Exporting Rules: The European Union as Model for International Regimes?

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Peter Holmes
Centre on European Political Economy
University of Sussex
Falmer, Brighton BN1 9SH
UNITED KINGDOM
Tel: +44 1273 678 832
Fax: +44 1273 678 571
email: sffa2@sussex.ac.uk

Alasdair R. Young
Centre on European Political Economy
University of Sussex
Falmer, Brighton BN1 9SH
UNITED KINGDOM
Tel: +44 1273 877 156
Fax: +44 1273 678 571
email: a.r.young@sussex.ac.uk

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INTRODUCTION

The basic theme of this paper is that the European Union (EU)[1] occupies a very peculiar role in the global system: it is simultaneously an international actor and an international institution. It is both a protagonist in the global system and a potential model for that system. This potential is due to the fact that it was designed to liberalise economic exchange between states.

The EU's potential as a model is arguably becoming increasingly relevant as the global trading system moves further in tackling 'beyond-the-border-issues'— technical barriers to trade (TBTs) and domestic regulations governing services and investment, as well as competition. Essentially, differences in product regulations can present barriers to trade. National regulations governing competition, services or establishment and their pattern of enforcement can hinder investment and entry.

We, not terribly controversially, assume that the vast majority of regulations are intended to address legitimate public policy objectives. Nonetheless, they may do so in ways that impede free economic exchange. In addition, some regulations are adopted as disguised

[1] Although the term European Union is legally inaccurate, as all of the issues we discuss fall within the first pillar of the EU and as it is the European *Community* that is a member of the World Trade Organisation, we adopt common usage.

emerges between further liberalisation and preserving legitimate regulatory sovereignty. This tension is evident in the current transatlantic dispute over beef hormones and was a factor in the collapse last year of the negotiations on a multilateral agreement on investment (MAI). One particularly difficult aspect of this tension concerns how to deal with different national attitudes and approaches to risk.

We argue that this is something that the EU has tackled before. Although it does not frame the issue the way we have, the EU, particularly the European Commission, is explicitly or implicitly arguing that it own experience should inform multilateral rule-making (see, for example, Commission 1998a). The most striking example in the current context is competition policy where the Commission has invested heavily in persuading the rest of the world, and above all its immediate neighbours, to adopt a philosophical approach based on the EU's experience. The EU would claim to have pioneered mutual recognition as a way out of the dilemmas posed by attempts at strict harmonisation. In telecommunications services, in particular, there has been a fairly successful adaptation of the EU model, with its emphasis on competition policy instead of regulation, to the global stage. The EU's state aids rules, arguably, inspired the World Trade Organisation's (WTO) subsidy code (Woolcock, 1993).

There are, however, substantial limits to the suitability of the EU as a model for the global system. Only where the EU has pursued trade liberalisation on a scale that essentially anticipates multilateral action might it be seen as a pioneer. Where the EU is truly *sui generis* and is to some extent creating some of the attributes of a state or at least a confederation, it is unlikely to be appropriate. There is thus a risk that the WTO might seek to pursue the kind of beyond-border 'deep integration' discussed by Lawrence (1995) in a context where there is not the kind of 'club' of countries, which he suggests is needed for it to work. Moreover, we also argue that attempts to transpose EU-like approaches to the wider stage can and do have feedback effects, some unanticipated, on the EU itself (see also the companion paper by Alasdair Young).

This paper is more about defining a research agenda than providing definitive answers. Nonetheless, in addition to characterising the EU system of regulation and contrasting it with the multilateral developments to date, we aim to identify which aspects of the EU model might be appropriate for application at the global level and in which areas. Our central finding, which is perhaps not surprising, is that the EU's less highly developed internal regimes, whether now or at some previous stage in the integration process, are more likely to serve as models for the multilateral system. Whether the EU is an appropriate model or not, its experience with these issues may provide valuable insights into how (or how not) to advance multilateral liberalisation.

We consider the appropriateness of EU models in four areas that are now rising — some as a result of the discussions about a possible 'Millennium Round,' others because of recent WTO dispute settlement cases — to the top of the international trade agenda. These are:

- technical barriers to trade, focusing on issues of risk;
- services (which are addressed in detail in Henrieke Mueller's paper);
- investment; and
- competition policy.

We begin, however, by addressing what we see as one of the fundamental challenges to further liberalisation — respecting regulatory sovereignty, particularly as it reflects different attitudes to risk.

LIBERALISATION VERSUS REGULATORY SOVEREIGNTY?

Divergent national regulations can and do pose barriers to trade. While regulations adopted as disguised protectionism might be eliminated much as quantitative restrictions (QRs) have been, most regulations serve legitimate and necessary purposes. Consequently, they cannot simply be swept aside. Squaring the circle by replacing divergent national rules with common rules, as even the EU has discovered, is fiendishly complicated and time-consuming, at best; and at the multilateral level probably impossible. In the absence of common multilateral regulations, how can the tension between liberalising trade and addressing market failures by satisfactorily addressed?

The problem exists because there are a number of legitimate reasons for national regulations to diverge (Hancher and Moran, 1989; Previdi, 1997). First, and most straight forward, different countries face different problems. This naturally results in different policy responses. Second, there are cultural differences in attitudes towards risk. When devising rules for assessing the safety of substances no formula will be perfect. There is the double-edged risk of mistakenly banning something that is quite safe or of mistakenly permitting something dangerous. No test is perfect. Statisticians distinguish 'Type I' and 'Type II' errors, i.e., falsely rejecting a true hypothesis vs falsely accepting an untrue one. They tell us that for any given amount of evidence you cannot reduce the risk of one type of error without increasing the risk of the other. The choice on the trade off depends on subjective preferences regarding the consequences of error, the 'loss function' (see Bernstein 1996). Where these differences are cultural, as we contend they are at least in part, national regulatory frameworks will be set such as to opt for more of one or other risk. The US, and to a lesser extent the UK, tend to err on the side of the putting burden of proof on those who want to act, and thus require high levels of scientific proof before introducing regulations. Denmark and Germany, however, are more concerned about the potential risk of the new and tend to place much greater emphasis on the 'precautionary principle' (Héritier 1994).[2]

Last, but not least, even if two countries face the same problem and have the same attitude to risk, politics would produce different outcomes, (Pollak 1998). As different countries (including the EU) have different constellations of societal interests and different political institutions, the political interplay between them would be expected to produce different regulatory outcomes.

Given the legitimate bases for differences in national regulatory approaches, the question arises how the multilateral system should cope with the tension between trade liberalisation and regulatory sovereignty. The international system faces a trade off between the risks of allowing national bans that are ostensibly for consumer protection, but actually are sheer protectionism (letting the guilty person go free) versus the danger of preventing countries banning products merely because their collective preferences are different (convicting an innocent).

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[2] There is no risk minimising free lunch here as attention paid to any one risk may distract from another (Jaynes p.xiv).

Moreover one country's choice of system is likely to provoke responses by others. So if country A acts in an ultra-cautious manner and gets permission from the world system to do so, that would give authorisation to others to do the same, which would have the additional costs of hurting country A's exports and it might deny consumers in the other countries freedom of choice and competition, as they were in country A. This spillover effect may be in the same or different sector. There is in fact no economic welfare reason for the US to deny its non-risk averse consumers EU-made products that the EU itself does not permit, if in fact the US consumers do prefer choice. Thus if the EU presses the WTO to allow it to opt out of internationally agreed standards, it is asking for others to have this right too. Once this would have been accepted readily, but with the increased political weight of *export* interests at the expense of importers (Milner, 1988) this is no longer so easily agreed.

Moreover, as Alasdair Young discusses in a companion paper, there is a dynamic interaction between EU and multilateral rules. If the EU as a whole has accepted a norm at WTO level, then degree of differentiation *within* the EU and the processes for managing it becomes subject to WTO disciplines.

ECONOMIC INTEGRATION THE EU WAY

A crucial feature of the EU's regulatory approach is that, despite having engaged in a greater degree of regulatory approximation than any other group of countries, a significant degree of variation between national rules is still permitted. It is this acceptance of variation, albeit within limits, which we argue holds the key to the EU's potential as a model for the multilateral system.

An important aside here is that the EU has shown much greater tolerance for differences in regulations of production processes — such as social legislation and some environmental measures — than it has for those that affect market access — such as product characteristics. Apart from worker safety legislation, which often actually concerns equipment safety, the EU has made very little attempt to harmonise working conditions — the work-time directive being the sole exception. Most environmental legislation that addresses pollution from production processes has taken the form of minimum directives, which set only the regulatory floor. This approach is reinforced by the treaty provisions on worker safety and the environment (Articles 118a and 130t, respectively, of the Single European Act) explicitly permit the member governments to maintain or introduce national measures more stringent than those agreed at the European level. Further, environmental, process directives, the large combustion plant directive being the prime example, often formally accept significant degrees of national variation in the form of derogations. Lastly, recently there has been a move to make greater use of environmental quality targets, as opposed to the approximation of limits on particular emissions from specific sources. This permits much greater flexibility at the national, and even regional, level.

Although there is a strong economic argument (see, for example, Smith et al 1996) for not worrying about production processes when seeking to liberalise international economic exchange, the shape and nature of the EU's approach has been dictated by regulatory politics (Young and Wallace, forthcoming). The member governments have different preferences, which cannot always be readily reconciled within common rules. Given the problems the EU — compared to the world, a relatively small and homogenous club of countries — has had tackling these issues, it is highly unlikely that the global system will make much progress towards common standards, despite concerns in parts of the developed world about social and environmental 'dumping'.

Although the EU is less tolerant of variation with respect to regulations that affect market access, it is not *in*tolerant. Again, politics matter. Progress on trade liberalisation within the EU has been possible only because the approach acknowledges and respects the member governments' prerogative to pursue legitimate public policy objectives, even at the expense of interfering with the four freedoms (Young and Wallace, forthcoming). The result is that although the EU system is predicated on liberalising inter-state economic exchange, it accepts legitimate national restrictions. To understand how this works and how it might be applicable to the multilateral system, it is necessary to summarise briefly the key aspects of the EU's regulatory regime, the *acquis communautaire*.

The starting point is, of course, the Treaties, particularly, for our purposes, the 1957 Treaty of Rome. The Treaty of Rome established the core principles of non-discrimination and the free circulation of goods, services, capital and people, albeit crucially within certain bounds (see Table 1). Significantly, however, national rules, at least in part because they addressed valid public policy objectives, could not simply we swept away by the application of treaty principles. Consequently, secondary legislation, which introduced a degree of regulatory approximation, had to be adopted in a number of areas. Thus John Pinder's (1968) distinction between 'negative' and 'positive' integration, while analytically useful, is rather too stark.

Crucial to both the functioning of the EU regime and to its suitability and transferability to the multilateral level, is the central role played by the European Court of Justice (ECJ) in interpreting the provisions of the treaties and the member states' compliance with them and subsequent secondary legislation. In particular, the ECJ is charged (at least implicitly) with assessing whether national rules that impede the four freedoms do so within the acceptable limits set by the treaties. Acceptance by governments of negative judgements, particularly in the light until recently of no coercive powers, hinges upon the legitimacy of the ECJ.

Goods

The inability of the Treaty alone to deliver economic integration was, in many respects, most evident with respect to goods, although there were also particular problems with transport services (see below). Following the creation of the customs union in 1968, it became evident that TBTs were the most significant remaining obstacles to free trade. Most of these rules, however, safeguarded legitimate public policy objectives and so could not simply be swept aside. The Commission's initial response was to seek to agree detailed common rules to eliminate the awkward national differences that impeded trade. This proved extremely cumbersome, slow and unsatisfactory (Dashwood, 1983).

In the early 1980s the EU changed tack. The Commission, building upon the ECJ's *Dassonville* and *Cassis de Dijon* judgements, advanced two core innovations — the mutual recognition principle and the new-approach to harmonisation — which paved the way for the single European market programme (SEM) (Wallace and Young, 1996). The mutual recognition principle assumes that although the member states' rules might differ in substance, unless proved otherwise, they should be considered to be equivalent in effect. Consequently, the default scenario is for the member governments to accept products legally on sale in other member states.

The mutual recognition principle, particularly the assumption of equivalence, has been tested numerous times. Significantly, the ECJ has not required governments to provide conclusive proof that a product would harm human health before it can exercise it prerogative under Article 36 (Weatherill and Beaumont, 1993). This was illustrated in the *Eyssen* case, in which the Dutch government's ban on the preservative nisin in processed cheese was challenged as an unfair trade barrier. Although existing scientific evidence on the health risk of nisin was equivocal, the ECJ took the view that a government is entitled to protect its public from substances the safety of which is subject to scientific doubt. In other words, application of the precautionary principle is sufficient to justify action under Article 36.

The mutual recognition principle applies to products accounting for approximately 25 percent of industrial production (Commission, 1996b). This indicates that, even within the a relatively homogenous club of countries that is the EU, only a relatively small proportion of regulations can be assumed to be equivalent in effect.

Even when European regulation is required, it does not necessarily have to be detailed. This is where the new-approach directives come into play. In some areas, the European institutions confine themselves to agreeing common 'essential minimum requirements,' which tend to establish only ends, not the means of achieving them. Developing detailed specifications to meet these requirements is delegated to the European standards bodies — CEN, CENELEC and ETSI. Even those European standards, although bringing advantages, are not mandatory; any standard that is certified to meet essential minimum requirements can circulate freely within the EU. Products falling under the new approach directives — such as toys, construction products, pressure vessels and recreational craft — account for about 17 percent of EU industrial production (Commission, 1996).

As a consequence, detailed harmonisation is restricted to relatively few products — most notably cars and chemicals — that are regarded as particularly dangerous. There are also centralised authorisation procedures for pharmaceuticals and genetically modified crops and foods. Although restricted to relatively few product groups, because of their economic importance, detailed harmonisation affects products accounting for about 30 percent of industrial production.

Finally, even when common EU product standards have been adopted, it is possible, under certain circumstances and with the prior approval of the Commission, for member governments to impose more stringent national standards under Article 100a(4). This provision was included in order to address the Danish and German governments' concern that single market rules adopted under qualified majority voting, with them in the minority, might force them to accept products that they consider unsafe or environmentally harmful (Ehlerman 1987). This was underlined by Denmark's (not legally binding) Declaration in the Single European Act to the effect that

> ... in cases where a Member State is of the opinion that measures adopted under Article 100a [single market measures] do not safeguard higher requirements concerning the working environment, the protection of the environment or the needs referred to in Article 36, the provisions of Article 100a(4) guarantee that the Member State in question can apply national provisions.

According to the Commission (1996a), governments have invoke Article 100a(4) most often in the chemical sector. It is the most likely basis, for example, of the Danish government's recent announced bans on phalates and lead compounds (The *Guardian*, 3 May 1999). Such restrictions are disputed. As far as we know, however, the only legal challenge to have been concluded was the French government's challenge of the Commission's approval of Germany's ban on PCPs. The ECJ, in 1994, overturned the Commission's approval of the ban on procedural grounds.

The Treaty of Amsterdam substantially modified Article 100a(4). These changes require the member government to notify the Commission of the reasons for maintaining the provision, but also permit member states, with the permission of the Commission, to *introduce* national provisions based on new scientific evidence after the adoption of common measures.

Services

There are two particular aspects to services that make transnational liberalisation particularly challenging: they are often subject to high levels of domestic regulation and often the provision of services requires the physical proximity of supplier and consumer and, thus, often involves establishment. The EU, as did the General Agreement on Trade in Services (GATS) (see below), makes a distinction between the cross-border supply of services and those involving establishment. We shall follow their lead and focus here on the cross-border provision of services, including establishment in our discussion of investment, below.

Despite the general difficulties of liberalising cross-border trade in services, European action was required in only a relatively few service sectors: financial services, transport, telecommunications, broadcasting and advertising (Commission, 1996b). Significantly, the Treaty of Rome explicitly allocated special treatment to financial services and transport, and the liberalisation of telecommunications services was not even considered at the time. In fact, that trade in services could be liberalised was not widely appreciated until the 1980s (Drake and Nicolaïdes 1992).

The transport sector was given special treatment in the Treaty, as it was in the member states, because of its importance to national economic development. Its special role was protected through economic regulations that set quantitative restrictions, explicitly or implicitly through monopolies, and often price controls. Cross-border transport services were governed by bilateral arrangements between the member states, which also limited numbers of service providers and set prices. European regulation liberalised cross-border provision of transport services, in all but rail, by eliminating quantitative restrictions and price controls, replacing them with common qualitative criteria and safety measures. This is roughly analogous to the mutual recognition principle on the basis of equivalent national rules (or minimum essential requirements).

An essentially similar approach was adopted towards financial services, as Henrike Mueller's paper explains in detail with respect to the insurance sector. Here the comparison with essential minimum requirements and mutual recognition is even more striking. The centre-piece of the approach was approximation of national prudential regulations (minimum essential requirements) combined with 'home-country control' (mutual recognition). Under this system, with the exception of some aspects of personal life insurance, the EU-wide operations of a financial institution — whether provided across borders or through establishment — are regulated by the government of the state in which it has its headquarters.

The move to liberalise telecommunications services in the EU came only in the late 1980s, and thus, more than in any other sector paralleled multilateral developments. As a result, the EU's internal liberalisation efforts explicitly referred to the establishment of a 'fair international trade environment' (see, for example, Council Resolution of 22 July 1993). The key to liberalising cross-border telecommunications services was abolishing discriminatory conditions for access to the existing network. The most important elements, however, concerned establishment, to which we now turn.

Investment

Unlike with goods and services, there has been relatively little secondary legislation implementing the EU's internal investment regime, which is base almost entirely on the Treaty of Rome. Nonetheless, some common rules have been necessary to ensure the free flow of investment between member states. The most important of these concern the liberalisation of capital movements and the abolition of exchange controls and the establishment of basic conditions with respect to financial, transport and telecommunications services, mentioned above.

Prior to the SEM programme, transport was the only sector to which the right of establishment did not apply. The SEM, however, created common definitions of European firms and established frameworks that enabled them to operate freely throughout the EU. Establishment in financial services was less of a problem, although it did require a national licence for each member state in which operations were conducted and sometimes licensing conditions were discriminatory. The establishment of 'home-country control,' described above, addressed both of these problems.

In telecommunications, common rules were adopted to eliminate exclusive rights on mobile, data and satellite services and, more recently, basic telecommunications. The 1998 package of liberalisation measures requires: objective, transparent and non-discriminatory licensing of network operators and service providers. Although various conditions, including for universal service, may be attached to licences, the number of licenses available cannot be limited except where necessary for technical reasons. Particularly relevant for our purposes, is the regulatory framework to ensure that competitors have access to and interconnection with the network on reasonable terms. This regime, enshrined in the EU's 1995 open-network provision directive, provided the model for the GATS 'Reference Paper' on anti-competitive behaviour (Holmes et al 1996.)

A wide range of non-investment-specific European rules also affect cross-border investments within the EU. The works council directive and the merger control directives, for example, apply only to firms with operations in more than one member state. Other rules, such as controls on state aids (subsidies), rules on regional aids, the work-time directive, and environmental measures affect foreign investment as well as domestic firms.[3] Arguably, the interlocking web of general European rules obviates the need for an extensive regime specific to extra-EU inward investment.

Competition policy

The Commission is extremely active in promoting something resembling the European idea of competition policy as a model for the global system, (see Commission 1995, 1996c). The trade-related dimension of EU rules make this a very interesting idea, but we argue that there is need for considerable caution here.

EU competition policy (Treaty of Rome, Articles 85-94) appears on the face of it to be a straightforward form of anti-trust for the European market. It is, however, worth noting, however, that the Treaty is targeting not inefficiency or harm to consumers *per se* but measures and actions that 'distort trade between member states.' The objective is to ensure that as tariff barriers and other state-controlled border measures disappear they are not replaced by subsidies or by various forms of market entry barriers put in place by private or state-owned firms. Thus, the Treaty targets cartels that enable the fragmentation of the European market and abuses of dominant position that allow a firm in one market to rip-off

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3 See Brewer and S. Young (1995) for a full description of EU policies with implications for FDI.

consumers while preventing rivals from elsewhere entering its home market. Rapacious abuses that do not affect trade are acceptable.

This explains the emphasis in the initial years of EU competition policy on the removal of vertical restraints — such as restrictive selective and exclusive distribution agreements — which allowed producers to segment (national) markets. Thus the Commission's 1996 Green Paper on Vertical Restraints notes that EU competition policy is unusual in having 'market integration' *per se* as a goal. One reason for this appears to have been to prevent firms with a dominant position in one market using that as a springboard to sell at lower prices into other parts of the common market, while using control of the distribution system to prevent 'sell-back' into the higher priced market, thus allowing 'predation.' This helps to explain the emphasis placed on competition policy in the Europe Agreements with central and east European countries. It must, however, be remembered that competition policy is not the only tool for promoting market integration and, whatever one may read into the Treaty, integration is not the sole goal of competition policy.

As the single market became a reality, EU competition policy came to a turning point. It could be argued that, if the single market worked properly, each national market could be considered 'contestable' as it would be so open to entry that European competition policy would be made redundant. Alternatively, firms might respond to the completion of the single market in ways — such as pan-European mergers, cartels, and market sharing arrangements — that would frustrate the intensification of competition. Thus, competition policy needed to be applied more vigorously if the single market was to be meaningful. The EU took the latter view, most clearly in the adoption of the 1989 mergers directive, which gave the Commission authority to vet mergers that might affect the common market. Many member states had no merger rules at all before this and welcomed the new regulation. The size threshold for Community competence was much disputed, though logically the criterion should have been whether or not mergers were capable of affecting intra-EU trade.

EU competition policy has been especially successful in the telecommunications sector, in which the EU has moved from domination by state monopolies to an essentially competitive market in barely 10 years. It did this in part through the deployment of the Commission's powers in competition policy in a context where the establishment of Community *regulatory* authority would have been unthinkable.

We should note that within the EU state aids are treated as part of the competition policy process, as another element in "levelling the playing field". The EU has had some influence in persuading its WTO partners of the value of its approach to distinguishing trade distorting subsidies from others (e.g., those for pre-competitive R&D).

MULTILATERAL EFFORTS TO DATE

The multilateral system has begun to tackle the types of issues discussed above only relatively recently. The Uruguay Round (1985-93 +), in particular, saw significant advances with respect to TBTs and trade in services, including establishment, in particular. Investment rules, to date, have been discussed essentially among just the developed countries in the Organisation for Economic Cooperation and Development (OECD). With the latest effort, the Multilateral Agreement on Investment (MAI) collapsing in 1998, renewed attention has turned to the WTO as the possible forum for a multilateral framework for investment (MFI). The links between both trade and investment and trade and competition policy have been the discussion of WTO working groups set up following the Singapore Ministerial. There have not been any truly multilateral efforts at international competition policy, most international efforts have been essentially bilateral co-operation agreements.

Goods

Historically, the General Agreement on Tariffs and Trade (GATT) sought to freeze ('bind') and periodically reduce tariff barriers and to replace quantitative restrictions (QRs) with tariffs, which were then subject to reduction. The notion of a QR under the GATT was much less sweeping than the Treaty of Rome's inclusion of 'measures having equivalent effect.' In addition, the 1947 GATT had no provisions for harmonising laws in order to ensure free trade.

Starting with the 1979 Tokyo Round agreement, however, the multilateral system began to impose disciplines on national regulations that impeded trade — TBTs. This was challenging as the GATT – with several members from the then socialist bloc – even more than the EU, had to recognise diversity of policy and market structures. Nonetheless, its members sought above all to ensure that whatever systemic diversity existed did not have discriminatory effects on trade. Thus it is not surprising that prior to the WTO, free traders (e.g., Low 1993[4]) argued that not only were GATT disciplines too weakly defined, they were also too laxly enforced.

The Uruguay Round made major changes to the rules on trade in goods sweeping the main additional agreements (but not that on government procurement) along with the GATT itself under the umbrella of the WTO and its tougher dispute settlement understanding, under which a WTO member can no longer veto the adoption as WTO law of a decision against it. The combination of new restraints on standards and technical barriers and binding dispute settlement makes the parallels (and intersections) between multilateral and EU approaches to trade in goods particularly intriguing.

In a nutshell the Uruguay Round agreement on technical standards is based on the Tokyo Round code. Both stress the procedural elements of standard setting, emphasise non-discrimination, and insist that *unnecessary* obstacles to trade must not be created. The 1994 code (Article 2) goes a bit further in saying that international standards shall be used where they exist, unless they are ineffective to pursue legitimate ends. It adds that in any departure from international norms, scientific evidence must be 'among the relevant considerations.' The 1994 code (Article 2.7) also says that member states shall 'give positive consideration' to mutual recognition of others' norms that achieve the same effect.

Jackson (1997) notes that there is ambiguity about the burden of proof regarding the scientific basis of contested measures. However, he notes, there is far less ambiguity in the separate code governing sanitary and phytosanitary (SPS) measures. This is the subclass of technical regulations governing food and animal health.[5] Hoekman and Kostecki (1995) note that the United States was particularly dissatisfied with the weakness of the TBT code as a

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[4] Low (1993: 5) is not untypical in writing, "Seriously buffeted by multiple challenges to its authority and integrity the [GATT] system has proven less and less capable of mediating trade relations among countries."
[5] For reference, about 70 of the 300 proposals contained in the Commission's 1985 White Paper on Completing the Internal Market concerned sanitary and phytosanitary measures.

means of addressing EU bans on certain US agricultural products and hence pressed for tighter SPS measures.

The SPS agreement is remarkable in that it goes well beyond the TBT agreement in many respects. It lays down a tighter regime of scientific testing (Articles 3 and 5), and states that members 'shall accept' others' standards even if different so long as the exporter can 'objectively' demonstrate equivalence off effect (Article 4). It also goes much further than the TBT agreement in requiring member states to base their rules on international standards, specifically the *Codex Alimentarius*. Jackson (1997) reports US satisfaction at the much more specific rules in the SPS agreement than the TBT agreement regarding the way scientific evidence could be used to justify measures stricter than those agreed in the *Codex*.

The wording appears to deny the member governments much discretion to set higher standards. Lang and Hines (1993), writing before the conclusion of the Round, expressed concern that the combination of new WTO rules and a modification of the *Codex* rules on beef hormones sought by the US would make illegal the EU ban, which it seems was previously GATT-compatible. Indeed this proved to be the case. Invoking these new rights under the SPS agreement, the US, supported by Canada, challenged the EU's ban on hormone injected beef, arguing that there was little or no scientific evidence that the specific substances in question posed an actual risk and that the onus of proof lay with the EU. The EU relied on the fact that there was some indirect evidence that this class of hormone was carcinogenic and above all on the precautionary principle – i.e., that there might be a risk and the public did not want to take it.

The WTO's Dispute Settlement Panel (August 1997) and the Appellate Body (January 1998) both found against the EU, although Appellate Body rejected two of the Panel's three findings, insisting on the right of states to depart from the *Codex* if they could give good reasons. As a result, the issue turned on whether the prohibition was based on a satisfactory risk assessment. Neither WTO tribunal carried out tests of their own, but gave more credence to the experts called by the US who said that evidence used by the EU could not justify the measures applied. A detailed procedural requirement was thus turned into a substantive finding by the WTO.

Further research is needed for a detailed comparison of this decision with the ECJ jurisprudence. A superficial comparison, however, would suggest that the ECJ gives greater weight to the precautionary principle, and thus may be more sensitive to subjective consumer fears, which Pollak (1998) argues is not always unreasonable.[6]

The SPS agreement is of course a very special case, but if it had gone the other way this would have indicated that the new WTO régime did not make any difference. The Beef Hormone judgement was to some extent balanced by the Shrimp-Turtle decision that allowed environmental considerations to over-ride trade rules in some cases. The implication of the Beef case is merely that as in the EU, the issue of derogations or exceptions from higher legal norms is a no longer a right that can be exercised unilaterally.

Services

The GATS, concluded as part of the Uruguay Round, is the first multilateral and legally enforceable agreement governing trade and investment in services. With the limited exceptions of the agreements in basic telecommunications and financial services, the GATS did not significantly advance liberalisation in services. Nonetheless, it did establish a foundation for future liberalisation.

The GATS establishes a general framework containing general concepts, principles — most importantly the most-favoured-nation principle (non-discrimination between foreigners) — and rules that apply to all measures affecting trade in services, which apply to all sectors unless explicitly excluded (a 'negative list' approach). The meat of the agreement, however, is made up of specific national commitments on national treatment and market access. These commitments are made on the basis of a 'positive list' approach — they apply only to those sectors and modes of supply (movement of customer, cross-border, establishment, temporary residence) explicitly identified by each government.

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[6] "Public fears do play a role in the formulation of government policies regulating risks and it is not obvious that such fears should not play a role". Pollak 1998.

The GATS included several other general principles, including that relevant policies must be published in a timely fashion and that the domestic regulation must be based on objective and transparent criteria and not be more burdensome than necessary.

The agreements on basic telecommunications and financial services were concluded after the end of the Uruguay Round and went further towards liberalisation. The basic telecommunications agreement differs from the general GATS Agreement in that a number of countries (including some EU member states) took advantage of the negotiations to accelerate their liberalisation plans, and almost all countries signed up to regulatory principles designed to ensure access to infrastructures and to constrain anti-competitive behaviour by market incumbents. In this respect the telecommunications agreement bore some of the hall marks of the EU regime, which anticipated it, in leaving the basic regulatory responsibilities with the member states, but subjecting these to an external regime in which competition principles are central (Holmes et al. 1996).). The telecoms regime goes further into detail in this respect than do other parts of GATS, thus raising the prospect that the EU will be put under pressure to ensure that its own definition of anti-competitive behaviour is aligned with any emerging GATS jurisprudence.

The financial services protocol follows the general framework of the GATS and concentrates only on access for and treatment of service providers. Consequently, it does not impinge upon governments' conduct of macroeconomic policy or on prudential regulations, unless they are used as a means of avoiding commitments or obligations under the agreement. Governments may also retain non-prudential regulations, such as requirements to lend to certain sectors or to offer preferential rates to certain people, so long as they are not discriminatory, are not intended to restrict access to the market, and do not constitute unnecessary barriers to trade. Members may also introduce temporary restrictions in the event of serious balance-of-payments and external financial difficulties, subject to consultations with WTO members.

Investment

The GATS is also the only binding multilateral framework that directly addresses investment, but only with respect to services. The GATS agreement applies the general principles of MFN and NT principles to establishment. As noted above, however, NT applies only to those sectors that a government explicitly says it does. In addition, the GATS distinguishes between pre- and post-establishment. Meanwhile the WTO agreement on trade-related investment measures (TRIMs) actually dealt more with investment-related trade measures (but IRTMs would have been hard to pronounce).

The most ambitious attempt to establish a plurilateral framework for investment were the negotiations on the MAI in the OECD. The negotiations began in May 1995 and broke down in October 1998 after France walked out of the talks. The negotiations adopted a broad definition of investment, which included portfolio investment and intangible assets (particularly intellectual property rights). It would have provided for investor and investment protection and deployed the principle of non-discrimination based on the better of MFN and NT through a negative-list approach. Several members, notably the US, however, tabled extensive lists of exceptions.

Significantly for our purposes, the autonomy of national regulators, particularly with respect to the environment, was one of the crucial issues that contributed to the collapse of the talks. There was concern, particularly in environment ministries and among non-governmental organisations, that multinational corporations might be able to use the MAI's binding investor-state dispute settlement provisions to challenge national rules that were discriminatory in *effect* as well as those that were discriminatory in law. This prospect was brought to life by Ethyl Corporation's (of the US) challenge of Canada's ban on the chemical MMT, of which it was the sole producer and importer, under Canadian law and the dispute settlement provisions of the North American Free Trade Area (NAFTA), on which the MAI's provision was based.

As with beef hormones, the case hinged on the quality of the scientific risk assessment. In July 1998, while the MAI was in hiatus, the Canadian government lost the case under Canadian law, and settled the NAFTA dispute. Although, the negotiators were already making progress to defuse the potential — the April 1998 negotiating text included a draft 'additional article,' that would protect government regulators and their 'normal non-discriminatory work,' particularly with respect to environmental and labour standards (OECD 1998: 27) — concern about the shift of power from the public to the private was one of the reasons cited by the French government for its withdrawal from the talks (Jospin, 1998).

Competition

Although there are a lot of regional and bilateral agreements which address competition issues, the EU regime is *sui generis*. There are essentially two types of international competition agreement, those based on approximation and those requiring cooperation:

1. *approximation:* the EU has agreements with its immediate neighbours — notably those in the European Economic Area (EEA), the CEECs and Turkey — which require that competition policy in each mimic the effects of EU rules addressing possible trade distorting effects of private arrangements. The EEA agreement goes further and requires a supranational authority to enforce these rules.
2. *cooperation*: there are a number of bilateral cooperation agreements of which the most notable is the EU-US deal, but also including EU-Canada, Canada-US, Australia-New Zealand, Australia-US and Japan-US. In reality the extent of the legal obligations is very limited.

It is worth recalling that these types of arrangement are quite separate. A requirement to approximate competition rules in order to prevent trade distortions does not necessarily imply *cooperation*. That is to say the EU's partners must act in certain ways but there is no obligation to exchange information, etc. Nor, curiously, does approximation for the purposes of avoiding trade distortions require detailed harmonisation of laws with respect to internal competition rules. The CEECs, for example, can have an efficiency defence in their merger laws even though the EU does not, so long as any resulting mergers do not then create trade barriers. The same is indeed true of EU member states.

In practice these aspects often go together. Private trade barriers *between* separate markets do not require harmonisation. This is the logic of the Europe Agreements and the

EEA. Formally they require domestic law to ensure no distortions of trade, rather than being a domestic transposition of the essentially transnational rules embedded in the Treaty of Rome. Their experience, however, makes it clear that this is a necessary, but not sufficient, condition for the end of contingent protection (anti-dumping).

The relevance of our discussion of risk here is that there is a trade-off among the kind of errors one is prepared to make. Some states will be more willing to tolerate less competition – including less entry by foreign firms in exchange for more stable market conditions. A question arises how far trade integration or even the broader notion of efficiency must be adopted if a country has other goals.

SUITABILITY OF THE EU AS MODEL(S)?

The EU undoubtedly addresses a far wider range of issues much more thoroughly than can be contemplated at the multilateral level, certainly for the time being. Nonetheless, as our preceding discussion has indicated, the EU's regulatory regime is not as rigid, nor necessarily as advanced, as is commonly perceived. It is in these areas where we would anticipate that the EU is most likely to provide models for aspects of the international system. Below we explore this potential directly.

Goods

Of the areas we have considered, it is probably in goods that they EU holds the greatest potential as a model for a multilateral regime. There is a clear need to strike a balance between liberalising trade and running rough-shod over national regulatory preferences. The EU, for all of the appearance of harmonisation, actually is quite respecting of national differences, not least because that has been a condition of the member governments' willingness to proceed with economic integration. Even still, it has only been possible due to a number of unique features, including the direct effect of European law, the ability to agree on minimum standards to underpin mutual recognition (see Gatsios and Holmes 1998) and the existence of a number of compensation elements in package deals. Finally, and crucially, the ECJ enjoys a high level of legitimacy and, perhaps relatedly, shows a sensitivity to the different national regulatory traditions.

There are indications that, particularly in the light of the beef hormones judgement, the EU considers the precautionary principle, while present, to be underdeveloped in the WTO's provisions. In an informal discussion paper to trade ministers in mid-May, the Commission (1999), indicated that 'non-trade concerns' — such as human health, consumer safety and environmental protection — will have to be adequately addressed in the negotiations on agriculture and that the SPS and TBT agreements may have to be examined. The US, by contrast, considers the principles incorporated in the SPS agreement 'balanced and sound' and stresses the importance of the 'reliance on science' in avoiding disguised protectionism (USTR, 1998).

Services

Although in telecommunications one aspect of the EU's internal regime proved a useful element of multilateral liberalisation, this is probably a one-off. As EU experience has demonstrated, in most service sectors entry barriers are not significant. In those sectors where they are — financial services and transport, in particular — the transfer of host country control, barring a degree of regulatory approximation, is simply not politically acceptable. As yet, such regulatory approximation seems beyond multilateral agreement. The EU's lesson here is to be realistic and to aim for realistic targets — such as, eliminating discrimination in licensing procedures for financial service providers.

Investment

The EU's internal regime for FDI is too supranational and dependent on the broader European regulatory framework to be a suitable model for an multilateral framework. In the light of the MAI being a step too far for even the developed countries, even the more intergovernmental NAFTA approach, on which the MAI was modelled, appears too ambitious for the multilateral system. Again, it will be a case of picking and choosing those elements of the EU framework that address specific problems.

It may be that the EU has the most to offer in addressing what we would argue, particularly in the light of the collapse of the MAI, is the fundamental issues for an MFI — squaring liberalisation with regulatory sovereignty. The Commission (1997) actually sought to do just that during the MAI negotiations, proposing general exceptions for public security and public health subject to an anti-abuse clause, along the lines of Article 56 of the Treaty of Rome.

Competition policy

The intra-EU regime derives from a real fear that private trade barriers can frustrate liberalisation but it requires a degree of supra-nationality of law and of enforcement that is unimaginable in the WTO arena. A number of initiatives (such as, Scherer 1994; DIAC 1993) that drew on this were shot down in the 1980s. The EU's own regime does not face the problem of diverse national rules, but its bilateral agreements do. The EEA, the Europe Agreements and EU-Turkey agreement go further towards harmonisation — while still not guaranteeing exemption from anti-dumping — than WTO members are willing to consider. Even the EU-US agreement does not even address harmonisation.

CONCLUSION

We are inclined to the view that, while the EU has much to offer the world by way of experience in liberalisation, any simple transposition of EU frameworks is likely to be very tricky. In some ways the competition rules might seem to offer the best model as they were originally developed as a way of dealing with non-border measures that might frustrate agreed trade liberalisation. But their supra-national character and the fact that they now apply to what is an 'internal' market make them a rather special case. At the same time EU experience provides some interesting clues about the problems the emerging WTO régime will face.

Our reading of the regulatory convergence debate is broadly speaking that unqualified openness requires a certain degree of commonality in regulatory approaches. This is less of a challenge in the EU than in the wider world since the EU, although by no means homogeneous, is composed of only 15 relatively developed countries.

This issue applies to many areas of public policy. For example attitudes towards the desired intensity of competition versus market stability differ across countries, and it is only relatively recently that the EU has moved towards the beginnings of a single competition regime for a single market.

Increasingly we would argue this divergence is going to be most tested with respect to attitudes towards risk in a narrower sense. Where states have fundamentally different approaches to risk and valid reasons for not accepting mutual recognition (or not just relying on labelling in simple cases) then so long as the national regulations are based on legitimate grounds then both harmonisation and mutual recognition have limits. Even within the EU questions of legitimacy have been posed where the Commission or the ECJ decides (sometimes is left to decide) whether a national rule is legitimate. Enlisting an external constraint in order to resist lobbies seeking purely protectionist measures is not the same as agreeing to allow (non-majoritarian, unaccountable) outsiders to decide what measures are and are not protectionist. These legitimacy problems are likely to be particularly profound where the judgement comes down to differences in risk aversion.

Arguably, this implies that the Uruguay Round both tackling beyond-border issues and applying binding dispute settlement may have gone too far. Either step by itself would have been far less controversial. The combination may challenge the legitimacy of the multilateral system.

This may hold even for successful exporter of rules to the multilateral level. Where one jurisdiction (whether the EU or the US) succeeds in persuading others of the desirability of adotping their system as a model, the price of this exporting of the system is that it can take on a life of its own in the outside world. If the move from GATT to the WTO is to mean anything at all, then signatories of WTO codes will no longer be able to interpret them as they see fit, but will be subject increasingly to pressures such as that in the beef hormones case where a WTO tribunal decided what a correct 'risk assessment.' We are already seeing similar developments in telecoms where the EU, having inspired the global regime is faced with the fact that its ability to invoke special exemptions from the GATS telecoms annex is defined by what it negotiated at the WTO, and how a panel will interpret this. In this context the somewhat vague, occasionally ambiguous and relatively brief character of WTO texts, including those on telecoms, will not necessarily make life simpler for the system, as someone will have to decide what they actually mean if there are disputes.

The EU's strength as a potential model for the world system is its history of seeking to create a regulated balance between open markets for their own sake and the right of governments to safeguard legitimate public policy objectives. The US has not tackled this question. It tends either to have common rules or to leave matters to the market. It has not for a long time had to set up mechanisms to cope with interstate differences in taste.

It would appear that the international system will never be able to totally eliminate TBTs and other rules that may inhibit commerce. The relevance of the EU is not so much as a model to be admired, but as a living lesson that even here there are some limits to harmonisation — limits which nonetheless can be regulated. Ensuring that national rules remain within acceptable limits requires policing and adjudication — what might be called 'bounded variation.' The binding character of the WTO Dispute settlement system, together with certain inevitable ambiguities in the basic agreements has put the panels and the appeal body in the position of deciding some very profound political issues as the ECJ had to do in its early years.

While policing can be diffused to those reporting harm, the judges need to be accepted as legitimate. In the almost certain absence of democratic legitimacy, the legitimacy must be based on transparency and performance, including showing due sensitivity to different regulatory preferences. The ECJ has been remarkably successful in persuading EU member states to accept its interpretation of rules they themselves drew up. It remains to be seen what happens as the WTO takes on an analogous role and how acceptable this will be when losing parties can no longer hide behind the right to veto panel decisions.. Even from a free trade point of view one may be wary of a possible backlash. We are not arguing that the Beef case indicates rampant judicial activism, but in the context of other cases it shows merely that the WTO cannot easily side-step problems which the EU has faced in the past.

Table 1. The EU framework of regulation

	Treaty principle	Treaty qualification	Secondary legislation
Goods	Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states. (Art. 30 (28))	... Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states. (Art. 36 (30))	mutual recognition new approach directives detailed harmonisation centralised authorisation
Services	... restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of member sates who are established in a state of the Community other than that of the person for whom the services are intended (Art. 59 (49))		<u>transport</u>: abolition of quantitative controls + common qualitative measures (incl. safety). <u>financial services</u>: approximation of prudential supervision + home country control <u>telecommunications</u>: rules to ensure market access
Investment	... restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be abolished by progressive stages in the course of the transition period (Art. 52 (43))	The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions ... providing for special treatment for foreign nationals on grounds of public policy, public security of public health (Art. 56 (46))	liberalisation of capital movements and abolition of exchange controls. service-sector-specific rules works-council directive merger control directive

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