *Is EC Trade Policy Up To Par?: A Legal Analysis Over Time- Rome, Marrakesh, Amsterdam, Nice, And The Constitutional Treaty*, 13 COLUM. J. EUR. L. 305 (2007).

⁴⁴ *Id.* at 378

⁴⁵ *Id.* at 400.

⁴⁶ *Id.*

conditions.”⁴⁷ The collective consequence of the multilateral tariff increases was to cripple demand for goods from any country.⁴⁸

The effect of the EU system regarding trade policy is, according to one observer, “dissatisfaction with the lack of information on trade policy provided . . . by the [European] Commission.”⁴⁹ Given this lack of adequate transparency, EU Member States do not fully trust the supranational European Commission to defend their national interests in all areas of trade policy. As a result of this diminished trust, member states wish to retain their right to participate in and veto international trade negotiations.⁵⁰ For this reason, the EU has historically been far more protective of products such as wine, cheese, etc. because they are items that are of cultural and historical importance to their original European source.⁵¹

IV. CURRENT U.S. AND EU TRADE PROTECTIONISM

a. Comparative Tariffs and NTBs

The United States Trade Representative (USTR) has stated that its office has a goal of “opening markets throughout the world to create new opportunities and higher living standards for families, farmers, manufacturers, workers, consumers, and businesses.”⁵² Similarly, the EU has created a “Market Access Strategy” in an attempt to create the “best possible conditions for European firms to export around the world” and to “make sure international trade rules are enforced.”⁵³ While this is an excellent idea in theory, it is unlikely that many truly liberalizing policies will make it into EU legislation because the structure of the EU leaves the legislative

⁴⁷ Gerhart, *supra* note 41, at 908.

⁴⁸ Mccorrison, *supra* note 24.

⁴⁹ H.L., *European Union Committee*, at Ch. 4.

⁵⁰ Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125 (2006).

⁵¹ Tomer Broude, *Taking "Trade And Culture" Seriously: Geographical Indications And Cultural Protection In WTO Law*, 9336 U. PA. J. INT'L ECON. L. 623, 628 (2005).

⁵² Office of the United States Trade Representative, *Mission of the USTR*, <https://ustr.gov/about-us/about-ustr>

⁵³ European Commission, *Accessing Markets*, <https://ec.europa.eu/trade/policy/accessing-markets/>.

implementation of this liberalizing theory dependent upon the consensus of every EU member state.

b. Comparative Implementation of Protectionist Measures

Given their different structures, the U.S. and the EU implement tariffs and NTBs differently. In particular, the United States Trade Representative (USTR) was established within the Executive Office of the President and has “primary responsibility for developing, and for coordinating the implementation of United States international trade policy . . . and shall be the chief representative of the United States for . . . international trade negotiations.”⁵⁴ The USTR is a large, well-funded, and functional branch of the executive and it has a high success rate of implementing US trade liberalizing measures.⁵⁵ However, in recent years, its implementation of trade liberalizing policy has been interrupted by President Trump’s use of unilateral 232 tariffs purporting to protect U.S. national security and 301 tariffs to combat China’s unjustifiable and discriminatory trade practices—especially regarding appropriation of U.S. intellectual property.

The European Council (EC) is responsible for enforcement of all EU trade Agreements.⁵⁶ Given the Market Access Policy adopted by the EU, the EC attempts to address current barriers to trade (tariffs, non-tariff-barriers, etc.) through trade agreements. The Council reports that it has been successful in liberalizing trade by addressing twenty-three barriers to trade in 2015, twenty in 2016, a record forty-five barriers addressed in 2017 and 35 removed barriers in 2018.⁵⁷ Considering both its claims and its protectionist regulation regarding cultural goods, the EU has

⁵⁴ 19 U.S.C. § 2171(c)(1), (1974)

⁵⁵ Executive Office of the President of the United States, *2019 National Trade Estimate Report on Foreign Trade Barriers* (2009), available at https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf.

⁵⁶ European Commission, *Report from the Commission to the Parliament and the Council on Trade and Investment Barriers* (2019). https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157929.pdf.

⁵⁷ *Id.*

removed barriers imposed by other countries, but has retained barriers imposed by the EU on its trading partners.⁵⁸

V. CONCLUSION

Arguably, the U.S. system is better for trade in general because it is less subject to factious constituents pressuring for protection of their industries. While the U.S. system does have some weakness in that the U.S. President can unilaterally withdraw from trade treaties, and may impose tariffs for ambiguously defined reasons, there are better safeguards in the U.S. against protectionism, which lessens possibility of the U.S. engaging in blatant protectionism.

Under the European Union, according to one scholar, the European Council is “shrouded in politics” and as a result can engage in protectionism without the knowledge or consent of the member states.⁵⁹ To make matters worse, the influence of the European Union as a unified economic force is thought to be waning due to its inability to speak with one voice.⁶⁰ According to another scholar, “it is in [the member states’] national interest to give up their national sovereignty to the European level in order to have a stronger negotiating position, provided that the EU common position defends that national interest.”⁶¹ However, this would only be legally possible by amending the EU Treaties. Therefore, the absence of exposure and accountability allows the European Council to engage in unchecked protectionism, often at the expense of free trade far more than the transparent activities of the U.S. Congress.

⁵⁸ Council Regulation 116/2009, 2009 O.J. (L 39) 1 (EC).

⁵⁹ Jeffrey Peterson, *Unrest in the European Commission: The Changing Landscape and Politics of International Mergers for United States Companies*, 24 Hous. J. INT’L L. 378, 391–94 (2002).

⁶⁰ Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1 (2012).

⁶¹ Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125 (2005).