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## Is EU Policy Eroding the Sovereignty of Non-Member States?

Jeremy Rabkin\*

Ten years ago, the collapse of the Soviet Empire seemed to leave the United States as the last remaining superpower. But the United States is not quite alone. In some respects, the European Union ("EU") now has the resources of a very great power, with an aggregate GNP that is larger—by about 25 percent—than that of the United States. From the outset, some advocates of European integration have seen it as a way of giving Europe greater weight in international affairs, enough, perhaps, to counter the power of the United States. And now, with an expanded and more integrated European Union, the dissolution of the Soviet Union has made Western Europe less dependent on security cooperation with the United States.

Today, the European Union does act as a single diplomatic unit in important international forums. In these negotiations, its size and wealth do make it an equal bargaining partner with the United States and a far larger factor than most other states. Americans need to consider whether this new force in international affairs is not, in some ways, a serious challenge to American policy aims and American political ideals.

In the long run, the most important tensions between Europe and the United States may not derive from differing policies toward Russia, or China, or the Middle East. The most important issues may arise over something that is fundamental to the European Union's own structure and legitimacy—namely, its systematic program of eroding or reconfiguring national sovereignty. This EU posture has many practical ramifications for US policy. But it also presents a clear ideological alternative. A world more in accord with EU designs will be a world in which national sovereignty has less and less meaning. Is that the kind of world Americans want to inhabit?

Some hints of what that world might look like are already apparent in EU-sponsored proposals regarding international criminal justice, international environmental regulation, and international trade regulation. After a brief look at the

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distinctive features of EU politics, we look at the way developments in each of these fields have come to reflect the peculiar policy penchants of EU-style governance.

### I. SUPRANATIONAL STATE OR MEGAPHONE FOR LEADING STATES?

Today's European Union is a curious hybrid. Its Member States have their own military forces, exchange ambassadors with other nations, and negotiate treaties on their own. In important respects, they are independent or sovereign states. Accordingly, each augmentation of the EU's authority has been accomplished by a new treaty—essentially, an international treaty—among the Member States.

Yet these treaties have built up a remarkable degree of supranational authority over the signatory states. Member States submit to rules and regulations drawn up by the European Commission in Brussels and enforced by the European Court of Justice ("ECJ") in Luxembourg. The ECJ even claims (and exercises) the authority to invalidate enactments of national parliaments if they conflict with European law, in a process the ECJ itself describes as developing "constitutional norms" for Europe. The European Union now claims that citizens of the Member States are citizens of the European Union. EU citizens already have common passports and most of them will soon have a common currency. In many respects, therefore, the European Union looks more like a rudimentary federal superstate than an international organization.

Yet in contrast with other developed states, the European Union has only limited and indirect forms of democratic control. The European Parliament is directly elected but has little real authority. It has, in principle, certain veto powers but it can neither initiate legislation nor alter the budget nor even choose the European Union commissioners who are responsible for policy planning and detailed administration. The powers of the European Parliament remain restricted because the Member States are wary of building up a central authority that could rival the authority of national parliaments (or of the national governments, whose authority derives from the democratic election of the national parliaments). Decisive authority in the European Union remains in the hands of various councils, composed of ministers from the Member States, where (even with the advent of weighted voting in some of these councils) a minority of states can still block new initiatives. So the European Union remains a strange hybrid—a federal mega-state in some respects, and a special sort of international organization in others.

Which side of EU politics is most important? Some analysts have emphasized the independent dynamism of supranational institutions like the ECJ and the Commission. Others insist that, on the most important issues, policy momentum comes from national governments, preoccupied with the same sorts of self-interested calculations that have traditionally held the attention of national governments. Clearly, a number of EU policies can only be understood as accommodations to the aims of particular Member States, as with the very costly Common Agriculture Policy championed by France.

But whether EU policies reflect bargaining among self-interested nations or some wider European consensus, they are still developed through a very unique set of institutional or political arrangements. The European Union has been described as a "post-modern polity" for the way it twists and bends traditional attributes of statehood or national sovereignty.<sup>1</sup> And, increasingly, it seeks to deploy these patterns in international ventures.

First and most obviously, the EU Member States slip in and out of national independence in international forums, where the European Union often has ambassadors and treaty-signing rights even while Member States continue to have their votes counted as if they were independent actors. In 1919, the Foreign Affairs Committee of the US Senate insisted that the United States should not join the League of Nations unless it were given a number of votes equal to those controlled by Imperial Britain, through separate seats for various British dominions, colonies and client states. In 1945, Stalin demanded—and won—separate United Nations ("UN") seats for the Ukraine and Byelorussia to compensate for what he insisted would be extra US votes provided by client states in Latin America. Though it is certainly unfair to depict smaller EU states as mere puppets of the larger Member States, the European Union does coordinate positions in advance in many international negotiations, on trade issues, environmental issues and other matters, gaining the advantage of fifteen votes at international forums (with more to come, after projected enlargement) while retaining the leverage of a unified position.

Perhaps this would not matter very much in itself, since most international negotiations still seek general consensus. But to the extent that Europe negotiates as a bloc, it is harder for the United States and other nations to bargain with otherwise like-minded states within the European Union. So French insistence on agricultural protection means that "Europe" resists international agreements for more open trade in this area.

Still more importantly, since the European Union does not have a serious military capacity, European solidarity may complicate cooperation on security issues. When Saddam Hussein conquered Kuwait, Britain and France could join the United States—both in the UN and on the ground in the Gulf—in reversing this act of aggression. Britain and France still retain far more military capacity than other EU states and still have permanent seats on the Security Council. But it is a fair question whether they can act independently of the European Union in the coming decade if Germany and other EU states favor different policies. As it is, the European Union

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1. Ian Ward, *Identity and Difference: The European Union and Post-Modernism*, in Jo Shaw and Gillian More, eds, *New Legal Dynamics of European Union 15* (Oxford 1995). The EU "can be best understood as a . . . postmodern polity. From a political perspective, the European Union apparently continues to defy objective determination. It does not fit comfortably with any of the familiar modernist theories of law and society."

has fostered ever closer integration, to the point of announcing common citizenship, while evading the difficulties of assembling a common security policy, let alone a common military force. Thus it is also a question whether the ethos of the European Union does not make it more difficult for European states to focus seriously on security issues: they have finessed fundamental questions of force and authority within Europe, so why not in the world?

Meanwhile, the European Union has championed new supranational institutions on the international stage—from a new International Criminal Court, to a range of ambitious environmental agreements, to new authorities for the regulation of international trade. In all of this, the European Union's international posture mirrors its "domestic" arrangements within Europe. Just as democratic states like to be surrounded by other democracies in the world, the European Union may seek to encourage similar structures that place great authority in supranational hybrid structures. Projecting EU-style arrangements onto the international stage may reassure restless European voters that national sovereignty really cannot be defended, as countries around the world agree to compromise their own sovereignty. European policy makers, having the longest and most extensive experience with supranational institutions, may also feel they will be the most influential players in international forums that operate by their rules. In any case, the national governments that submit to a European Court and a European Commission find it easy to contemplate international counterparts that can give direction to other states, without the fuss and bother of parliamentary ratification.

The European Union is also a great patron of non-governmental organizations ("NGOs") for reasons that are closely related to its own structure. With most European electorates focused on their own national politics, the EU Commission (as well as the European Parliament) have sought to build Europe-wide constituencies for European policy. These groups allow officials in Brussels to counter the pressures from national governments (and perhaps also from business lobbies that are such a prevalent feature of policy deliberation in Brussels).

So the European Union devotes nearly 10 percent of its budget to funding NGOs.<sup>2</sup> To be sure, not all the beneficiaries are engaged in direct advocacy. Most are involved in research or service functions. But they constitute a network of organizations on which private advocacy groups can draw. And the latter are numerous: a 1996 survey found that one of every five interest advocacy groups (of those operating at the EU-wide level in Brussels) is a non-profit "public interest" group and that the latter actually have higher budgets and more permanent staff than the more numerous business and trade organizations in Brussels.<sup>3</sup>

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2. Ali M. El-Agraa, *The European Union: History, Institutions, Economics and Policies* 319 (Prentice Hall 1998).

3. Justin Greenwood, *Representing Interests in the European Union* 179 (Macmillan 1997).

The same pattern has reappeared in international negotiations, where non-governmental advocacy groups play an increasingly prominent role. NGOs are subsidized and accommodated by international conference organizers for much the same reasons that they are subsidized in Brussels. NGOs provide a means of raising interest and visibility and rallying support in their home countries. They also lend credibility to the notion that international conferences are more than mere bargaining sessions among governments. NGO activity makes it plausible to think that international organizations are instruments of what NGO publicists like to call "global civil society"—suggesting a sort of surrogate democratic legitimacy in the absence of any system for an elected global parliament. Many international fora have thus become an extension of EU policy and politics on a larger stage.

One can sum up all these trends quite succinctly: as the European Union is not quite a state, it favors a world in which states are much less central to international society than they used to be. Talk of "global civil society" does not, of course, mean that "society"—or even a subset of self-appointed activist groups, claiming to speak for global society—makes decisive policies on its own. Talk of "global civil society" does not mean that governments in the European Member States no longer figure in international policy. But having learned to work with—or through—supranational institutions with NGO constituencies in Europe, major European states are much more ready to do so on the international stage than is the United States.

## II. INTERNATIONAL CRIMINAL JUSTICE

The idea of establishing an international criminal court is not entirely new. It has been discussed at various international gatherings since the earliest days of the UN. A reference to a possible future court of this kind even appears in the 1948 Convention on the Punishment of Genocide.<sup>4</sup> Still, proposals for such a court could not have had much appeal during the Cold War, when the major powers were so much at odds on so many fundamental matters. In fact, quite apart from the special tensions of the Cold War era, the idea was bound to provoke strong doubts.

One of the central elements of sovereignty is that each sovereign state is responsible for defining and enforcing its own criminal law within its own territory. True, the UN did spin out a whole series of human rights conventions purporting to put limits on the way governments treat their own citizens. But the fact is that none of these international conventions has any serious enforcement provisions. Criminal prosecution, on the other hand, is the most serious enforcement power.

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4. "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Art VI (1950).

Is the world ready to establish a criminal enforcement authority which sits on top of existing governments, enforcing a world law on behalf of the world at large? Supposed precedents for such a venture are either irrelevant or discouraging. At Nuremberg, the Allied Powers claimed the right to judge top Nazis because they were at the time exercising sovereign power as the conquerors of Germany. They consulted no other states in organizing their International Military Tribunal for the trial of war criminals and then carefully defined the tribunal's jurisdiction to exclude any charges against the Allies for their own misdeeds (such as Soviet aggression against Finland, Poland and the Baltic states and horrendous Soviet brutality in the treatment of war prisoners).<sup>5</sup>

The Security Council did establish a special tribunal in 1994 to judge those responsible for organizing genocidal massacres in Rwanda, but it did so with the full cooperation of the new Tutsi government there. In the prior year, the Security Council established a special tribunal for war crimes in the former Yugoslavia, seeking to impose its authority over the protest of governments in the region. But the majority of those indicted have still not been apprehended, even though NATO forces might have access to many of the indictees in Bosnia.

Nonetheless, a UN conference in the summer of 1998 did draft an elaborate plan for an International Criminal Court ("ICC"). It would establish broad jurisdiction for "crimes against humanity" and "crimes of aggression" as well as for "genocide" and "war crimes." Even the Clinton administration, which had spoken enthusiastically about the need for some form of permanent court of this kind, found the resulting plan too flawed for American participation. At the Rome conference, delegates from most participating countries expressed approval for this version of the ICC and voted down US proposals to limit its authority. European delegates were particularly visible in rallying support for the final plan, now known as the "Rome Statute." In both Germany and France, when domestic constitutional authorities announced serious legal obstacles to participation, both countries simply amended their constitutions to make it possible for them to adhere to the ICC statute.

In three ways, at least, the shape of the proposed new Court has proved congenial to Europeans while disturbing to the United States. First, it undermines national sovereignty in ways that are by now familiar to Europeans though very novel for Americans. The current version of the Rome Statute authorizes an independent prosecutor to initiate charges even when the relevant government has not consented to

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5. The point is not that the Nuremberg Trials were improper but that they are no precedent for a court that would have general jurisdiction to judge offenses by the United States—and this restriction seems to have been much on the minds of the American legal specialists who organized and manned the International Tribunal. Another forgotten fact about Nuremberg is that the judges did not allow anyone to be convicted for crimes committed in peacetime against German nationals, because asserting such a jurisdiction was thought to be in excess of any existing rule of international law and to mark an improper interference in the internal affairs of sovereign states.

such charges—just as the European Commission is empowered to launch suits against national governments in the European Union. Moreover, the Rome Statute insists that its terms cannot be modified by national reservations. At the same time, it authorizes amendments to its current provisions which can be imposed on all signatories—even those who do not consent to the specific changes—if adopted by two-thirds vote in the “Assembly of the Parties.”

These arrangements are nothing new for the Member States of the European Union. They are accustomed to living with independent initiatives (including lawsuits against governments) by the European Commission. They are accustomed to directives imposed by qualified majority votes in the Council of Ministers, which must be accepted even by the states that do not agree to them. But such delegations of authority to international bodies have almost never been accepted by the United States. The Rome Statute, however, does not just delegate authority from its signatories; it authorizes the prosecutor to take action even against nationals of non-signatory states, if they have committed war crimes or “crimes of aggression” against nationals of a signatory state.

The United States expressed great concern about this arrangement. At a time when the United States plays a major role in international peace-keeping ventures, the Rome Statute would set up independent prosecutors and judges to determine whether American forces (or perhaps, even, American leaders) had behaved properly in these ventures. The American delegates urged repeatedly that prosecutions, if not requested by the home state of the accused, should be subject to approval by the Security Council—where the United States has a veto. This proposal was rejected.

Side-stepping the authority of the Security Council should have troubled Britain and France, too, since both also have permanent seats on the Security Council. Both Britain and France also have significant military capacities which might be affected by ICC jurisdiction. In fact, both French and British governments had, in earlier negotiations, displayed resistance to the idea of an entirely independent prosecutor. But both ultimately fell in with the position favored by other EU states.

Another feature of the ICC familiar to EU politicians is the prominent role of NGOs in deliberations on the design of this institution. Not only did human rights advocacy groups play a prominent role in successive drafting conferences, they have tried to secure a permanent place in the ICC’s operation. A conference hosted by the French government in Paris, during the summer of 1999, sought to work out detailed procedures to assure “victims’ access to the International Criminal Court.” Among other things, human rights groups urged that when the ICC prosecutor declined to initiate an investigation or prosecution requested by victims or their advocates, this prosecutorial decision should be subject to review by the Pre-Trial Chamber of the Court—on the initiative of victim advocates. Though this proposal may not be adopted, a report adopted at the end of the conference by the official Preparatory Commission refers repeatedly to submissions by “parties” in a way that suggests victim advocates are participants in the prosecution. The report also makes several provisions



for any "organization or person" to submit amicus curiae briefs—in what are supposed to be criminal trials.<sup>6</sup> The idea seems to be that the ICC will need its own constituency of NGO advocates to publicize, defend and prod its activities. In fact, NGOs have already been quite active in trying to extend the concept of "crimes against humanity" to state policy towards rape and other crimes of particular concern to feminists.

Still, nobody has yet suggested that the ICC should have its own police or military capacity to enforce subpoenas or respond to violent opposition to its rulings. Like the ECJ, it is expected to operate quite adequately as a court without an army. It is premised on a notion of international cooperation which now seems highly plausible to Europeans, though very unlikely to many Americans.

### III. MANAGING THE GLOBAL COMMONS

One may hope that ICC prosecutions will be rare episodes of international intervention. Environmental regulation, however, is already a more entrenched factor in international affairs and threatens to become much more important. It is another field in which the EU has played a particularly prominent role, while the United States has much uneasiness about the approaches favored by Europeans. And the pattern of EU-style "post-modern" politics is again particularly evident in this field.

To start with, "domestic" practice within the EU offers a particularly clear example of the way European policy allows some states to leverage their own preferred policies. Support for environmental protection is particularly high in the Netherlands, Germany and Scandinavia, but there is much less support for "Green" politics in other parts of Europe. In a forty-three country survey of public opinion, Italy, France and Belgium—along with less affluent Spain, Portugal and Ireland—ranked among the lowest of all countries in support for environmental protection.<sup>7</sup> Yet the European Union has pressed ahead with ambitious environmental policies, becoming "a vehicle for exporting the environmental standards of Europe's greener nations to the rest of the continent."<sup>8</sup> This has been so, not only in matters which threaten trans-boundary pollution, but also for environmental problems that do not necessarily affect neighbors, such as solid waste disposal. But just as the EU seeks to "harmonize" standards in other areas, it has pressed hard, since the advent of the Single European

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6. Report on the International Seminar on Victims' Access to the International Criminal Court, PCNICC/1999/WGRPE/INF/2 (July 6 1999). See also Discussion Papers Proposed by the Coordinator, Part 5 of the Rome Statute, Investigation and Prosecution, PCNICC/1999/L3/Rev 1, summarizing discussion paper PCNICC/1999/WGRPE/RT 1.

7. Ronald Inglehart, *Public Support for Environmental Protection: Objective Problems and Subjective Values in 43 Societies*, 28 PS, Polit Sci & Polit 61 (1995).

8. David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* 97 (Harvard 1995).

Act in 1987, to see that costs imposed on business in one nation are also imposed on producers in other states: staff resources at Directorate-General XI, the directorate of the European Commission responsible for environmental policy, increased nearly nine-fold between 1987 and 1992.<sup>9</sup>

Naturally enough, then, the European Union's 1991 Maastricht Treaty authorized the European Union to promote "measures at the international level to deal with regional or world wide environmental problems."<sup>10</sup> So, after the European Commission announced a five year environmental action plan stressing "sustainable development" in 1992, many of the same themes, with the same rhetorical phrasing, reappeared in the Declaration on Environment and Development, launched at the UN's 1992 "Earth Summit" (Conference on Environment and Development) in Rio de Janeiro.<sup>11</sup>

Environmental NGOs, which have been particularly prominent in European policy debates, reappear on the international stage, usually with close EU sponsorship. The European Environmental Bureau ("EEB") in Brussels, an umbrella organization for a network of environmental advocacy groups in Europe, receives about half its funding directly from EU grants (and other green advocates in Brussels receive substantial EU funding as well).<sup>12</sup> The EU delegation to the Rio Summit and other international environmental conferences carefully made space for EEB representatives and other NGO advocates. As the UN's Commission on Global Governance noted, "In the interlinked global conferences that have followed the Rio meeting, NGOs continued to have a strong impact on both the preparatory processes and the conferences. . . . More and more, NGOs are helping to set the public policy agenda—

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9. Greenwood, *Representing Interests* at 181 (cited in note 3).

10. Currently Art 174 Para 1 in Title XIX ("Environment") in the consolidated text of the Treaty Establishing the European Community. See Bernard Rudden and Derrick Wyatt, eds, *Basic Community Laws* 59 (Oxford 7th ed 1999).

11. Particularly notable is the "precautionary principle," which is expressed in these terms in the Rio Declaration: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Rio Declaration on Environment and Development, Prin 15, in Burns H. Weston, Richard A. Falk, and Hilary Charlesworth, eds, *Supplement of Basic Documents to International Law and World Order* 1112 (West 1997). It is not easy to say what meaning this "principle" has, given that attempts to take precautions against one threat may exacerbate dangers from another and that without clear understanding of a threat, it is impossible to know whether precautions are "cost-effective." As late as February 2000, the EU Environment Commissioner released a White Paper report trying to make sense of the "precautionary principle." (And Commissioner Walstrom was clear about the international implications: "There will be conflicts with the United States. Let's not be naive about that." Joe Kirwin, *Proposed Precautionary Principle Seeks Nonbiased Analysis of Environmental Risks*, 23 BNA Intl Envir Rptr 146 (Feb 16, 2000).) But the "precautionary principle" had already appeared in German environmental legislation in the 1980s and then found its way into EU documents in the early 1990s, before being exported to the Rio Declaration.

12. Greenwood, *Representing Interests* at 186 (cited in note 3).

identifying and defining critical issues, and providing policymakers with advice and assistance."<sup>13</sup>

The success of this outreach is evident in the pattern of environmental regulation developed at the international level. It tends to follow EU priorities—or rather, the priorities established by Germany and other “green” states within the European Union. And it tends to follow Euro-style institutional structures at the international level. Three examples must suffice here to illustrate the pattern.

The 1989 Basel Convention on the transboundary shipment of hazardous wastes is widely credited to the efforts of Greenpeace, a particularly flamboyant and militant environmental NGO, which protested in the late 1980s that western countries were “dumping” hazardous chemicals in less developed countries. Of course, recipients could have prohibited the import of genuinely hazardous materials, as African countries did, in fact, organize to do in the 1991 Bamaco regional accord. But the Basel Convention instead organized exporting countries to limit exports. In effect, it organized a producers cartel and called it an environmental measure.

There is much at stake. Waste material that is not exported must be processed in some way in the country that produces it. Much of it can be recycled if recycling facilities receive adequate subsidies or low cost access to waste material. The processing of solid waste has, in fact, launched an industry that takes in some \$50 billion per year. Germany and a few other European countries have invested heavily in recycling. Thus, some provincial governments in Germany have actually tried to restrict shipments of recyclables from one part of Germany to another, simply to ensure that business stays at local sites.<sup>14</sup> The Basel Convention now ensures that there are international controls to protect German or other European recycling firms.

The convention operates through an “A-list” of developed countries which determine what materials can be exported to which countries outside the list. And decisions are by majority vote of the A-list countries, which guard their prerogatives somewhat jealously: in 1998, for example, they rejected applications of Israel and Monaco to receive shipments of certain materials designated as hazardous.<sup>15</sup> The United States is not a party to the Basel Convention. The reason is not that the United States has more need to export hazardous waste than do European countries: with much lower population density, the US has, if anything, much less difficulty finding domestic sites for waste disposal. But the United States has always taken a skeptical view of international agreements to consolidate cartels.

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13. Commission on Global Governance, *Our Global Neighborhood: The Report of the Commission on Global Governance* 254 (Oxford 1995).

14. Brian Wynne, *Risk Management and Hazardous Waste: Implementation and the Dialectics of Credibility* 188–89 (Springer-Verlag 1987).

15. Cheryl Hogue, *Parties to Basel Convention Adopt Two-List System for OECD Waste Exports*, 21 BNA Intl Envir Rptr 185 (Mar 4, 1998).

The 1992 Earth Summit then launched a series of far more ambitious and wide-ranging regulatory initiatives. A Convention on Biodiversity promised Western support for conservation efforts in less developed countries in rather vague but encompassing terms. Though not much has come of this global commitment, the parties to the Biodiversity Convention were quickly steered into focusing on a follow-on protocol of particular concern to Europeans—a so-called Biosafety Protocol to regulate trade in genetically modified organic material. This matter stirs great emotions in parts of Europe, fanned by the protests of environmental advocacy groups. By contrast, it has stirred far less interest in the United States, where genetically modified (“GM”) plant strains have been widely adopted by farmers (so that a third of US soy crops and nearly half of US cotton crops were planted with genetically-modified strains by 1998).

Bio-engineering has produced plants that are more resistant to drought, frost and other weather hazards and also allows farmers to reduce the use of chemical pesticides—which ought to please environmental advocates. But it does not, especially not in Europe. Whereas the US Agriculture Department has generally tried to resist environmental challenges to genetically modified crops, governments in Europe have been much more insistent on restricting their use. The European Union, deeply committed to protecting inefficient agricultural producers in Europe, has shown a pattern of opposition to new agricultural technology, as in its years-long effort to resist the importation of hormone-treated beef, which a series of international trade arbitrations have judged to be improper trade restrictions rather than scientifically-grounded safety measures.

The United States is not a party to the Biodiversity Convention either and therefore cannot be a party to the Biosafety Protocol. But it has a great interest in what sorts of trade restraints will be imposed on GM crop products. Proposals by the EU delegation would have put limits even on the use of cardboard packaging for US products, if the cardboard included GM starch components. In international negotiations over the past three years, US objections have been strongly supported by Canada, Australia, and New Zealand, as well as Argentina, Chile, and Uruguay—all agricultural exporters, like the United States.

A compromise accord which was signed in Montreal in January 2000 did provide that food and packaging should be treated more leniently than “living modified organisms” which will be introduced into the environment (such as plant seeds). In general, it left broad discretion to each importing state to set its own standards. It also allows new rules to be developed by majority vote of the signatories and makes provision for delegating authority to specialized agencies that the signatories may develop.<sup>16</sup>

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16. *Final Draft of Biosafety Protocol, Approved at the Montreal Meeting on Biological Diversity Convention, January 29, 2000*, 23 BNA Intl Envir Rptr 125 (Feb 2, 2000). Art 29 authorizes decisions by the

The most ambitious environmental agreement of all time was also launched at the Rio Earth Summit. The 1992 Framework Convention on Climate Change called for signatory states to reduce their output of greenhouse gases, which are thought to be exacerbating a warming trend in the earth's climate. The principal greenhouse gas is carbon dioxide, which is generated by the burning of fossil fuels (oil, natural gas, coal). So a reduction of greenhouse gas emissions would seem to require a sharp reduction in fossil fuel use, which would, in turn, require considerable changes, if not actual reductions, in industrial activity. The United States signed and ratified this treaty without much controversy, however, because the treaty did not commit any signatory to any particular action.

The follow-on agreement, the 1997 Kyoto Protocol, tried to put teeth into the treaty by committing a designated list of developed countries to specific reductions in greenhouse gas emissions within a specified period of time. Environmental advocates in Europe placed particular emphasis on the supposed perils of global warming. So, to be sure, did environmental advocates in other countries, especially in the developed countries—though developed countries are least threatened, because they will have the most resources to accommodate climate change problems, should they develop in the course of the next century. Less developed countries, led by China and India, insisted they would make no commitments to reduce their own greenhouse gas emissions, because they would do nothing to inhibit their own industrial development.

Nonetheless, EU delegates came to Kyoto with a spectacularly ambitious agenda—based on a characteristic European political arrangement. The European Union arrived in Kyoto advocating that all developed nations agree to cut their greenhouse gas emissions by 15 percent from 1990 levels. Britain and Germany were anxious to use 1990 as the baseline, because, for different reasons, each of these countries began to decrease its carbon emissions in that year. In Britain, the Thatcher government was consolidating its victory over the miners union by privatizing the coal industry and encouraging a nationwide transition to more efficient oil and natural gas. In re-unified Germany, the government began closing down dirty and inefficient coal-powered plants in the former East Germany. So both Britain and Germany could expect to make sizable reductions in carbon dioxide emissions without much pain. Other European states were persuaded to go along with German and UK ambitions by a plan that would have the European Union as a whole reduce emissions by 15 percent, though each individual state would not have to do so.

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“conference of the parties” without specifying any special majority, thereby implying that simple majority may suffice and authorizes this majority to “establish such subsidiary bodies as are deemed necessary.” (Para 4b).

At Kyoto, most other countries balked at the scale of the EU proposal. It was finally agreed that different countries could have different reduction targets—and none were so ambitious as the EU proposed. In March of 2000, the EU Environment Commissioner released a report acknowledging that greenhouse gas emissions had actually increased in most EU countries and only two Member States were in range of meeting their commitments—Britain and Germany. But the EU Commissioner insisted that targets could be met everywhere with more planning and effort.<sup>17</sup> And the EU continued to take part in negotiations to establish the specialized monitoring and standard-setting agencies envisaged in the Kyoto Protocol to help see that emission reduction commitments are ultimately implemented.

The US Senate has not ratified this treaty and remains unlikely to commit the United States to such a far-reaching program of international control and supervision. Among other things, senators are concerned that no less developed country has agreed to reduce emissions, though projected increases from new plants in China alone will likely cancel out the promised reductions by western countries. Still, the EU insists upon pressing forward. It may think that down the road it will have new means of enforcing this agreement on recalcitrant states.

#### IV. "EURO-TIZING" THE WTO?

The World Trade Organization ("WTO") might not seem to be in much of a position to direct global policy. The organization's December 1999 summit in Seattle was widely described as a "fiasco" and a "debacle," breaking up with no agreement even on the proper agenda for future trade negotiations—amidst rioting by angry protesters outside. And President Clinton, as host of the conference, infuriated many people by simultaneously urging measures to strengthen the WTO within the conference, and then expressing sympathy for anti-trade activists on the streets.

Obscured in all the recriminations are some basic issues about the relation between the WTO and wider agendas of global governance. Despite Clinton's effort to take both sides of these issues, there are reasons to think that in this area, too, the United States and the European Union will end up on opposite sides of major divides.

The General Agreement on Tariffs and Trade ("GATT"), launched in 1947 by twenty-two Western countries, was a very traditional sort of international agreement. The countries involved negotiated reciprocal tariff reductions and then bound themselves to obey only the actual terms of the agreements they negotiated. Even the advent of dispute resolution panels in the 1970s did not change the fundamental character of the system. When one country accused another of improperly interfering with its exports, the dispute could be submitted to arbitration—if not amicably

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17. Joe Kirwin, "Twin Track" Plan to Reverse Rising GHG, Meet Kyoto Aims, Includes Trading Scheme, 23 BNA Intl Envir Rptr 223 (Mar 15, 2000).

settled by informal negotiation. But the disputes were state-to-state affairs about obligations under the precise terms of the latest trade treaty. The launching of the WTO in 1995 brought a more formalized system for dispute resolution with a standing Appellate Body to review the rulings of ad hoc arbitration panels. But this, in itself, did not necessarily mean any fundamental change.

What threatens to change the organization is the attempt to accommodate non-trade issues and make a larger place for advocacy groups concerned with these issues. First, there is the question of how to reconcile trade sanctions—for non-trade offenses—with the basic rule of international trade agreements, since 1947, that all signatories must receive non-discriminatory treatment from the others. Suppose that a country does not live up to its obligations under the Kyoto Protocol or some other environmental agreement: can other countries try to compel the delinquent to change its ways by imposing trade sanctions? The answer under the existing rule seems to be no.

A second, obviously related, issue is whether countries with high labor standards and high environmental standards should be allowed to protect themselves against “unfair” competition from countries that gain commercial advantage by failing to provide protection for workers or for their own environment. Here again, the traditional view was that raising barriers against exports from the countries of the latter sort would violate the basic rule that import restrictions must be justified by some characteristic of the imported product itself, not by objections to the way it was produced. The aim of the GATT agreements was to lower barriers to international trade, not to dictate how countries behave within their own borders.

But by the time the WTO was being established, there were many critics of the traditional approach. Both the United States and the European Union imposed trade sanctions at different times for environmental practices they found objectionable. The United States sought to prohibit the import of tuna caught by nets that would also snare dolphins. When this policy was successfully challenged by Mexico as contrary to the GATT rules, many environmentalists in the United States were outraged. European Greens were upset by a Canadian challenge to an EU regulation banning the import of fur from animals caught by leg traps. Having agreed not to impose such restraints on trade, however, neither the United States nor the European Union was really in much of a position to protest that rulings against these practices by GATT panels were a constraint on their sovereignty.

Meanwhile, labor unions in both North America and Western Europe protested that free trade would be dangerous and unfair if workers in Western countries were forced to compete with workers in countries where business faced none of the burdens of labor or environmental protection. In 1992, for example, the European Parliament called for the imposition of protective tariffs against “environmental dumping”—that is, the sale of goods by countries without adequate environmental regulation in their own territory. But less developed countries bitterly opposed such measures and would not agree to any change in GATT rules to allow them. They were equally opposed to

proposals to authorize trade sanctions for the enforcement of international environmental agreements. So the Uruguay Round of GATT negotiations ended in 1994 without any explicit response to these issues and instead reaffirmed the existing non-discrimination norms.

The demands for change continued. When the WTO was launched in 1995, President Chirac of France insisted that the organization must find ways to let countries protect themselves from the unfair competition of producers operating without adequate labor or environmental standards. As a first step, the new WTO did establish a Committee on Trade and Environment to decide how to reconcile trade norms with sanctions for non-compliance under environmental accords. The committee was never able to find such a formula that would satisfy less developed countries.

In these circumstances, environmental advocacy groups harped even more insistently on a different complaint. They had been given a great deal of access to international environmental negotiations where they were able to lobby and agitate with some effect. But they were largely shut out of trade negotiations. And once again, less developed countries resisted changing the traditional practice. So the WTO remained a stubbornly state-centered organization.

One of the issues which helped to derail the Seattle Summit was President Clinton's proposal that the WTO establish a new working group to study ways of coordinating trade rules with labor standards promulgated by the International Labour Organization ("ILO"). What made this particularly explosive was his casual suggestion at a press conference that the United States expected in the future to impose trade sanctions on countries that did not maintain proper social standards for their workers. Even European trade negotiators, who supported Clinton's suggestion for exploring closer collaboration between the ILO and the WTO, expressed chagrin at such loose talk about trade sanctions and subsequently derided the President's performance as pandering to American unions during the Presidential campaign season.<sup>18</sup> Beseated with sharp divisions on other matters, the new round of trade talks did not get off the ground at Seattle and Clinton's proposal seems unlikely to find its way into a new trade agreement any time soon.

But it may no longer matter so much what the 135 separate members of the WTO will accept in the actual text of the next trade agreement. Without much fanfare, the WTO has already laid the groundwork for accommodating environmental and labor activists. In the fall of 1998, the WTO's Appellate Body upheld an earlier challenge by several Asian countries, protesting an American law against shrimp imports from countries where shrimp nets can ensnare sea turtles. This was not quite a replay of the tuna-dolphin dispute, however, because this time,

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18. *EU/WTO: Seattle Fiasco Prompts Total Trade Rethink*, Eur Rep, No 2457 (Dec 8, 1999).



the Appellate Body took pains to emphasize that such sanctions might be appropriate if coordinated with international environmental agreements.<sup>19</sup> The ruling also broke new ground by holding, for the first time, that NGO submissions ought to be considered by dispute panels to ensure that wider issues are fully developed. In other words, the Appellate Body is already prepared to see environmental accords merged with trade norms and similar reasoning would seem to support a merging of ILO standards with trade norms.

In the process of elaborating the proper terms for these reconciliations, the Appellate Body would become a much more powerful institution. Among other things, it would seem to be in a position to pick and choose which environmental or labor agreements (and perhaps human rights agreements) had become widely accepted and which had not. The crucial issue, it seems, is not whether the victim of sanctions has directly agreed to the standard invoked against it. Nor would Appellate Body rulings necessarily turn on whether the international accord in question had originally been drafted with the notion that it would ultimately be enforced by trade sanctions. All that seems necessary is that a country imposing trade sanctions be able to show that it is not acting unilaterally but rather basing its action on some sort of internationally recognized standards. And a host of international advocacy groups will be happy to give weight and substance to the idea that there are recognized or recognizable standards in any particular dispute.<sup>20</sup>

European trade negotiators have insisted throughout the past decade that the WTO needs to find some "controlled" way of accommodating trade norms with

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19. Article XX of the GATT allows for "General Exceptions" to the non-discrimination rules in a number of circumstances. Instead of treating the US shrimp net law as an exception under Para (b) for "measures necessary to protect human, animal or plant life or health"—which, with the opening word "necessary," implies rather stringent tests for invoking the category—the Appellate Body suggested the US policy might be justified under Para (g) for measures "relating to the conservation of exhaustible natural resources." General Agreement on Tariffs and Trade, Art XX, in Burns H. Weston, Richard A. Falk, and Hilary Charlesworth, eds, *Supplement of Basic Documents to International Law and World Order* 693–94 (West 1997). In so doing, it clearly implied that the "resources" need not belong to the country invoking this exception. The US was found to be in violation of GATT norms because it acted unilaterally. But the Appellate Body went out of its way to emphasize the potential for coordinated action—though not necessarily through coordinated action by the whole membership of WTO: "We have not decided that sovereign nations which are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign nations should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do." WT/DS58/AB/R at Para 185.
20. For some observers, this is much to be welcomed. An article by two private legal specialists heralded the shrimp-turtle ruling as "an important step towards the creation of a dispute settlement system in the WTO . . . that is more in line with the global economy of today rather than 18th Century sovereign state rhetoric or 19th Century neoclassical economics." James Cameron and Stephen J. Orava, *WTO Opens Disputes to Private Voices*, *Natl L J B5* (Dec 7, 1998).

environmental and social standards. The European Union is not happy about unilateral American resort to sanctions but there is much support in Europe for a scheme that would allow some resort to trade sanctions within an agreed framework. As the United States has become accustomed to imposing trade sanctions to register its disapproval, against a wide range of non-trade practices, it might seem that the US and the EU could reach some compromise on sanctions by letting the WTO's Appellate Body sort out the whys, wheres and whens. There would certainly be important constituencies for such a trend, in the United States as in Europe.

But in the not very long run, this trend would be likely to provoke much uneasiness in the United States. The United States itself does not subscribe to any conventions of the ILO. It has hesitated to subscribe to international human rights conventions and the few it has ratified have been hedged with carefully drawn reservations. Even in the North American Free Trade Agreement, the United States refused to subject itself to a permanent trade court and insisted instead on referring disputes to ad hoc arbitration panels, which would be far less likely to develop activist tendencies and try to establish themselves as major policy makers. Even when the Clinton administration sought to qualify NAFTA with environmental and labor side-agreements, it did not dare to go beyond superficial gestures. Under the side-agreements, each NAFTA partner only commits itself to enforcing its own existing labor and environmental laws, with no obligation to respect or develop common standards for internal practices.

A WTO with the institutional capacity to elevate particular environmental or labor standards (or human rights standards) to privileged positions in the trade system, a WTO court which could do this without the consent of the members—such an institution would be a formidable capstone of global governance. It would attract NGO advocates to prompt and trumpet its rulings. In many ways, a WTO with this authority might look like the supranational institutions of the European Union. After all, the central bargain at the heart of the EU is that, in return for access to German and French markets, other members comply with internal regulatory standards favored by the largest states.

So, Europeans might find an international version of this arrangement attractive.<sup>21</sup> Among other things, it would allow the EU to exert steady pressure on

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21. The new EU Trade Commissioner, Pascal Lamy, said after the Seattle meeting: "We need to reform, review and revise the way the WTO operates. The theory that the WTO is a black box in the hands of unknown and mysterious multinationals [that is, multinational business corporations] has played well among NGOs for years and there's some truth in that." He also said there "was scope for more majority voting at some stages of the decision-making process" although current rules require decision by consensus or in extraordinary situations by a three-quarters supermajority of the members. *EU/WTO: Seattle Fiasco*, Eur Rep, No 2457 (Dec 8, 1999) (cited in note 18). He told British journalists, "I am not a liberal. I'm still a socialist." He explained that free trade should be "controlled, steered and managed according to the concerns of EU citizens." *The Battle in Seattle*, *Economist* 21 (Nov 27, 1999). A spokesman for M. Lamy subsequently confirmed that the EU still

other countries to adopt its own favored regulatory standards within their own territories. This arrangement is likely to have less appeal, however, for Americans who care about American independence.

## V. CONCLUSION

From a European perspective, the United States may look like the odd creature in the international system. The United States is unusually squeamish about committing itself to international agreements. It is very resistant to delegating authority to supranational institutions. Not only the European states, but most other governments are far more open to participating in international standard-setting.

Still, governments are not always highly scrupulous about living up to the agreements they do sign. What is new in the past decade are the efforts to put teeth into international agreements by creating new supranational enforcement authorities. What is unique about the EU is that it already has very well developed supranational enforcement authorities to make its members comply with EU standards. European governments have learned how to work through such structures and their peoples have become accustomed to obeying them.

Thus, the European Union can be a persistent force for tugging other states toward following the European example—handing over more and more bits of their sovereignty to supranational institutions. The United States can be a force for an opposing trend. It may have to be, if it does not want to be dragged into the same patterns that are now preached and practiced in Brussels.

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wished to see a "more inclusive agenda" for trade talks: "Any new round cannot just be about market access for goods and services but must overhaul the WTO rule book" and include "investment and competition policy, environmental protection and worker rights." Gary G. Yerkey, *US, EU Report Little Progress in Talks Over New WTO Round, Bilateral Disputes*, 17 *BNA Intl Trade Rptr* 301 (Feb 24, 2000).