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AFTER FIFTY YEARS: THE COMING CHALLENGES

The Limits of the European Union in a Globalized World

50 ANOS PASSADOS: OS DESAFIOS DO FUTURO

Os Limites da União Europeia num Mundo Globalizado

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INTRODUCTORY NOTE

A few months after the celebration of the 50 th anniversary of the Treaty of Rome, on the 23 rd March 2007, the Treaty of Lisbon was signed, in Jerónimos, on the 13 th December.

It is therefore the right time to make an evaluation of the process of European integration up to now, but an evaluation looking towards the future.

Historical analyses have the greatest interest, and indeed important research has been done and will go on being done in this area. It was the case of contributions given in the Seminar **After Fifty Years: The Coming Challenges**. But, as the title suggests, much greater emphasis was given to the "coming challenges".

The Seminar was organized by the Associação de Estudos Europeus of the Law School of the University of Coimbra, and took place in this school, on the 23 rd and 24 th November 2007, with the sponsorship of the European Commission. Were invited to it, presenting papers, the ECSA (European Community Studies Associations) European Presidents, but had as well the participation of other scholars, mainly Portuguese scholars.

Already in 2008, on the 3rd March, the Associação organised another Seminar, on **The Treaty of Lisbon**. It was a complement to the first one, trying to see, into a great extent, whether the Treaty has the right responses to the coming challenges, with the innovations introduced in the institutional framework and in other areas.

The presentations of the two Seminars were afterwards updated, to be edited; together with other papers on the same topics that we have received. The number of papers in the Seminars was obviously limited, with time limits: both had only one day for the sessions. But, in addition to them, we had the opportunity of receiving a much greater number of contributions, with the greatest interest, of colleagues of our school and of other schools: Portuguese schools and foreign schools.

To have a broader divulgation, the papers are edited in three issues of *Temas de Integração*, each one with a specific topic (some overlapping of approaches could not be avoided, but in some cases it is even illuminating...). Of course, each issue covers as well papers on other topics.

In the first one, n. 24, corresponding to the second semester of 2007, are edited the papers mainly concerned with two main challenges of the coming years: globalisation and enlargements. It does come out with the title **The Limits of the European Union in a Globalized World.**

The second volume, n. 25 of the journal, corresponding to the first semester of 2008, is mainly concerned with the problems of governance and sustainable development: with a particular concern with the problems of water and energy management. It will come out with the title **Governance and Sustainable Development.**

Of course some discussion on the Treaty of Lisbon arises already in the two first issues, taking position on the topics under discussion. But further contributions on the Treaty will come up in the third volume, n. 26, corresponding to the second semester of 2008: with he title **The Treaty of Lisbon.**

We are sure that these three volumes give relevant contribution for the discussion on the future of the European Union, in a globalized world: in which all countries of the world should go on seeing in Europe a strong space, for our benefit but also a space of cooperation and opportunities for third countries, in particular for less developed countries.

MANUEL PORTO

NOTA INTRODUTÓRIA

Alguns meses depois da comemoração do 50.º aniversário do Tratado de Roma, no dia 23 de Março de 2007, foi assinado nos Jerónimos o Tratado de Lisboa, no dia 13 de Dezembro.

É assim o momento asado de fazer uma avaliação do processo de integração europeia até ao presente, mas uma avaliação na perspectiva do futuro.

A investigação puramente histórica tem sem dúvida o maior interesse, e muita tem sido de facto feita acerca desta temática. Assim aconteceu ainda agora com alguns dos contributos dados no Seminário **After Fifty Years: The Coming Challenges.** Mas, tal como é sugerido pelo título, uma atenção muito maior foi dada aos "desafios que se seguem".

O Seminário foi organizado pela Associação de Estudos Europeus da Faculdade de Direito da Universidade de Coimbra e teve lugar nesta Faculdade, nos dias 23 e 24 de Novembro de 2007, com o patrocínio da Comissão Europeia. Teve prioritariamente a participação dos presidentes das ECSA's (European Community Studies Associations) da Europa, mas também participaram nele outros académicos, fundamentalmente académicos portugueses.

Já em 2008, no dia 3 de Março, a Associação organizou outro Seminário, neste caso sobre **O Tratado de Lisboa**. Constituiu um complemento do primeiro, procurando-se em grande medida ver se o novo tratado será a resposta adequada aos "desafios que se seguem", com as inovações introduzidas no domínio institucional e nos demais domínios.

As comunicações apresentadas foram entretanto actualizadas, tendo em vista a sua publicação; a par de outros contributos também do maior interesse sobre os tópicos em análise que fomos recebendo. Os contributos a apresentar nos Seminários teriam de ser aliás necessariamente poucos, tendo um e outro tido lugar apenas num dia.

Para terem uma divulgação maior, são publicados em três números de *Temas de Integração*, cada um deles privilegiando uma das áreas em análise (não podendo naturalmente deixar de haver algumas sobreposições temáticas, o que poderá todavia ser mesmo enriquecedor, numa reflexão académica). Mas cada número da revista não deixará naturalmente de integrar igualmente artigos sobre outros temas.

No primeiro dos números, o n.º 24, correspondente ao segundo semestre de 2007, são publicados basicamente artigos considerando as duas primeiras temáticas do Seminário de Novembro de 2007, da globalização e dos alargamentos. Aparece consequentemente com o título **The Limits of the European Union in a Globalized World.**

O segundo volume, o n.º 25 da revista, correspondendo ao primeiro semestre de 2008, é dedicado basicamente às problemáticas da governação ("governance") e do desenvolvimento sustentável, com uma atenção particular dada às questões da gestão da água e da energia. Virá a lume com o título **Governance and Sustainable Development.**

Naturalmente nesses dois primeiros volumes é já dada atenção ao Tratado de Lisboa, procurando ver-se em que medida dá a resposta adequada aos problemas em análise. Mas outros aspectos do Tratado são considerados *ex professo* no terceiro volume, no n.º 26 da revista, correspondendo ao segundo semestre de 2008, que sairá precisamente com o título **The Treaty of Lisbon** (tal como nos outros dois casos, com o sub-título em português).

Estamos seguros de que com estes três volumes é dada uma achega relevante para a reflexão acerca do futuro da União Europeia num mundo globalizado: em que todos os países devem continuar a ver na Europa um espaço forte, no nosso interesse mas também no interesse dos países terceiros, em especial os mais desfavorecidos, vendo aqui uma área de oportunidades e cooperação.

MANUEL PORTO

THE NEW MAP OF THE WORLD

por *Manuel Porto**

1. Introduction

It is now clear that we will have in the 21st century a new or renewed map of the world.

1.1. There are no accurate numbers, but it is sure that until the 15 th century countries of Asea, in particular China and India, were among the most developed countries of the world: with quite advanced cultural standards[1] and strong and diversified economies, producing not only primary products, also manufacturing with the highest quality at the time (for example ceramics and textile).

It was of course the knowledge of these circumstances and of the quality of these products (not only spices, and in no case raw materials) which attracted the interest of the Europeans, purposed to reach India (in one second moment China) either by the east (as Vasco da Gama did) or by the west (as Cristóvão Colombo attempted, thinking that the American territory was territory of India...).

1.2. An important change occurred with the discoveries, beginning with the Portuguese navigators, followed by navigators of other European countries.

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[1] Recent descriptions of this situation can be seen in SEN (2005) and in BARU (2006), showing as well the interrelationship and the good neighbourhood that for centuries existed between China and India.

In the centuries before, connections between the continents were dangerous and expensive, therefore scarce. For this reason, the improvement in the connections by sea was the point of departure for globalisation[2].

A better knowledge of navigation gave to the Europeans the opportunity to reach all the other continents in much better conditions. But it remains difficult to explain how we could keep supremacy all over the world for four centuries: on territories that were not only much more populated, they were also richer than Europe[3].

In particular, we should remember that still in 1820 China had 28,7% of world GDP and India 13,4% (so, the two together 42,1%), when (in what were later on the territories of these countries) France had 5,5%, the Soviet Union also 5,5%, the United Kingdom 5,0%, Japan 3,1%, Germany 2,4%, Spain 1,9%, the United States 1,8%, Indonesia 1,6% and Pakistan 1,0% (see Maddison, 1995, annexe C, or Wei, 2006, pp.55-6). The effects of the industrial revolution, with origin in England in the 18 th century, can not explain the already previous dominance of Europe, neither the dominance which prevailed in the two following centuries.

1.3. In the 20th century we had already a bi-polar or a tri-polar world.

In this century was specially relevant, since the first decades, the coming up of the United States of America (USA), both as a political and as an economic world power.

In the political arena, mainly after the second world war, there was a bi-polar world, with the "cold war" between capitalism and communism: the capitalist "bloc" led by the United States and the communist "bloc" by the Soviet Union.

This was a situation which disappeared with the failure of communism, near the end of the century. And the fall of communism was indeed due to the economic incapacity of the system, at least after a certain degree of development.

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[2] The contribution of Portugal for the openness of the world economy is well expressed in the titles (and in the contents) of two books: CHARLES VINDT, *Globalisation, from Vasco da Gama to Bill Gates* (1999) and MARTIN PAGE, *The First Global Village. How Portugal Changed the World* (2002).

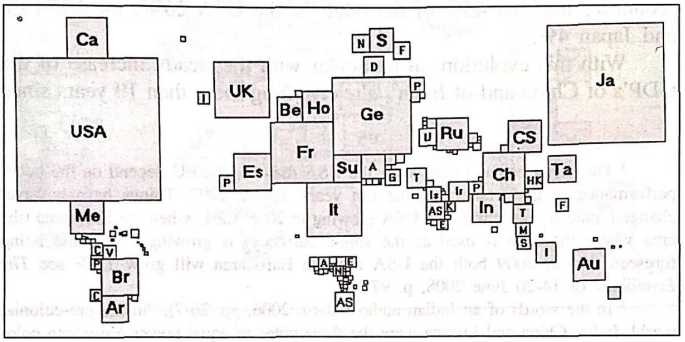
[3] Even having in mind the usual arguments of better technology, in particular in navigation, or better weapons; which of course could be imitated, without difficulty, by so advanced Asian countries.

In the economic arena, disputing the world markets, we have had a tri-polar world, the so called "triade", composed by the United States, the European Union (an increasingly integrated economic space) and Japan.

It is a picture well illustrated by map 1.

Map 1

Countries GDP's (absolute values)



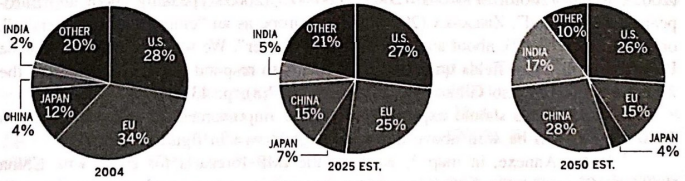
Source: *L'Etat du Monde 96* Scale: 100 billion US dollars

It is however sure that in the 21st century we will have a new or renewed map of the world: a map in which the "triade" will remain, but in which, together with new members, we will have again China and India as world powers.

It is an evolution which can be seen in figure 1:

Figure 1

Countries GDP's (percentages)



Source: *Business Week,* of 22-29 August 2005, p. 38

In 2004 China and India, which, as pointed out, still in 1820 had 42% of world output, had come down to 6% (China contributing with 4% and India with 2%).

It is however foreseen that in 2025 they will account for 20%, but each one still behind the US, with 27%, and the EU, with 25%[4]

And the picture foreseen for 2050 is still quite different, China having then 28% of world output, India 17% (so, the two countries together 45% of the total ![5]), the USA 26%[6], the EU 15% and Japan 4%.

With this evolution, in particular with the steady increase of the GDP's of China and of India[7], already along more than 10 years since

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[4] The much better forecasts for the USA than for the EU depend on the better performance of that country in the last years, before 2007. Things have however changed quite recently, with the USA growing in 2008 1.2%, when the Euro area (the area where the euro is used as the single currency) is growing 1.7%; and being foreseen that in 2009 both the USA and the Euro area will grow 1.5% see *The Economist* of 14-20 June 2008, p. 97.

[5] In the words of an Indian author (Baru, 2006, pp. 26-7), "in the pre-colonial world, India, China and Europe were the three poles of equal power. European colonisation weakened India and China. The history of the 20th century has been the history of recovering this process. In the 21st century India and China will regain their place in a new 'multipolar', or 'poli-centric'world in which the United States will continue to be the pre-eminent power but will have to accommodate the aspirations of many other nations, including India"(see also Frank, 1998, pp. 126-7 and Fernandes, 2005, pp. 204-5; or also Jain, 2008, analysing the strategic partnership between the EU and India, and comparing it with the strategic partnership of the EU with China).

Antecipating some features of the 21st century see also for example Dicken (2003), CEPII (2007) or, considering as well non-economic circumstances, Gnesotto and Grevi (2007-8).

[6] With pessimistic views about the evolution of the USA (mainly in the political field), being more optimistic about the prospects of the European Union, see Kupchan (2002), Rifkin (2005), Schnabel (2005), Leonard (2005), speaking about an "European invisible hand", Zielanka (2006), about Europe as an "empire" with "diversity", or McCormick (2007), about an "European civil power". We will see however that the USA has in different fields quite good arguments to respond to the challenges of the 21 st century (see also Gnesotto and Grevi, 2007(8), p. 43).

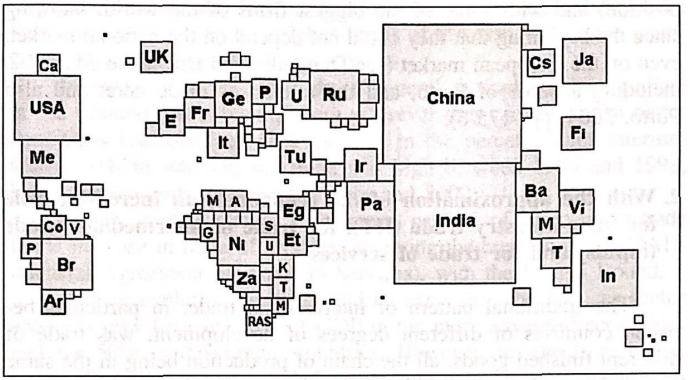
Of course, we should expect that, with the improvement of our conditions, in 2050 the EU will be well above the percentage shown in figure 1...

[7] In the Annexe, in map 3, we have the IMF forecasts for 2008, with China growing 10% and India 8.4% (Angola having in this year the highest rate of growth of the world, with 27.4%...).

its beginning, the map of GDP's, map 1, will be closer to the map of populations (map 2):

Map 2

World population



It is of course not sure that the growth forecasts will be confirmed. In particular, difficulties can arise in the growth processes of China and India[8]. Moreover, an important role should be expected also from the two other BRIC's, Brazil and Russia, the first one with a rate of growth of 4.8% foreseen for 2008 (see again map 3 in the Annexe: with a rich agriculture, enormous mineral resources and quite developed manufacturing in some sectors, for example in the production of aircrafts) and Russia with a foreseen rate of growth of 7.0% in 2008 (loc cit.: with enormous energetic resources and the largest territory of the world, between Europe and Asia....).

It should however be mentioned at this stage the role that small countries can accomplish, in Europe and in the other continents. The

[8] Among a growing literature on the economies and on other conditions of these two countries reference can be made: on China, to Gu (2001), Jin (2004), Shenkar (2006), Lenoine (2006), Wei (2007), Sheshabalaya (2006), Hutton (2007-8) or Leonard (2008), and on India to Das (2002), Acharya (2003), Boillot (2006), Luce (2006), Coissorò (2007) or Kamdar (2008).

Some authers, comparing the experiences, use only one word to designate together the two countries: Cindia (Rampini, 2005-7) or Chindia (Engardio, 2007).

first cases of great success in Asia were the Asian Tigers, countries of small dimension. But the European case (including non-EU countries) is also a meaningful case, with the success of smaller countries, some of them with the highest GDP *per capita* (six small countries have the highest GDP *per capita* of the EU-27, coming Germany in the seventh position) and with some of the biggest firms of the world: knowing since the beginning that they could not depend on the national market, even on the European market (see Dumoulin and Duchenne ed., 2002, including a paper of Porto, and the references made here; and also Porto, 2004, pp. 175-6).

2. With the approximation of the economies, an increasing role for intra-industry trade (IIT), for trade of intermediate goods (inputs) and for trade of services

The traditional pattern of international trade, in particular between countries of different degrees of development, was trade of different finished goods, all the chain of production being in the same country (or only raw materials being imported) . Most textbooks on international economics reproduce the famous example of Ricardo (1817), England exporting textile to Portugal and Portugal exporting wine to England.

The approximation of the countries, with their development, an easier access to technological improvements, a general qualification of the people (indeed with important differences between the countries) and of course also better transports and communications, led in the last decades to a new pattern of comparative advantage and trade.

Nowadays many less developed countries are no more specialized only in the exports of raw materials and primary products; in several cases they have also developed diversified manufacturing products (in some cases, they are leaving the "cathegory" of less developed countries...).

With this evolution, we see an increasing number of countries exporting and importing products of the same sectors.

The evolution of IIT in Europe showed clearly this pattern of approximation. In the 60s (of the 20th century) the degree of IIT was already high in the more industrialized countries, but very low in Greece, Portugal and Spain. However, since then a sharp

increase occurred in these countries, with the approximation of the economies[9].

Looking at trade between the European Union and third countries, the expected results are found: with high levels of IIT with high-income counties and low levels of IIT with low-income countries (high-intermediate and low-intermediate being in-between)[10].Now, we have an evolution towards higher levels of IIT also with some countries previously with lower incomes.

In many cases IIT, or trade in general, is trade of intermediate goods (inputs), firms buying them wherever they are offered in better conditions (outsourcing). The increase in the percentage of intermediate goods in international trade was high between 1995 and 1999, but, curiously, not between this year and 2002[11].

Finally, another feature in the recent patterns of international trade is the increase in trade of services, justifying the creation of the GATS (General Agreement on Trade in Services), with the Urugai Round.

It is an evolution which should be expected. The services sector accounts now for over 70% of GDP in the more advanced economies and for 50% in developing countries. However, for the time being, only 10% of services are traded, comparing with 50% for manufacturing. With the new extremely favourably conditions (in particular with new technologies) which will be pointed out later, there is indeed "a clear potential for continued rapid expansion" (Belessiotis *et al.*, 2006, p. 42): an estimated annual increase of 30% between 2003 and 2008, according to McKinsey & Company (2005, pp.17-8)

Also with services, in an increasing number of cases it is not trade of finished goods (services), but trade of services which constitute inputs for different activities, for the supply of other services (*v.g.* travelling or banking services) or for manufacturing[12].

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[9] See Brülhart and Elliot (1999, pp. 107-9) and Porto and Costa (1999), on the Portuguese case.

[10] These differences, represented in a figure, can be seen in Belessiotis *et al.* (2006, pp. 38-9, with data from the European Commission, 2005)

[11] See again Belessiotis *et al.* (cit., p. 38).

[12] India has the main world role in the outsourcing of services, with 12.2% of the total, followed by Ireland (a good example for other European countries, even with high wages...), with 8.6% (see McKinzey & Company, 2005, p. 13). According to "some estimates, there are more IT engineers in Bangalore (150,000) than in Silicon Valley (120,000)" (Engardio, 2007, p. 47).

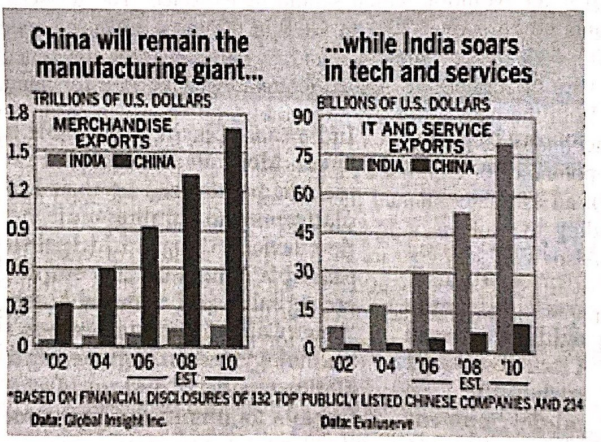
Interesting examples from India can be seen in Friedman (2005-6), with the particular specialization of Bangalore; and a similar evolution can be seen in China,

Finally, also in the provision of services we can see a clear approximation between the economies, with until now less developed countries providing services of increasingly higher quality. They are no more less specialized services, provided in the call centers: increasingly, there is more participation for example in more requiring back offices, in programming (*v.g.* for offices of taxation in the USA), in medical diagnosis, in engineering and architectural projecting or in activities of scientific and technological research (R & D).

Comparing India with China, the following figure (figure 2) shows that the success of India is mainly based on the exports of services, *v.g.* with outsourcing, while China is performing much better in manufacturing:

Figure 2

India v. China



Source: *Business Week* of 22-29 August 2005, p. 34

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up to now with 3.4% of the total, for example with Dallian having a special role in outsourcing for Japanese firms (trying to foresee the prospects for both countries see DOUGHERTY, 2008).

The possibility is increasing, that also important services (inputs) for public administration are supplied in outsourcing (MCKINZEY, cit., p. 55).

3. A foreseeable greater openness of the economies, despite difficulties in the WTO negotiations

Even with the acknowledgement of the better arguments in favour of free trade and of free economy, according to the theory and according to the experience[13], we should always expect that in periods of difficulties protectionist temptations arise again[14].

It is interesting to see nowadays a clear change of attitude in the more developed countries relatively to free trade in manufacturing and in services. Traditionally they have been protectionist for agricultural products, three main examples being the "triade": the European Union, with the Common Agricultural Policy, the United States, with enormous public subsidies (of course now – not during the Uruguai Round... – also contested by many less developed countries) and Japan, with extremely strong protectionist measures. Already in manufacturing and in the provision of services the industrialized countries were generally in favour of free trade.

A clear change of attitude can be noticed nowadays, with delocalisations to and outsourcing from less developed countries[15]. But both in Europe and in the United States the institutions and most of the economists remain defending free trade, of course together with the required measures for the restructuring of the sectors, the promotion of competitive sectors and compensations for the people, sectors and regions harmed with globalisation.

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[13] Were quite clear the results of deep researches made by institutions of the greatest prestige, as the OECD, the World Bank or the National Bureau of Economic Research (NBER), as well as by notorious economists (see for example Sachs and Warner, 1995, Frankel and Romer, 1999, Wang, Liu and Wei, 2004, or Santos-Paulino, 2005, considering countries with quite different characteristics; or also other references in Porto, 2001(4), pp. 34-5, and 2007, pp. 400-1).

[14] It is clearly an area in which, according to the theory of "public choice" ("economic theory of politics"), well organized groups (including trade-unions and associations of entrepreneurs, lobbying together, with common interest in the protection of their sectors), are able to organize themselves and lobby with success. It is not the case of the main beneficiaries of free trade, the consumers (see the references in Porto, 2001(4), pp. 165-73).

[15] On the change of attitude of the people relatively to delocalisation and outsourcing see Belessiotis *et al.*(2006, p. 13), pointing out as well (p. 40) other factors leading into a great extent to the present levels of unemployment (see also Porto, 2007).

Up to now the European movement of delocalisation has been into a greater extent to previously communist countries of Central and Eastern Europe.

Among an extensive and expanding literature, in favour of globalisation (*v.g.* having in mind the movements of delocalisation and outsourcing) special reference can be made to Bhagwati (2004) and Bhagwati, Panagariya and Srinivasan (2004); and arising doubts to Samuelson (2004)[16] or to Stiglitz (2002)[17].

Anyway, it is clear that the movement of openness will go on, despite delays and difficulties in the negotiations of the World Trade Organization.

Of course, each country or bloc (the case of the EU, necessarily with a common position, being a customs union) will always try to have the highest gains and the lowest losses, even if these are only short run losses, in many cases trying to postpone the effects. But the overall gains of trade finally lead the countries to accept the negotiations.

In particular, with realism, nobody can expect that the other countries accept without retaliation our protectionist measures. Some protectionist defenders seem to have a "dream" of no reaction: their home countries would establish or increase barriers, while the others, "friendly", would remain with full open borders...

This is something that Europe should have particularly in mind, having usually a surplus in the balance of trade (it is not the case of the United States, with a big deficit). In 2006 the Euro area had a trade surplus of 1.5 billion euros, with 113 billion euros of exports and 11.5 euros if imports[18].

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[16] The doubts of Samuelson were dispelled by Bhagwati, Panagarya and Srinivasan (2004; see also for example Fontagné, 2005, pp. 12-4, Monteagudo, 2005, pp. 10-11 or Engardio, 2007, pp. 322-9).

Bhagwati was among the first contributors to the theory of domestic divergences (see Bhagwati and Ramaswami, 1963, and Bhagwati, 1971); and it is interesting to see the role of Indian economists (of course together with many others), all them professors in the best Universities of the United States, defending free trade views since a long time ago, much before the so successful opening of the economy of their country of origin...

[17] Stiglitz became perhaps the most quoted critical author, with his book from 2002 (*Globalization and its Discontents*). But seems to have a more positive view in his more recent book (2005, with Charlton), in a position reflected also in the title of the book (*Fair Trade for All. How Trade can Promote Development*, in which the previous book is not mentioned).

[18] In the last 12 months before March-April 2008 the trade surplus of the EU (merchandise trade) was of 14.1 billion dollars (Germany with 278.7, the biggest surplus of the world), while the USA had a deficit of 831.2 billion dollars (*The Economist* of 14-20 June 2008, p. 98).

Not only in commodities, also in services Europe is one main world actor, with surpluses, as the first exporter, with 27.7% of the total, and the first importer of the world,

Of course, a general retaliation of the other countries of the world would at the end have more costs than benefits for the Europeans[19].

It should finally be stressed that a revival of protectionism would perhaps be possible for commodities, with limitations (even prohibitions) in the borders of the countries. This is however a possibility not available

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with 25.0% of the total (the USA having 20.2% of global trade of services). And, in the words of AMITI and WEI (2005)"trade in services, like trade in goods, is a two-way street").

The European Union remains also by far the main destination of foreign direct investment, as shown in the following table (see also map 4 in the Annexe):

Table (with percentages)

Région	1986 1990	1991 1992	1993 1998	1999 2000	2001 2004	2005 2006
Developed countries	82.41	66.50	60.92	78.25	68.98	64.30
European Union	36.26	45.29	31.73	46.90	45.38	41.77
Japan	0.20	1.22	0.33	0.85	1.05	-0.17
United States	34.60	12.68	21.78	24.14	13.63	12.28
NAFTA	39.96	19.14	28.81	29.04	18.30	18.35
Developing countries	17.44	21.27	35.50	19.57	27.53	30.79
Latin America and Caraiben	5.03	11.73.	12.39	8.28	8.98	7.07
Mercosul	1.44	3.10	4.37	3.90	2.82	2.05
Asia-Pacific	10.60	17.39	21.33	10.47	16.10	20.82
Africa	1.82	2.16	1.77	0.82	2.44	2.90
Central Europe	0.15	2.23	3.58	2.18	5.47	3.41
Less developed countries	0.40	0.60	0.65	0.38	1.20	0.74

Source: Mouhoud (2008, p. 23)

With 41.77% of the total, the European Union has more than two times the enormous and growing space which is in the second position, the Asia-Pacific area (with a high concentration, here, in China and Hong Kong: see GRAZ, 2008, p. 64); while the NAFTA has 18.35% and the USA 12.28%, not much more than one fourth of the EU value...

[19] Public opinion is however influenced by the great and increasing deficit of the European Union (and other countries and areas...) with China. All efforts should therefore be made to force this country to follow "the rules of the game", when they are not being followed, and to increase our competitiveness.

On the good prospects of approximation between China and Europe, in a "strategic partnership", see MARQUES (2005 and 2008) and SHAMBAUGH, SANDSCHNEIDER and HONG, ed. (2008). In particular on the opportunities which can be open in China to the Portuguese entrepreneurs and on the strategies to follow see Ilhéu (2006).

On the challenges of China and India on another continent, Latin America, see LEDERMAN, OLARREAGA and PEERY, ed. (2008). And on the environmental problems caused by the growth of China see World Bank (2008). It is foreseen that the level of CO 2 emissions arising from energy will be in 2030 close to the North American (mainly USA) values, the EU coming in the third place (see GNESOTTO and GREVI, 2007(8), p. 85).

Increasingly, the environmental conditions are taken into account in the evaluations of the development of the countries (see for example Gadrey and Jany-Catrice, 2007, pp. 57-78).

for many services, in their immateriality, with new technologies of communication, without difficulties and very low costs of transmission: services being provided instantaneously in any point of the world, in the houses of the families....

4. "Old theories"and the experience, explaining and showing the advantages of international specialization and international trade, as well as the need to have adjustment policies

Having in mind the theories of international trade, their capacity to go on explaining the present patterns of international trade can be underlined: taking into account relative differences in the availability of the factors of production, technological developments or any other reason explaining international movements. With changes in the development of the countries, their competing conditions are of course changed: changing the goods in which they are specialized.

Making a welfare analysis, it is clear that the enlargement of the number of suppliers, located in countries all over the world, leads necessarily to the availability of goods (commodities and services) with better quality or / and with lower prices. It is a first best solution, with the enlargement of possibilities, without being lost any of the previous ones.

This is of course reflected in the welfare of the consumers, benefit very often not considered in the economic analyses. Being inputs, used as intermediate goods, the possibilities of gain are increased, allowing higher rates of profitability for the firms. It is a benefit not only in the provision of material goods; as mentioned, in an increasing way firms of more developed countries use in outsourcing cheaper services provided by firms or individuals located in less developed countries.

In this way we can however have the following outcome: an increase in the profitability of the firms of more developed countries, leading to increased rates of growth of the country, but with overall reductions in the number of employed people(probably also with serious regional implications, with some countries and regions suffering into a much greater extent at least with the immediate impact of foreign competition).

The studies already made are not conclusive, but in general they seem to show that the negative effects are not big, and that in general there are gains, also for the up to now more developed countries.

One main research was done by Catherine Mann (2003), showing that outsourcing would lead to an increase of 0.3% in the

USA GDP[20]. Other studies reached also in general positive conclusions, not only in the USA, also in Europe[21]: see references in Belessiotis *et al.*(2006, pp. 63-70), distinguishing the researches made on the impacts on productivity, on employment and on income distribution, and concluding (p. 72) that the "benefits tend to be large, dispersed, long-term and of a permanent nature. The costs tend to be limited, concentrated and of a one-off nature".

5. The policies to be followed

We should anyway understand the present worries in the more developed countries: in Europe, in the United States and in the other industrialized countries (case of Japan), with salaries much higher than the salaries of now extremely competitive less developed countries.

In the European case (of course also in the other cases), we can admit and perhaps agree with the attempt to have some postponements, giving time to prepare our agriculture, our industry and our services to a worldwide competition. But these delays can be admitted only if it is not possible to follow immediately the right policies (first best policies), perhaps with the help of the European Union[22], and if after some time the sectors become competitive. If it is not the case, we are delaying the possibility for the consumers to have better and

[20] We can add three figures more: according to the McKinsey Global Institute (2005), one dollar invested in delocalisation leads to a gain between 12 and 14%; and according to Drezner (2004), 22 million new jobs will be created in the USA until 2015, many more than the jobs lost, and "close to 90 percent of jobs in the United States require geographic proximity" (see also Villemus, 2005-7).

[21] As underlined by Fontagné (2005, p. 10), "les études d'impact des délocalisations ont eté le plus largement effectués sur les Etats Unis" (adding that "les chiffres variant fortement, les hypotheses de travail sont très differentes, mais la conclusion globale est de relativiser cet impact, des lors qu'on remet les ordres de grandeur dans une juste perspective").

[22] We can remember the delay in the openness of the borders for all textile and clothing, with the negotiations of the Uruguai Round, and the specific program approved by the European Commission to help the restructuration of the Portuguese industry.

On the role of regional blocs, v.g in the framework of the WTO, we can see Lima (1995), Mota (2005, pp. 531-71), Cunha (2008) and Teló (2008); in particular on a "regional" "dialogue" between Europe and Asia Seidelman and Vasilache, ed. (2008); and on the "perceptions" of an European "identity", v.g. seen from Asia, see Bain and Holland, ed. (2007).

cheaper goods, with important social benefits, and of having a greater competitiveness in our productive sectors.

Moreover, as is always being remembered, if adjustments are justified, in principle they should be made with direct interventions, according to the teaching of the theory of domestic divergences. "The challenges arising from delocalisation and outsourcing are conceptually no different from the challenges arising from trade liberalisation in general" (Belessiotis *et al.*, 2006, p. 62).

The way to follow is to compete in a globalised world, according to the lessons of theory and of experience, removing imperfections of the market and creating the required external economies.

In the clear words of Kirkegaard (2005, p. 25), "offshoring and offshore outsourcing is not a choice for Europe – it is a fact. Yes, it is an opportunity, rather than a threat (...)"; "it will generate both winners and losers among Europeans, but it is up to individual governments to assure countries realize a net gain".

For Europe the main strategy now is in the Lisbon Agenda, established in 2000, in the Lisbon Council, when Portugal had the previous presidency of the Union[23]; as well as in following documents, including of course the Financial Perspectives for 2007-2013 (see Porto, 2006).

In a synthetic way, it is possible to stress what must be done in the main areas[24].

a) It is necessary to have a non-bureaucratic framework, with a light and efficient State (more purposed to have a regulatory role)

The experience of the 20 th century was very clear, in some cases with dramatic consequences, with the communist regimes. Nowadays,

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[23] Still in the words of Kirkegaard (p. 2), "auspiciously, EU members already have many of the required solutions at hand in the Lisbon Agenda to generate both higher productivity growth and higher employment from outsourcing and offshoring – what matters is that they are implemented".

[24] These are the main conclusions of recent reports, in particular reports commanded by the European Commission. It is the case of the several times quoted Belassiotis *et al* (2006). According to it, "policy should not attempt to manage delocalisation and outsourcing, let alone limit it.The European economy is inextricably linked to the world economy and it is essential for European firms to be able to access international markets, exploit efficiency advantages and assets in order to stay competitive. Rather, policy-makers should aim at putting in place framework conditions that enable Europe to benefit fully from globalisation while ensuring that losses are smaller and transitory in nature. The real challenge is therefore to improve the European economy so that globalisation and delocalisation are no longer a threat to jobs, but an opportunity for growth in the EU" (p. 9).

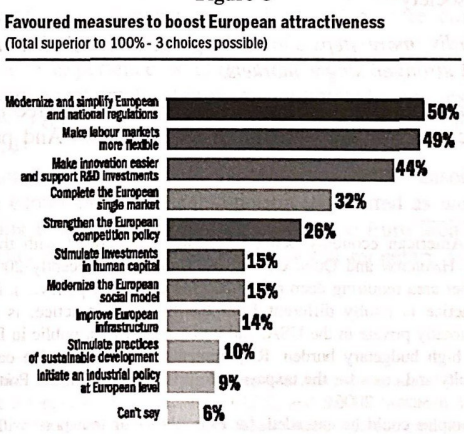
nobody is able to be in favour of a State centralized system, unable to compete, at least after a certain degree of development, with dynamic economies. But also in market economies it is clear that bureaucracy remains one main obstacle to efficiency and competitiveness.

We should also have always in mind something very often forgotten, that State (public) intervention is made with funds raised through taxation, in countries in which the tax burden is already very high. It can be argued that the tax burden should be on entrepreneurs, not on poor people: so, would not have social inconveniences. But attention must be given, as well (also for social reasons...), to the conditions of competitiveness in open economies.

The real situation, in Europe and in the other continents, is that the only possibility for increasing taxation in a significant extent is through indirect taxes, with a higher burden on poor people (spending in consumption a much higher share of the personal income) than on rich people: so, with a regressive distribution.

"Modernize and simplify European and national regulations" are indeed the most quoted requirements by entrepreneurs, answering to enquires. It was the case in an enquiry made by Ernst & Young, as shown in figure 3:

Figure 3



Source: Ernst & Young (2005, p. 37)

Bureaucracy must therefore be removed, allowing an efficient State.

b) In a non bureaucratic framework, a strong society must be a society in which everybody, individually or through different kinds of entities, can contribute with new initiatives.

Only in this way many people can develop talents, fulfilling ambitions and projects. The examples, known by all of us, are uncountable. And besides the personal realization of each person taking an initiative, there are meaningful spread effects, with the employment of other people and the demand for other goods, together with a demonstration effect, motivating other people to take also socially relevant initiatives.

Looking at the biggest companies of the world, we can notice the personal role that the leaders have in each of them, initiating and giving projection to the activities. Microsoft is closely connected with Bill Gates, and similar situations can be reported in most of the other cases.

The situation of Europe in this field should be compared with the situation in the United States, still now our main competitor[25], with a much stronger society. One clear case is the University system, in the USA mainly based on private universities, where nowadays teach and do research most of the Nobel prices. The MIT, mentioned as an example to be followed in Europe, is a private institution, with a leading role in the dynamisation of the American economy and of the American society[26]

c) Thirdly, more steps should be given to build clearer, broader and stronger single markets.

Even accepting the general advantages of world free trade, it is not realistic to think that it could be reached soon. And probably it should not.

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[25] The American economy being increasingly integrated with the European economy (see HAMILTON and QUINLAN, ed., 2005, and more recently 2008)

[26] Another area requiring deep reflection (and change of policy...), in which the American practice is totally different from the European practice, is the area of broadcasting: totally private in the USA, and into a great extent public in Europe, with an extremely high budgetary burden. Requirements of public service can be made, without difficulty and costs for the taxpayers, to private firms (on the Portuguese case see PORTO and ALMEIDA, 2006).

The examples could be extended, for example to air transport, with the totally private American companies having much lower prices than the public European companies, with the social and economic implications of this difference (competition was however increased recently in Europe).

The cases of China and India, as the case of the United States, are exceptional cases, of countries of great dimension. But even in these cases, as stressed before, it is a tremendous mistake not to follow an outward-looking policy. And all them are also integrated in regional blocs, at least celebrating free trade agreements[27].

The need to gain a larger dimension is of course stronger in Europe, even for the more populated countries, as Germany, UK, France or Italy, requiring, as well, the enlargement of the market achieved with the process of regional integration. The need to have a larger scale is however higher for smaller countries, the vast majority of the EU-27 [28].

The evaluations of the 'single market' show the success of the initiative (see for example Porto, 2001(4), pp. 421-3 or Porto and Flôres, 219-21), being clear that further steps should be given (see again figure 3). And from the adoption of the single currency important benefits should also be expected, for Europe and for the world economy (loc.cit. pp. 431-53 and 231-52).

Possible negative regional implications of globalisation were pointed out above. But a cohesion policy is not justified (only) by social (or for example environmental) reasons: a more equilibrated space is also a more efficient space. Only with it external diseconomies of congestion can be avoided and a more complete use of all the resources available (including human resources) can be achieved. The experience is quite clear, with better performances (*v.g.* in employment creation) in more equilibrated countries (see again for example Porto, 2001(4), pp. 375-416 or Porto and Flôres, 2006, pp. 183-214).

The single markets should therefore be, for all reasons, a space with more economic and social cohesion (benefitted as well with the euro, making business easier and cheaper in the Euro area and giving more stability and opportunities in the world monetary system).

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[27] On the recent steps taken by China see ANTKIEWICZ and WHALLEY (2005). India is since a longer time member of SAARC, and the USA is member of NAFTA and of APEC (besides an agreement with Israel; being without great evolution, now, the initiative of a Free Trade Area of the Americas, the FTAA: see SILVA, 2008).

[28] Portugal is well over the average. In the EU-27 are bigger than Portugal (more populated) 7 countries, of about the same size 4, and of smaller dimension 14.

d) A realistic social model, primarily purposed to the creation of employments

The comparison of Europe with the United States is also very interesting in this field.

The Europeans are very proud of the "European Social Model", which was built along the years. It is a model according to which there is a comparatively strong social protection, but in some cases with the cost of rigidities in the labour market.

The "American model" is criticised because it does not provide the same coverage of social protection. In a so rich country as the USA it is indeed difficult to accept for example the lack of a broader coverage of the health services.

The right position should be in-between, with a broad social coverage (for example also for the situations of unemployment) with which, without unacceptable social costs, it will be possible to have a more flexible labour policy, leading to higher levels of employment[29].

The comparison between Europe and the USA is indeed interesting. With our social model (also for other reasons) in the last years we have had in Europe a much lower rate of growth than in the United States (still in 2006, in the Euro area, 2.6%, comparing with 3.3% in the US), and almost twice as much unemployment (7.4% in the Euro area, comparing with 4.5% in the USA). Things have however changed recently, as mentioned before (in footnote 4): in 2008 the USA is growing 1.2% and the Euro area 1.7%[30].

We should wait to see whether there is a structural change or whether the worse results in the last years in the US are short run

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[29] See once more figure 3. In a quite recent Resolution, approved on the 14th September 2006, the European Parliament (2006), stressing of course, in point 1, "the necessity of preserving and enhancing the values associated with the European social model", "is convinced that there is no alternative to urgently reforming economic and social systems where they fail to meet the criteria of efficiency and socially sustainable development, and where they are inadequate to tackle the challenges of demographic change, globalisation and IT revolution" (point 3) (with recent contributions in this journal see Policarpo, 2007, and Sampaio, 2007, Flôres Jr., 2007, Coissoró, 2007 and Wei, 2007, considering different areas: as well as contributions included in Porto and Silva, 2006-2007).

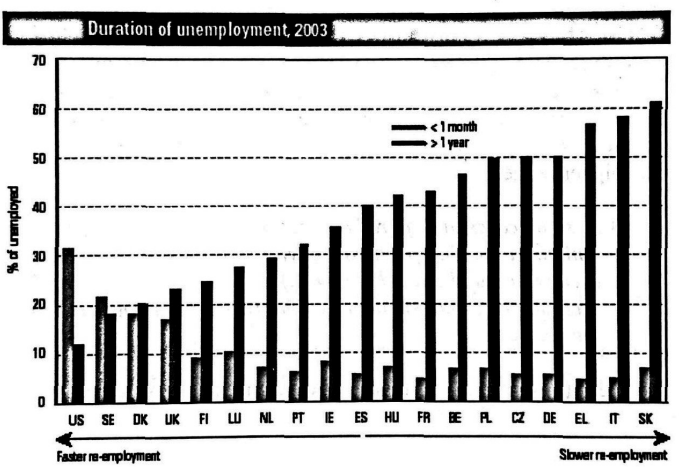
[30] Another problem, not dealt in this paper, is of course the problem of sustainability of the system of social security (among an expanding literature, see for example Tharakan, 2003 and a recent book by Pestieu, 2006).

results, due to the present financial crisis. Even now the rate of unemployment is lower there (5.5% in 2008) than in the Euro area (7.1%); and the forecasts for 2009 are that the USA will have the same rate of growth.

Moreover, an extremely important element to take into account in an evaluation of social models is the duration of unemployment: social problems being not so hard and difficult with short-run unemployment.

A comparison between 18 European countries and the USA can be made with figure 4:

Figure 4



Source: Belessiotis (2006, p. 71, with data from the OECD)

Are clearly in a better situation some Nordic and Central European countries, and in particular the United States.

The problem of unemployment is into a great extent in Europe the problem of young people, many of them in search of the first job. Looking at the figures, how can we convince them about the "virtues" of the "European Social Model"?

e) A high qualification of the people

Even with all evolutions in the history of humankind, in technology, management, etc., it remains clear that the man is the main factor of development.

The role of individuals, taking initiatives, was already mentioned above.

But besides the cases of leadership, the only factor always closely correlated with development is the general qualification of the people[31]. There are indeed "vicious circles" and "virtuous circles", with better endowed countries (with other factors, for example raw materials) having better conditions to educate the people. Having however in mind such correlation, less benefited countries must make all efforts to improve the qualification of the people, surpassing the initial difficulties and achieving "virtuous circles"; higher rates of education and professional training leading to higher rates of growth.

When China and India begin to dispute the market in computing services or in R & D, the only realistic answer of Europe must be the qualification of people able to compete, even (for some time more) with higher wages.

f) In some cases, a required contribution of the States[32] (or of the Union, in the European case), with subsidies (direct subsidies, exemptions and tax rebates, etc.) or direct supply of services, creating external economies and removing imperfections of the market

Despite what was mentioned above, an extremely important role remains for public intervention. Also for this reason, the State should

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[31] Not (so much) the labour costs, high salaries being compensated in many cases by much higher levels of productivity (see for example the contributions included in Conselho Nacional de Educação, 2003).

[32] An extensive literature shows that, in a time of globalisation, the States remain with a main role in all activities. Indeed also for political reasons, being a "bloc" of sovereign countries, the Lisbon Treaty reinforces the principle of subsidiarity. According to it (article 5 of the Treaty of the Union), "the Union shall take action only if and in so far as the objectives of the proposed action cannot be achieved by the Member States, at the central or at the regional or local level, and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union" (see also the Protocol on the application of the principles of subsidiarity and proportionality).

not go on doing what is better done by private initiative, with costs for the consumers and for the taxpayers (with a regressive distribution). Only in this way, without a great burden, the authorities can have the required means to intervene, when necessary (besides the regulatory role).

Each intervention should be carefully evaluated. In particular, it is for example acknowledged nowadays that tax intervention is not a so important way: other reasons of attractiveness being much more important than tax facilities (remember figure 3 and see for example Salvatore, 2002).

As one would expect, in the Financial Perspectives for 2007-2013 special attention is given, in one first point, to the promotion of sustainable growth (*v.g.* with higher competitivity and higher cohesion: see Porto, 2006).

With the right policies, the steady growth of the biggest countries of the world is strongly welcome: firstly, because only this way we can have quick improvements of the living conditions of hundreds of million of people[33]; and it is a unique occasion opening opportunities for our entrepreneurs[34].

6. Conclusion

Having in mind the lessons of history, it can be said that into a great extent the loss of power by China and India in the last four or five centuries was due to their inward-looking policies: with implications in different areas. And it is clear that their actual success is due to the opening of their economies (beginning with Deng Xiao Ping in China and with Manhoban Singh in India).

If we follow their bad previous example, avoiding globalisation (nowadays delocalisation and outsourcing), probably in the third millennium we will have in Europe the evolution (involution) of China and India in the second half of the second millennium.

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[33] It is reported that in the time of Mao Zedong about 30 million people did die for starvation in China; on India see for example Sen (1991).

[34] Every week we have news of Portuguese firms disputing markets, with great success, in the main emerging markets(it is not necessary to quote the names): exporting to them or having there manufacturing unities.

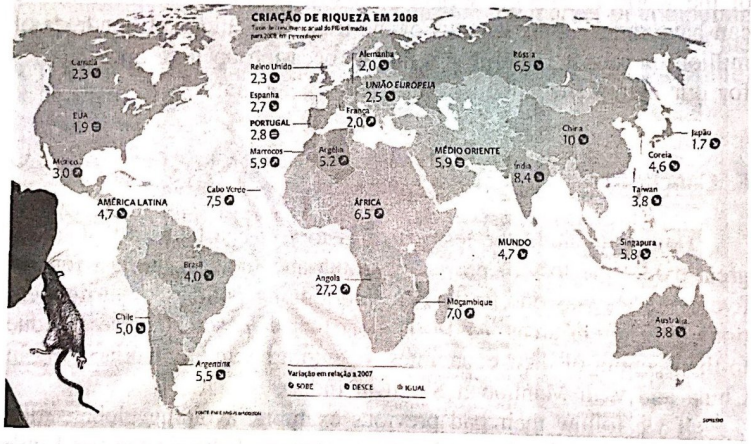
In the sixties Gunnar Myrdal wrote a very influencial book, with the meaningful title *Asian Drama* (1968). If Europe does not follow the right strategy, strengthening our competitiveness with open borders (without protectionism), within a few years somebody will write a book on the *EuropeanDrama...*

It would be a suicide, bad for us and for those great countries (for all countries of the world) who rightly expect from Europe a space of cooperation[35] and of opportunities[36], going on disputing the markets all over the world.

Annexe

Map 3

Expected GDP growth in 2008



Source: International Monetary Fund (IMF)

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[35] Europe is by far the main contributor to help less developed countries. Besides the contributions of the EU budget and of the European Development Fund (EDF) (also lending by the European Bank of Investment), only European countries have contributions over the minimum suggested by the United Nations: contributing with 0.7 of the GDP's (see figure 5, in the Annexe, with a picture which is not improving along the years ...)

[36] In particular the Africa countries can not have outside Europe meaningful marketas for their exports (see Porto, 2001(4), p. 514)

Map 4

Foreign Direct Investment

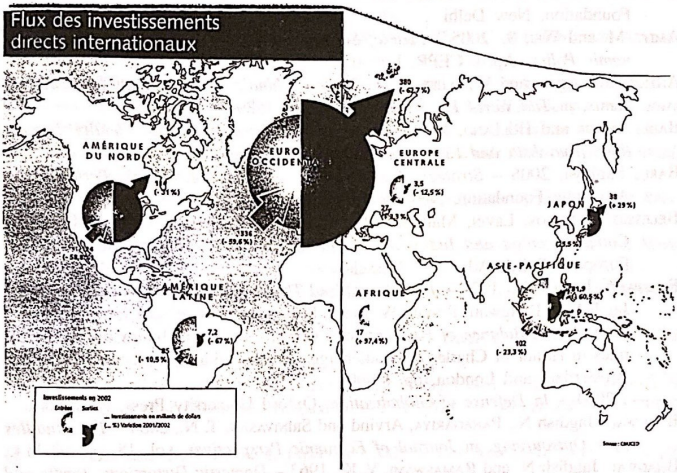
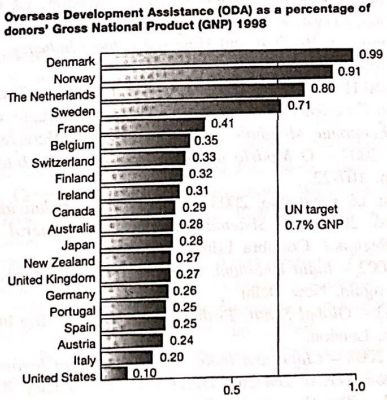


Figure 5

European Donations to other Countries



Source: Black (2002, p. 31)

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INTEGRAÇÃO PROFUNDA, INTEGRAÇÃO REGIONAL E MULTILATERALISMO

por *Luís Pedro Cunha**

1. Introdução

O sistema comercial internacional é susceptível de desagregação em (fundamentalmente) quatro (sub)sistemas internacionais[1]. Ao primeiro subsistema corresponde o multilateralismo, o segundo subsistema abre espaço ao bilateralismo e ao unilateralismo (com intenções proteccionistas) e no terceiro subsistema cabe o regionalismo. O quarto subsistema do sistema comercial internacional contempla acordos internacionais, multilaterais ou plurilaterais, que traduzam um aprofundamento da integração económica internacional e que se negoceiem ou possam vir a negociar no âmbito de uma instituição multilateral, a OMC. Estes acordos incidirão – ou poderão incidir – sobre novas matérias, face àquelas que tradicionalmente se integram no universo das disciplinas tradicionais do GATT, e dever-se-ão à crescente percepção de que a evolução do espectro de variáveis que influencia a capacidade de concorrer na economia mundial acompanha os progressos da liberalização das trocas internacionais. Vejam-se os exemplos da defesa da concorrência, da protecção do investimento directo externo ou da propriedade intelectual, da consagração internacional de *standards* sociais, ambientais ou técnicos, das compras públicas, ou outros ainda, relacionados *v. g.* com sistemas nacionais de distribuição, procedimentos de licenciamento de actividades económicas ou com demais obstáculos estruturais.

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[1] Cfr. CUNHA (1997: 201). Para mais desenvolvimentos, veja-se CUNHA (2008: 11 ss.), obra a partir da qual se elaborou o presente texto.

A abordagem deste quarto subsistema não dispensará uma referência a imbricações que se devam estabelecer com o segundo e o terceiro subsistemas, em linhas gerais, e, em particular, com questões de integração "profunda", a desenvolver em âmbito multilateral ou regional. Adiante desenvolveremos este último tópico, mas desde já podemos observar que a articulação entre este subsistema e o subsistema bilateral e unilateral, por um lado, e o subsistema regional, pelo outro, se pode fazer pela via das alegações ou de preocupações de concorrência desleal ou de *fair trade*, embora explique actuações distintas (quando nos referimos ao *fair trade*, estamos sobretudo a pensar na equivalência das oportunidades concorrenciais com que as empresas poderão contar num dado mercado ou mercados). Serão também, em larga medida, preocupações desta índole que explicarão as novas tentativas de convergência internacional (*lato sensu*) de legislações nacionais e, em consequência, a celebração de acordos internacionais sobre matérias antes tratadas com autonomia nas ordens jurídicas nacionais. Este é um aspecto comum aos três subsistemas. No seu conjunto, estes exprimem, em parte, a convicção de que os mecanismos previstos no sistema comercial multilateral (em particular, no GATT) se revelam incapazes para lidar com alegações de *unfair trade*.

Tradicionalmente, o (sub)sistema comercial multilateral orienta-se no sentido de procurar diminuir a capacidade dos Estados de controlar o nível e a composição das importações através da aplicação de medidas comerciais, de natureza pautal e não pautal, em regra com pura incidência fronteiriça e simples propósitos disciplinantes dessas mesmas importações. As questões de acesso aos mercados colocam-se habitualmente na esfera das medidas de política económica pensadas para produzir efeitos no momento da importação dos bens – e circunscrevem-se a essa mesma esfera. As matérias negociadas nos sucessivos *rounds* do GATT provam o que se afirma, com algumas excepções (pense-se, por exemplo, no acordo sobre os obstáculos técnicos ao comércio).

O decréscimo de capacidade dos países partes no GATT e membros da OMC para regular a pressão da concorrência externa aplicando medidas tradicionais de política comercial ou com efeitos típicos sobre as trocas internacionais, associado à crescente abertura de muitas economias ao exterior, tornou mais evidente a aptidão das legislações nacionais, com incidência em matérias diversas (à partida estranhas a questões de acesso aos mercados), para influenciar a penetração de

produtos ou produtores externos em mercados terceiros. Tornou-se mais visível o poder de as legislações nacionais (ou/e práticas informais) discriminarem a produção externa, sem que tal discriminação tenha que passar por (simples) medidas restritivas das importações.

Perante esta comprovação, admitir-se-ão, em abstracto, duas hipóteses: insistir na abordagem usual e limitada do GATT, no que respeita à identificação dos domínios que possam ser objecto de negociações comerciais internacionais – aceitando os inconvenientes daí resultantes –, ou aceitar uma redefinição desses domínios. Na primeira hipótese, salvaguarda-se, com algumas, poucas, reticências, o respeito tradicional pelas soberanias nacionais (as opções sobre matérias geralmente inseridas nas atribuições dos Estados continuam a tomar-se independentemente). A segunda possibilidade reflecte a necessidade de continuar a promover a integração e a eficiência económica internacionais (um desiderato do GATT e da OMC) – e é esta que explica a negociação e celebração de acordos internacionais sobre novas matérias, no seio do sistema comercial internacional.

Podemos explicar a abordagem clássica do GATT a matérias que ultrapassem questões de acesso aos mercados – da forma como estas questões são habitualmente entendidas[2] – invocando o exemplo de *standards* sociais, ambientais ou técnicos.

Com algumas excepções, cada Estado tem a liberdade de adoptar os *standards* que bem entender. À luz do GATT, a generalidade dos *standards* aplicados nas várias economias, em função de opções dos mesmos Estados, são-o lícita e legitimamente. Consequentemente, torna-se difícil aplicar medidas restritivas de política comercial, com a intenção de responder a *standards* considerados, real ou pretensamente, demasiado frágeis. Assim, em regra, não se prevêem derrogações às obrigações assumidas pelas partes (*v. g.* não discriminação, consolidação dos impostos), com incidência nas condições de acesso aos mercados, como resposta à adopção de *standards* questionáveis, *v. g.* de índole social ou ambiental, nos Estados de onde as mercadorias importadas são originárias.

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[2] E apenas no âmbito desse entendimento tradicional. A este propósito, BAGWELL e STAIGER (2002: 9-10) defendem que, mesmo nos termos actuais dos acordos multilaterais, as questões dos *standards* sociais e ambientais só são tratadas no GATT/OMC *se as mesmas se relacionarem directamente com questões de acesso aos mercados* (na medida em que um país levanta barreiras comerciais às importações de outro, a pretexto dos fracos *standards* deste último) (itálicos nossos).

Apenas o art. 20.º do GATT permite, em determinadas circunstâncias, o aproveitamento de derrogações a obrigações do acordo (em particular as que se encontram estipuladas nos arts. 1.º, 3.º e 11.º), com a intenção de fazer cumprir, no mercado de destino do produto, *standards* pensados, por exemplo, para manter recursos naturais esgotáveis, ou para proteger a vida ou a saúde das pessoas. O óbice estará no possível abuso do aproveitamento destas derrogações; teremos então a reimposição injustificada de níveis de protecção face ao exterior anteriormente negociados e já objecto de redução, eventualidade a que o próprio encabeçamento do art. 20.º não é alheio. Aí se ressalva que a adopção ou aplicação de medidas necessárias *v .g.* à protecção da saúde ou da vida das pessoas, ou ainda relativas à conservação de recursos naturais esgotáveis ou a artigos fabricados em prisões (etc.), não deve constituir um meio de discriminação arbitrária ou injustificada entre países onde existam as mesmas condições ou uma restrição disfarçada ao comércio internacional[3].

Seja como for, fica a descoberto a possibilidade de o país de importação "administrar" os seus *standards* nacionais, em função daquilo que pretende importar. Não obstante, a aplicação de *standards* particularmente estritos, porque de exigência claramente superior à dos padrões internacionais e sem base científica suficiente – melhor, a aplicação de medidas de política comercial restritivas com a intenção de salvaguardar esses *standards*[4] – pode representar uma violação das obrigações do GATT.

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[3] Ficam ainda em aberto duas outras possibilidades de responder a importações função de *standards* considerados desadequados. A de aumentar impostos alfandegários consolidados a níveis superiores àqueles que estão a ser efectivamente aplicados (ou não consolidados) e a de renegociar impostos consolidados (art. 28.º). Em ambos os casos ter-se-á que agravar a tributação de forma não discriminativa; no segundo, a renegociação em apreço implica a proposta de compensações ou a provável sujeição a retaliações. Neste sentido, BAGWELL e STAIGER (2002: 126, nota 2).

[4] Nestas circunstâncias, estas regulações assumir-se-ão como barreiras ao comércio, susceptíveis de captura por grupos de interesse. A este propósito, SIEBERT defende (2000: 142) uma maior aplicação do princípio do país de origem, em particular no que respeita a regulações atinentes aos processos produtivos e à qualidade dos produtos, tentando assim tornar mínimos os custos de transacção de bens materiais. As consequências serão um fortalecimento da ordem multilateral mas também a possível dinamização da rivalidade que possa existir entre as diversas regulações. SIEBERT salvaguarda alguns casos, entre os quais as regulações atinentes à protecção da saúde pública, para os quais se reservariam as regulações do país de destino (desde que também nestes domínios não se verificassem intuitos injustificadamente proteccionistas ou discriminativos).

Aos quatro subsistemas do sistema comercial multilateral, já mencionados, acresce ainda legislação de cada economia, adoptada autonomamente, mesmo que no respeito e na sequência de acordos internacionais. Pense-se em regulamentação sobre tributação anti-*dumping* ou compensadora, ou sobre o valor aduaneiro, ou ainda sobre a segurança dos produtos, etc. Entre este subsistema e aquele outro a que aludimos por último existe um traço comum: em ambos os casos fazem-se sentir esforços de harmonização internacional, de convergência entre legislações nacionais. Num caso e no outro as discrepâncias existentes retiram estabilidade ao sistema comercial internacional.

A existência destes subsistemas e a interacção que se desenvolve entre eles[5] não implica que todos revelem a mesma importância e se defrontem com perspectivas de evolução similares. Ainda assim, podemos afirmar que a (relativa) rigidez que tem caracterizado o subsistema multilateral – associada a pressões de natureza vária sentidas pelas economias – ajuda a explicar a emergência e o desenvolvimento dos restantes subsistemas e permite defender que cada um deles tem impacto nas relações comerciais internacionais. Fica por saber qual será o subsistema dominante: com a prevalência do subsistema multilateral viremos a deparar-nos com uma "super-OMC"[6]; ao invés, um futuro predomínio do subsistema a que corresponde o regionalismo dar-nos-á um mundo dividido em espaços de integração regional, cooperativos ou não cooperativos. Um maior peso dos segundo e quarto subsistemas abrirá espaço para *managed trade* e outros entraves ao comércio internacional.

2. Conceitos prévios

Neste ponto, convirá distinguir a *shallow integration* (integração fraca, com mera liberalização comercial) da *deep integration*. O primeiro caso cinge-se ao princípio da não discriminação, não se indo por conseguinte para além da aplicação não discriminativa da cláusula

[5] A existência de conexões entre os subsistemas referidos é manifestação dessa interacção. O caso que abordaremos prende-se, em particular, com as ligações que se estabelecem entre o subsistema que abarca acordos internacionais sobre domínios "não tradicionais" e o subsistema do regionalismo.

[6] Inspirámo-nos num termo colhido em THORSTENSEN *et al.* (1994: 33), o de "super-GATT".

do tratamento nacional a bens importados. No segundo, caminha-se para a convergência ou harmonização de legislações[7].

Identificada a integração profunda com a convergência de legislações – e também, acrescentamos nós, com uma extensão do objecto dos acordos internacionais que geram integração económica -, vejamos agora que vias podem ser percorridas para levar a cabo processos de convergência internacional de legislações[8].

Estes processos podem desenvolver-se com ou sem cooperação internacional, mas sempre exigirão uma actuação dos Estados. Se não se der cooperação internacional, poderão então os diversos países vir a definir (unilateralmente), nas matérias pertinentes, padrões que – para não prejudicarem os interesses das suas indústrias – tenderão a representar o mínimo denominador comum e a ignorar externalidades produzidas (estamos a colocar a hipótese desta convergência se realizar espontaneamente, traduzindo-se numa *race to the bottom*). Neste caso, a *autonomia nacional* define uma situação em que os governos nacionais tomam decisões "descentralizadas" sem nenhumas ou com poucas consultas internacionais e, portanto, sem cooperação.

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[7] Seguimos no corpo do texto a posição de LAWRENCE (1996: 7-8; 59-60). Com noções distintas, mas convergentes, de *deep* ou *deeper integration*, HOEKMAN e KONAN (1999: 1) e SAMPSON (2003: 4 e 10). Para os primeiros autores, *deep integration* corresponderá a actuações governamentais explícitas para reduzir, através da cooperação e da coordenação, os efeitos de segmentarização dos mercados de políticas de regulação domésticas. Para SAMPSON, a *deep integration* abrange medidas de liberalização, eliminação ou harmonização de políticas de regulação que revelem capacidade para restringir ou impedir fluxos comerciais e que tenham incidência "dentro" ou "para além" das fronteiras. Já POMFRET (1997: 214, nota 4) lembra que, colocando a ênfase na integração institucional, o conceito de *deep integration* chama à colação a ideia de Tinbergen da integração *positiva*, a ser confrontada, também por Tinbergen, com a integração *negativa*, que corresponde fundamentalmente à eliminação das barreiras pautais no seio de um espaço integrado (entre nós, Pitta e CUNHA (1964: 75) apresenta distinção similar). Por seu turno, SCHIFF *et al.* (2003: 151) reservam o conceito de *deep integration* para aqueles casos em que existe integração de políticas (indo-se para além da cláusula do tratamento nacional) e em que essa integração se faz com instituições supranacionais e com o objectivo de se avançar para uma união económica. Noutros casos, teremos integração de políticas realizada através de uma cooperação menos ambiciosa (com natureza intergovernamental e, por exemplo, *issue specific*).

[8] Na esquematização que se segue, acompanhamos, com alterações de pormenor, Henry J. Aaron *et al.*, no prefácio à obra de LAWRENCE (1996), pp. xxiii e ss., e, acessoriamente, OCDE (1995: 49-51).

Na possibilidade contrária, a gestão da convergência de legislações faz-se com cooperação internacional e pode consubstanciar-se numa de várias formas possíveis (que aqui se apresentarão por ordem crescente, no que respeita ao grau de compromisso internacional a que intencionalmente obrigam):

a) reconhecimento mútuo. Em comum com a autonomia nacional, as decisões são tomadas independentemente pelos governos nacionais. Simplesmente, neste caso, existem consultas e trocas de informação internacionais e, concomitantemente, estipula-se o reconhecimento expresso por cada um dos países, face aos demais Estados abrangidos, das regulações, *standards* e procedimentos de certificação desses outros Estados. O princípio do reconhecimento mútuo conduz ao princípio do controlo por parte do Estado de "origem". Este método permite alguma diversidade de normas mas, paralelamente, afasta-se da mera garantia do "tratamento nacional" e do controlo por parte do Estado anfitrião, na medida em que uma empresa que se dirija a um mercado terceiro não tem que se adaptar à legislação aí prevalecente, mesmo que em bases não discriminativas, devendo antes satisfazer as obrigações legais pertinentes do seu Estado de origem. Com a técnica do "reconhecimento mútuo" enfrentam-se em particular os obstáculos técnicos ao comércio e com o controlo pelo Estado de origem beneficia-se especialmente o sector dos serviços. Permite-se assim uma maior facilidade de penetração em mercados terceiros. Para mais, consegue-se um resultado similar ao da harmonização – na medida em que se neutralizam possíveis efeitos perturbadores resultantes da disparidade das regulações existentes – sem se comprometer notoriamente uma actuação livre dos Estados (indirectamente, no entanto, colocam-se em concorrência sistemas de regulação distintos – "valendo" em certa medida cada um deles o mesmo que os demais –, algo que só pode verificar-se se existir confiança entre os Estados envolvidos ou, até, um certo nível de harmonização);

b) os processos de *coordenação* são mais ambiciosos do que os anteriores, já que obrigam a um nível superior de cooperação internacional, com ajustamentos mútuos das políticas nacionais abrangidas. Existem por conseguinte negociações e acordos

internacionais e alguma restrição explícita à capacidade dos Estados actuarem autonomamente[9];

c) por último, temos a *harmonização* (explícita). Esta requer níveis superiores de cooperação entre os Estados e pode consagrar-se em acordos regionais ou mundiais. A harmonização de regulações ou *standards* obriga a grandes sacrifícios na capacidade de decidir "descentralizadamente" e exige instituições internacionais fortes. Pode ser total ou parcial (no que respeita aos requisitos abrangidos)[10] [11].

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[9] Numa posição intermédia entre esta situação e a que se segue pode verificar-se uma terceira, designada por descentralização monitorizada (*monitored decentralization*). Neste âmbito, os governos aceitam algumas regras que podem diminuir a sua capacidade de definir e executar políticas próprias ou uma gradual convergência dessas políticas. As consultas internacionais e a monitorização da concordância das políticas em causa com as regras previamente definidas ganham aqui relevância acrescida. Aaron *et al.* lembram a este propósito o exemplo da vigilância, por parte do FMI, de políticas cambiais e macroeconómicas nacionais.

[10] Hoekman e Konan (1999: 5) recordam ainda a hipótese de a harmonização se fazer pela iniciativa de um único país, que, por força de laços comerciais existentes, adopta unilateralmente *standards* de uma outra economia. O Canadá adoptou *standards* dos Estados Unidos respeitantes à emissão de poluentes por automóveis e a Suíça *standards* industriais e regulamentações técnicas comunitários, para efeitos de facilitação da produção ou/e exportação de bens.

[11] Para um confronto alargado entre as opções do reconhecimento mútuo e da harmonização, veja-se WTO (2005: 51-57; 66-67). A propósito das várias possibilidades de convergência de legislações, valerá a pena deixar algumas breves notas sobre a experiência comunitária. O reconhecimento mútuo é uma pedra angular do mercado interno. Permite que os produtos circulem livremente com base na sua conformidade com as leis nacionais do Estado-Membro em que o produto foi inicialmente comercializado. No entanto, em áreas complexas ou sensíveis o reconhecimento mútuo não é suficiente e a única forma de eliminar as barreiras é harmonizar, em maior ou menor medida, as regras nacionais ao nível da União Europeia. Por vezes adopta-se legislação técnica detalhada ("velha abordagem"); noutros sectores utiliza-se uma alternativa regulamentar simplificada denominada "nova abordagem", que também se tem revelado importante para o desenvolvimento do mercado interno. A "velha abordagem" apoia-se em directivas pormenorizadas, aplica-se a produtos com algum risco (produtos químicos, produtos farmacêuticos, motores) e conduz à substituição dos *standards* nacionais por um *standard* comum. Neste caso, a harmonização faz-se com alguma lentidão, tanto pelas exigências técnicas envolvidas como pela referência que se faz, produto a produto. As directivas da "nova abordagem", desenvolvida em 1985, limitam-se a estabelecer (harmonizar) os requisitos obrigatórios essenciais, em termos de segurança ou saúde, que os produtos devem respeitar, deixando aos fabricantes a liberdade de escolher se aplicam a norma europeia apropriada ou quaisquer outras especificações técnicas que respeitem esses princípios essenciais. Consultámos Brenton (2002: 229-230), Comissão Europeia (2004: 7) e WTO (2005: 52).

3. Integração profunda, integração regional e multilateralismo

Uma das vantagens que habitualmente se associam à celebração de (alguns) acordos de integração regional, em particular quando os mesmos são comparados com o sistema comercial multilateral, é o de, em âmbito circunscrito, ser mais fácil promover processos de integração profunda, nomeadamente tendo em consideração um menor número de participantes nessas negociações. As negociações comerciais regionais desenvolvem-se de acordo com uma dinâmica própria, distinta daquela que caracteriza as negociações comerciais multilaterais e mais eficaz do que esta – afirma-se –, o que nos permitirá compreender que, quando essas negociações têm como objecto novos domínios ou/e novas exigências de integração, no plano jurídico, se possa assistir à emergência de aspectos positivos dos processos de integração regional. Neste caso, temos a coordenação ou mesmo harmonização de políticas atinentes aos domínios mais variados, *v. g.* os dos serviços, da concorrência, das normas técnicas, do investimento, do ambiente, do trabalho, da protecção da propriedade intelectual[12]. Os defensores destas práticas de coordenação ou harmonização justificam-nas fundamentalmente com baixas dos custos de produção e ganhos de

[12] A análise da estrutura das relações preferenciais desenvolvidas pela Comunidade Europeia no espaço europeu e fora dele é pertinente nesta matéria, na medida em que evidencia que esta não só pratica a discriminação nas transacções internacionais, como o faz reiteradamente, diferenciadamente (de nível de liberalização para nível de liberalização) e nem sempre com reflexos apenas no simples tratamento pautal das mercadorias. Pode também, por exemplo, envolver a harmonização de normas técnicas ou de outros elementos, tendo-se como referência as exigências do espaço de integração regional a uma dada economia que se pretenda associar. Neste âmbito, existem duas possibilidades. Numa primeira hipótese, a associação pode entender-se (ao menos retrospectivamente) como uma etapa para a adesão (algo que aconteceu em larga medida com o Espaço Económico Europeu e com a associação de países da Europa Central e Oriental à União Europeia). Numa segunda – recordada em WTO (1995: 53) -, a preocupação de um país em avançar para a harmonização de normas técnicas (e de outras regulamentações), aceitando como parâmetros para essa harmonização referências de um dado espaço de integração regional, entende-se quando o comércio desse país com esse espaço de integração regional é relativamente significativo no cômputo geral do seu comércio externo. Esta opção pode mesmo revelar-se especialmente atractiva quando, por motivos de ordem diversa, se afasta a possibilidade da adesão a esse espaço. Este terá sido o caso da Suíça quando, na sequência da decisão de não integrar o Espaço Económico Europeu, entabulou a negociação de uma série de acordos bilaterais sectoriais com a União Europeia.

eficiência[13]. Pela nossa parte, poderíamos desde logo fazer notar que também se torna mais estável o acesso aos outros mercados integrados – para tal basta por exemplo lembrar que a adopção de um regime comum de concorrência permite eliminar a possibilidade da tributação anti-*dumping* no seio de um espaço de integração regional, para o comércio intra-regional.

Evidentemente, a comprovação de que processos de integração profunda se desenvolvem privilegiadamente em âmbito regional não tem que ser uma garantia de que desse processo resultarão forçosamente benefícios tanto para o conjunto dos países integrados nesse espaço como para países terceiros. O mesmo podemos afirmar se nos situarmos na perspectiva da defesa do sistema comercial multilateral. Devemo-nos interrogar sobre a capacidade dos processos de integração regional "profundos" para se afirmarem como elementos de reforço dos objectivos desse sistema mas também como factores adicionais de perturbação do multilateralismo. Pode até dar-se o caso de a subalternização do sistema comercial multilateral, face à instituição de espaços de integração regional, nos permitir apreender melhor o conjunto dos efeitos adversos desses processos em algumas economias.

Numa primeira linha de pensamento, acompanharemos autores como LAWRENCE, que sublinham os possíveis efeitos positivos dos processos de integração regional profundos na economia mundial e no multilateralismo[14].

A globalização gera pressões para que se conciliem práticas nacionais divergentes e essa compatibilização pode fazer-se (não exclusivamente) pela celebração de acordos internacionais. Adoptando-se a via convencional, já referimos as vantagens que a negociação de acordos de integração regional apresenta, face à alternativa de âmbito multilateral. Para mais, as mesmas pressões poderiam também explicar o recurso ao comércio administrado (esta sim, uma ameaça directa ao multilateralismo). Em suma, a integração regional "profunda" permitirá "acomodar" favoravelmente as pressões da globalização sobre o sistema comercial multilateral.

Mas LAWRENCE avança ainda um outro argumento: a eventual natureza mais "profunda" de acordos de integração regional pode facilitar o comércio dos países terceiros com os correspondentes espaços

[13] Cfr. PANAGARIYA (1999: 38-39).
[14] Cfr. LAWRENCE (1996: 105; 32).

de integração regional. Imagine-se que em âmbito regional se determina a aplicação de *standards* sociais ou ambientais de exigência adicional, *sem os impor à produção ou a produtores externos*. Nestas circunstâncias, poder-se-ia verificar o aumento de importações do resto do mundo, por parte dos países que, nas mesmas actividades, se mantivessem sujeitos a padrões mais permissivos (e, por esse motivo, com custos de produção mais baixos). Teríamos assim a natureza mais "profunda" do acordo de integração regional a jogar a favor das importações extra-regionais...[15]. Pode ainda lembrar-se uma outra hipótese, talvez de verificação mais comum do que a precedente; a aplicação de *standards* técnicos iguais em todos os países membros de um espaço de integração regional facilita a adequação dos produtos externos às exigências de diversos mercados terceiros agrupados.

No campo dos perigos e dos inconvenientes de desenvolver processos de integração profunda em acordos de integração regional, podemos adiantar os seguintes.

No âmbito da sua negociação, se se envolverem países desenvolvidos e países em vias de desenvolvimento, podem estes últimos ser coagidos a aceitar processos de coordenação ou harmonização de políticas que não lhes interessem, por se revelarem desadequados aos seus estádios de desenvolvimento. Uma muito provável repartição assimétrica do poder negocial entre as partes contratantes pode assim tornar esses processos de coordenação ou harmonização de políticas um instrumento que interessa particularmente a países desenvolvidos. Para mais, esta possibilidade – a de uma potência extrair benefícios adicionais de um processo de integração regional, através de negociações que conduzam à adopção de normas comuns em vários domínios – pode revelar-se ainda mais atractiva para o poder hegemónico, se as negociações se desenvolverem de forma

[15] Devemos *insistir* que LAWRENCE está a supor que a harmonização de *standards*, em âmbito regional, não será depois imposta a produtores externos, a coberto da ameaça de medidas retaliatórias, ou seja, não poderá servir como medida restritiva das importações. Por outro lado – acrescenta o autor – essa harmonização das várias regulações domésticas pode baixar os custos de produção das empresas do espaço de integração regional e assim estimular o comércio intra-regional, a expensas das importações do resto do mundo. No entanto, não se pode dar como certa a descida dos custos (LAWRENCE admite-o, a pp. 32) e, mesmo que assim seja, há que lembrar a eventualidade de também empresas de países terceiros poderem beneficiar de ganhos de eficiência (no corpo do texto coloca-se, de seguida, essa hipótese).

sequencial (e não simultaneamente) com vários países terceiros ou grupos de países terceiros[16].

Depois, a realização, em âmbito regional, de processos de coordenação ou harmonização de políticas pode servir para dificultar o acesso de produção externa (não conforme aos novos *standards*) aos mercados integrados, em particular aos mercados dos membros do espaço de integração regional que realmente introduzem novas exigências em matérias comerciais e não comerciais Estar-se-ão assim a reservar esses mercados para o país ou países, hegemónicos nesse acordo, que, numa fase prévia a esse processo de coordenação ou harmonização, definiram e já respeitam os ditos *standards*. A coordenação ou harmonização de políticas pode então ser vista como um instrumento de penetração discriminativa em mercados terceiros. Esta aptidão da integração profunda ganha acuidade acrescida em processos de âmbito regional conduzidos por uma potência ou potências hegemónicas[17].

Ainda que estejamos perante acordos de integração regional ou aprofundamentos da integração regional da iniciativa de um conjunto de países desenvolvidos, sempre teremos, através da aceitação de processos de coordenação ou harmonização de políticas, efeitos sentidos intra e extra-regionalmente. Neste sentido, por exemplo, afirma-se LAWRENCE (1996: 8), quando sustenta: "The UE might do nothing to change its external tariffs, but the adoption of a single European product standard, for example, could affect both intra- and extra-European trade flows". Em sentido convergente, WOOLCOCK (2003: 28) defende que a aproximação ou harmonização regional pode produzir o efeito de compelir países terceiros a adoptar os *standards* dominantes na região. Refere-se o caso da Europa, afirmando-se que a adopção de *acquis* comunitário pode ser considerada um pré-requisito para a garantia de acesso ao mercado da União Europeia, independentemente dos compromissos multilaterais em vigor (o mesmo sucederá, de acordo

[16] Com uma referência a esta possibilidade, por exemplo, BRENTON (2002: 230). O autor qualifica estes casos, que envolvem economias menos desenvolvidas (*v.g.* a Bulgária ou a Ucrânia, no âmbito de acordos de associação e de parceria e cooperação), como de *harmonização hegemónica* (por parte da União Europeia). Já noutros casos, envolvendo os Estados Unidos, o Canadá ou o Japão, a mesma União Europeia tende a adoptar o método do "reconhecimento mútuo".

[17] Com uma posição convergente, PANAGARIYA (1999: 38).

com o autor, no que se refere a exportações para os Estados Unidos). Se se estiver perante um país que pretenda aderir à União Europeia, a adopção do *acquis* comunitário é obrigatória. Mas mesmo que não se perspective a adesão, os países do Sul terão sempre a tendência para se adaptarem às regras e às políticas das economias do Norte, nomeadamente se com estas desenvolverem laços comerciais de dependência[18].

A este propósito, pode ainda convocar-se um texto recente de CHEN e MATTOO (2004). Os autores, na sequência de um estudo empírico envolvendo indústrias de 42 países, para o período 1986-2001, concluem que a harmonização de *standards* num espaço de integração regional estimula as exportações de países terceiros desenvolvidos mas reduz as exportações dos países em vias de desenvolvimento do "resto do mundo" para esse espaço de integração regional. A explicação para este último facto está na maior dificuldade das empresas dos países em vias de desenvolvimento em adoptar *standards* mais exigentes e na sua menor capacidade para beneficiar de economias de escala em mercados integrados. Já aos acordos de reconhecimento mútuo celebrados em âmbito regional são imputados efeitos gerais de estímulo das importações do espaço de integração regional originárias da generalidade dos países terceiros – países desenvolvidos e países em vias de desenvolvimento – excepto no caso de conterem regras de origem restritivas. Se este for o caso, o comércio intra-regional aumentará em prejuízo do resto do mundo, em particular de países em vias de desenvolvimento (a aferição da origem dos produtos pode então ser um elemento relevante. Aos países terceiros podem ou não ser aplicadas as disposições do acordo. Sendo aplicadas, os países terceiros poderão aceder aos mercados dos países que celebraram o acordo de reconhecimento mútuo cumprindo os *standards* aplicados pela parte nesse acordo menos exigente).

Nestas circunstâncias – coordenação ou harmonização de políticas com capacidades de diferenciação entre parceiros comerciais –, o desrespeito pela não discriminação pode verificar-se sem que haja violação do direito internacional económico (acordos da OMC). Em particular, a assunção de compromissos *WTO-plus*[19] pode fazer-se sem

[18] Neste sentido também, por exemplo, BAERT (2003: 101).

[19] Estamos a partir da aplicação de um critério que se remete aos compromissos já assumidos multilateralmente (ou à ausência dos mesmos) para as matérias de regulação

desrespeito pelo princípio da não discriminação se as obrigações assumidas regionalmente se vierem a aplicar em condições de igualdade, na base das cláusulas da nação-mais-favorecida e/ou do tratamento nacional, a países terceiros[20].

Os compromissos em causa poderão assumir várias formas. Podem revelar-se mais abrangentes em termos de "cobertura" de um determinado sector ou sectores (abarcando, por exemplo no sector do comércio de serviços, a garantia do tratamento nacional a sectores não abrangidos pelo GATS ou por acordos sectoriais subsequentes); podem ainda integrar um maior número de obrigações "substantivas" (atinentes, por hipótese, a disposições de reconhecimento mútuo, aproximação ou harmonização de legislações) ou "processuais" (respeitantes *v. g.* à "transparência", à cooperação entre as partes ou à resolução de litígios). As disposições "substantivas" serão geralmente mais ambiciosas e, à partida, proporcionarão maiores oportunidade de acesso aos mercados do que as disposições de natureza processual[21]. No entanto,

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que também sejam objecto de acordos de integração regional. Teremos assim, em geral, três avaliações possíveis:

a) casos em que nos acordos de integração regional se assumem compromissos que vão para além dos direitos e deveres previstos multilateralmente (introduziu-se a este propósito o conceito de *WTO-plus*);

b) casos em que apenas se reafirmam em âmbito regional obrigações já assumidas no seio da OMC (aqui o regionalismo fortalece indiscutivelmente o multilateralismo);

c) casos em se fica aquém destas últimas (*WTO-minor*). Assim, nem sempre os acordos de integração regional conduzem a uma *deeper integration*.

Seguimos o critério aplicado em SAMPSON e WOOLCOCK, eds. (2003). Os domínios abrangidos por acordos de integração regional variam substancialmente de acordo para acordo. Em muitos casos, os compromissos assumidos não ultrapassam ou ficam mesmo aquém das obrigações assumidas no seio da OMC.

[20] Colocando esta possibilidade, KODAMA (2000: 271). A este propósito, SCHIFF *et al.* (2003: 148) recordam por exemplo que medidas de simplificação de documentação e procedimentos aduaneiros podem ser objecto da aplicação da cláusula da nação-mais-favorecida sem novas intervenções intergovernamentais. Mas este não será sempre o caso. Em muitas circunstâncias, a aplicação do princípio da não discriminação obrigará a negociações ou mesmo à celebração de novos acordos. Esta é, por exemplo, uma via expressamente prevista no art. 7.º do GATS, para efeitos de extensão de acordos entre alguns membros da OMC de reconhecimento mútuo de diplomas, licenças ou certificados, a outros membros desta organização internacional.

[21] Cfr. REITER (2003: 79). Em matéria de compromissos *WTO-plus*, podemos destacar os seguintes acordos (e domínios).

No que respeita a *standards* de produtos, destacam-se a União Europeia, o ANZCERTA (*Australia-New Zealand Closer Economic Relations Trade Agreement*) e,

as duas formas de compromisso podem revelar-se, nos seus efeitos, complementares (por exemplo, a instituição de um mecanismo de consultas e resolução de litígios eficaz reforça naturalmente os com-

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noutro plano, a NAFTA. Existem em particular acordos de reconhecimento mútuo cobrindo tanto mercadorias como serviços e também *standards* próprios ou ainda o reconhecimento por cada uma das partes dos testes e certificações realizados por órgãos dos seus parceiros comerciais.

Em matérias de liberalização de transacções internacionais de serviços, há que destacar, para além da União Europeia, a NAFTA e o ANZCERTA. Na União Europeia dão-se progressos relevantes com a criação do mercado interno único, por exemplo nas telecomunicações, nos serviços bancários e nos serviços profissionais, embora já anteriormente se aplicasse, ao menos formalmente, o "tratamento nacional" a prestadores de serviços de outros Estados-membros. A NAFTA e o ANZCERTA apresentam também uma cobertura abrangente dos serviços, bastando-se para o efeito com uma "lista negativa"; todos os sectores de serviços estão incluídos excepto se forem especificamente excluídos (o que, para o primeiro caso, não impede um número relevante de excepções, fundamental na obtenção de um equilíbrio negocial entre as partes). Prevê-se, em particular, a aplicação da cláusula do tratamento nacional.

Nos domínios da concorrência e da política industrial, destaca-se mais uma vez a União Europeia, com regras comuns em matérias como subsídios, compras públicas, monopólios e concorrência. Para mais, existe legislação muito detalhada concernente ao mercado interno único. As mesmas regras aplicam-se no seio do Espaço Económico Europeu. Também o ANZCERTA se destaca, com uma cobertura relevante em matérias de política industrial e de concorrência. Não obstante, contrariamente ao que acontece na União Europeia, mantêm-se legislações distintas, embora, no caso das políticas de concorrência da Austrália e da Nova Zelândia, exista coordenação entre estas, a vários níveis (nos planos jurídico, judicial e administrativo). Também a disciplina sobre os subsídios é mais estrita do que a da OMC. Na NAFTA incide-se particularmente no abuso do poder comercial dos monopólios públicos. Encontramos também disposições gerais sobre esses monopólios e sobre empresas públicas; proíbe-se às partes contratantes que instruam uns e outras no sentido da adopção de medidas que vão contra disposições do acordo. Ainda em termos gerais, a NAFTA exigiu a cada um dos Estados participantes o desenvolvimento de uma política nacional de concorrência, visando-se o México, país que à época da negociação do acordo não contava com uma política deste tipo.

Na União Europeia, no ANZCERTA e, de forma menos impressiva, na NAFTA existe liberalização adicional dos mercados públicos, face ao estabelecido no acordo da OMC, determinando-se, em particular, a aplicação da cláusula do tratamento nacional para alguns contratos, a partir de certos valores mínimos (na identificação do leque de compras governamentais objecto destes acordos regionais existem, no entanto, outras variáveis a considerar, com especificidades de acordo para acordo; *v.g.* o universo de adquirentes abrangidos pelos acordos, o objecto dos contratos públicos em apreciação, as exigências de transparência nos processos decisórios).

Não existe aplicação de tributação anti-*dumping* ou compensadora entre os membros da União Europeia e do Espaço Económico Europeu (a problemática do

promissos "substantivos" previamente assumidos). As disposições processuais não representam, em regra, uma ameaça para o multilateralismo[22].

Numa outra óptica – mais circunscrita à "clássica" violação do princípio da não discriminação, que resulta da garantia de tratamento *pautal* preferencial – poderia também defender-se que, neste âmbito, mesmo o desrespeito pelo princípio da não discriminação, porque não passa pela concessão de preferências alfandegárias, não viola o direito comercial internacional[23] e não produz os efeitos perniciosos que tipicamente associamos a essas preferências; o de promoverem desvio de comércio.

Desta possibilidade devemos discordar. O facto de os processos de coordenação ou harmonização de políticas não assumirem natureza pautal preferencial não obsta a que, nos casos de aproximação ou harmonização de políticas em âmbito regional, seja possível estabelecerem-se tratamentos com consequências que recordam aquelas que se associam ao tratamento pautal preferencial. Em particular, as normas ou *standards* de regulação regionais podem constituir uma forma de preferência se divergirem daquelas que se aplicam num mercado de

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dumping, para as relações intra-comunitárias, nem sequer se coloca, como recorda PORTO (2001: 281, nota 24), aludindo ao chamado efeito de *boomerang*). No âmbito do ANZCERTA e do acordo de comércio livre entre o Canadá e o Chile dispensa-se a tributação anti-*dumping*, sendo possível que a mesma medida seja tomada no seio do MERCOSUL. Não se aplicam salvaguardas ("tipo art. 19.º") no comércio intra-*regional nos casos do MERCOSUL, da União Europeia e do ANZCERTA.*

Para esta resenha, consultámos, nomeadamente, SNAPE e BOSWORTH (1996), HOEKMAN (1998), WORLD BANK (2000) e OECD/HEYDON (2002). Para uma comparação exaustiva entre acordos de integração regional e acordos da OMC, nestas e em outras matérias, veja-se esta última obra.

[22] Esta relação de complementaridade também existe, naturalmente, no que respeita às disposições substantivas e processuais multilaterais. Incidindo exactamente neste ponto, SCHOTT (1996: 3), quando afirma: "Trading rules have little value unless they can be enforced. The dispute settlement mechanism provides a warranty that the bill of goods sold to participating countries during a trade negotiation will be dutifully delivered. For that reason, the effectiveness of the DSM is critical to the WTO's success.".

[23] Aparentemente com esta ilação, POMFRET (1997: 214). O autor observa que políticas nacionais, como as de investimento ou de concorrência, podem, em âmbito de harmonizações de circunscrição regional, ser utilizadas para discriminar *entre* parceiros comerciais, desrespeitando-se o princípio da não discriminação mas não *infringindo o direito comercial internacional.*

exportação de uma economia terceira ao acordo[24] e se, por conseguinte, implicarem, para o seu cumprimento, custos adicionais para os exportadores dessa economia[25].

Em termos mais gerais, os processos de coordenação ou harmonização de legislações podem até apreciar-se como uma derrogação da cláusula da nação-mais-favorecida. Por exemplo no âmbito do reconhecimento mútuo, os países que cumpram os critérios de equivalência estipulados contarão com condições de acesso a mercados externos distintas daquelas com que contarão outros países (os produtos deste últimos poderão, por exemplo, ter que ser sujeitos a testes de conformidade adicionais)[26]. Mesmo que, por hipótese, as disposições

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[24] Neste sentido, WOOLCOCK (2003: 27). Também colocando a possibilidade de os sistemas de regulação instituídos em âmbito regional ou circunscrito se poderem revelar uma barreira ao acesso de bens e serviços ao mercado integrado pela parte de países terceiros ao acordo, HOEKMAN e KONAN (1999: 8), KODAMA (2000: 271; 272) e SEN (2003: 148). Aliás, o que se estipula no n.º 2.6 do art. 2.º do acordo sobre obstáculos técnicos ao comércio e no art. 3.º do acordo sobre medidas sanitárias e fitossanitárias procura diminuir este risco (não obstante, o n.º 2.7 do mesmo artigo do primeiro acordo vem encorajar, embora não reclame, a aplicação do método do reconhecimento mútuo entre membros da OMC, algo que para se verificar exigirá naturalmente acordos de âmbito restrito, não multilaterais).

[25] STEPHENSON (1999: 285), por exemplo, recorre a um estudo da OECD (1996, *Proceedings from the Conference on Consumer Product Safety Standards and Conformity Assessment*) onde se afirma que *standards* e regulamentações técnicas distintos, em mercados distintos, combinados com os custos associados a testes e a certificações, podem representar entre 2 a 10% dos custos totais de produção de uma empresa.

[26] Cfr. WOOLCOCK (2003: 28). Em sentido convergente, TREBILCOCK e HOWSE (1999: 520-521), ao afirmarem que os acordos de reconhecimento mútuo sobre *standards* de serviços e de produtos, como aqueles celebrados entre os Estados Unidos e a União Europeia, geram importantes questões de efeitos de desvio de comércio, por serem negociados regional ou plurilateralmente. Na sequência, os autores defendem que a OMC fiscalize apertadamente a compatibilidade destes acordos com as obrigações da nação-mais-favorecida. Na verdade, aventam TREBILCOCK e HOWSE, estes acordos, à sua maneira, podem vir a permitir a formação de blocos regionais fechados, com a habitual capacidade discriminativa. Não querendo ser tão radicais, devemos, pela nossa parte, admitir que estes acordos poderão não ser apenas instrumentos de facilitação do comércio, sendo também meio de integração entre as partes, embora numa base marcadamente sectorial e dispensando a via clássica do tratamento pautal preferencial.

Numa posição distinta, temos NICOLAÏDIS (2000: 267). O autor começa por questionar abertamente o facto dos acordos de reconhecimento mútuo serem usualmente considerados "antithetical to the principle of non-discrimination". Para NICOLAÏDIS, este não terá que ser o caso se se estiver a tratar diferentemente o que é diferente. Nestas circunstâncias, o princípio da não discriminação não é violado; este obriga, por

de reconhecimento mútuo negociadas entre os países partes no acordo de integração regional se venham a estender a países terceiros, estes não terão participado na elaboração dessas disposições, que, por conseguinte, podem não servir os seus interesses da forma como servem os interesses das partes no acordo de integração regional. Nestas circunstâncias, das disposições de reconhecimento mútuo podem resultar tratamentos "preferenciais" para os países integrados regionalmente e isto mesmo que estas disposições se possam aplicar a países terceiros (algo que, aliás, não tem necessariamente que se verificar)[27].

4. Conclusão

O "segundo" regionalismo tem incorporado não só um aumento do número de espaços de integração regional constituídos e notificados ao GATT e à OMC como também o "aprofundamento" de alguns deles. Tradicionalmente, os acordos de integração regional consagram condições de acesso aos mercados dos países que são partes nesses acordos, garantidas por cada um deles aos restantes, que diferem daquelas que se aplicam a países terceiros. Ora o regionalismo mais recente envolve tentativas de integração profunda, com implicações nos domínios mais variados. Pode prever-se a liberalização do comércio de serviços (no todo ou em parte) e/ou dos movimentos de factores de produção, o reconhecimento mútuo ou a harmonização de *standards* sociais, técnicos e ambientais, a consagração do direito de estabeleci-

exemplo no comércio de mercadorias, a tratar da mesma forma produtos similares, de acordo com as cláusulas da nação-mais-favorecida e do tratamento nacional. Ora, podemos estar perante produtos "diferentes", na medida em que parte deles são fruto de legislação, regulamentações e *standards* distintos, não considerados válidos internamente (neste âmbito, ganha óbvia importância a definição ou caracterização de produto "similar"; cfr. Infante MOTA, 2005: 117 ss. e 137 ss.). NICOLAÏDIS acaba no entanto por admitir a existência de uma relação controversa entre o reconhecimento mútuo e a não discriminação. Adiante (p. 288) refere por exemplo que neste domínio a cláusula da nação-mais-favorecida se terá que aplicar condicionalmente, na medida em que a extensão do tratamento da nação-mais-favorecida dependerá da compatibilidade de regras ou da equivalência de processos entre o que estabelece no acordo e o que se verifica em países que não são originariamente partes nesse acordo.

[27] Também com esta conclusão – e, da mesma forma, abrangendo as duas possibilidades (acordos de reconhecimento mútuo com ou sem regras de origem que circunscrevam os efeitos do acordo às partes originais) –, BRENTON (2002: 233).

mento, etc., etc. De facto, a generalidade das políticas domésticas dos Estados encaradas como susceptíveis de afectar a competitividade internacional podem ser objecto de abordagem, numa óptica de integração regional.

No que respeita a imbricações entre processos de integração regional "profunda" e multilateralismo, existe um perigo evidente: espaços de integração regional que tenham desenvolvido processos de integração profunda autonomamente (isto é, fora de qualquer quadro multilateral) terão dificuldade em aceitar processos concorrentes ou antagónicos em sede multilateral[28] e, naturalmente, terão também dificuldade em incorporar-se em outros espaços de integração regional, com opções distintas. O risco da subalternização do sistema comercial multilateral ganha assim maior evidência (face àquela com que já contava, nos termos restritos dos inconvenientes da discriminação clássica realizada pela via comercial). Nestas circunstâncias, o desenvolvimento de abordagens "regionais" (estatuídas em diversos acordos de integração regional) a políticas de regulação das partes contratantes pode permitir que estas se venham a afirmar como barreiras ao comércio internacional. Da mesma forma, o perigo da marginalização de países que não se incorporam em espaços de integração regional "profundos", em particular países em vias de desenvolvimento, ganha nova expressão[29]. Por conseguinte, fica em evidência a hipótese de também pela via da integração profunda os espaços de integração regional se poderem vir a revelar *stumbling blocks*.

Em conclusão, a complementaridade entre integração regional e integração profunda só interessa se se demonstrar, em concreto, a utilidade – os ganhos de bem-estar – do processo de coordenação ou

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[28] Com este receio, por exemplo, REITER (2003: 63).

[29] A este propósito, BRENTON (2002: 233) refere que o Conselho europeu criou uma lista de países com os quais seria prioritária a negociação de acordos de reconhecimento mútuo, excluindo dessa lista todos os países africanos (salvo a África do Sul) e todos os países da América do Sul. Na sequência, o autor afirma que, no respeito pelo espírito do GATT e da OMC e pela cláusula da nação-mais-favorecida, seria conveniente que a União Europeia não evitasse a celebração deste tipo de acordos com quaisquer parceiros comerciais que demonstrassem capacidade para garantir os sistemas de testes adequados, nem que fosse como resultado de investimento de empresas externas com experiência nos domínios da avaliação da conformidade. O autor, exactamente como no corpo do texto, acaba por manifestar o receio de que países africanos, sul-americanos e asiáticos possam vir a ser crescentemente marginalizados, na impossibilidade de negociarem estes acordos.

harmonização de políticas em perspectiva para o conjunto das economias envolvidas. O ideal seria poder definir, a este propósito, uma região "óptima" (um grupo "óptimo" de países) para a produção "regional" (eficiente) desses bens públicos (*standards* comuns, políticas comuns, etc.). Para mais, os critérios que permitirão definir uma região "óptima" para efeitos de prossecução de processos de integração profunda, ou se se preferir, para efeitos de definição de *standards* idiossincráticos, podem variar, por força de alterações na economia mundial: novos desenvolvimentos nas tecnologias de transportes e comunicações; crescente globalização da informação e do conhecimento; aumentos sucessivos na liberdade de circulação dos factores de produção, etc.

Querendo avançar-se para um outro plano, o da defesa dos interesses do sistema comercial multilateral, deve provar-se que vantagens adicionais existem, em cada caso, em promover-se a integração profunda pela via da integração regional (esquecendo-se o multilateralismo), pesando-se também os inconvenientes, já mencionados. Em linhas gerais, podemos concluir que a ambivalência que os efeitos de criação e de desvio de comércio traduzem, no que diz respeito à integração "fraca" ou "superficial" proporcionada pela integração regional, se mantém, quando, de novo em âmbito regional, se avança na direcção da integração económica profunda.

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GLOBALISATION AND LAW
(SLOVAK STORY)

por *Vlasta Kunová**

Historical background

Addressing the issue of law and globalisation really is a challenging task to tackle. Where should I begin? In the first place, I must emphasise that my primary focus will be on research into globalisation phenomena in the region of Central Europe, with an excursion into the more distant past. The law that was the most highly developed in the times of Antiquity was that of the ancient Romans. Besides the positive influences of the ancient Romans in other fields, Roman law represented a grandiose achievement of the spirit of that civilisation[1]. In this connection, the fusion of *ius civile* with *ius gentium* may be perceived as the first successful step towards unification.[2] Another form of historic assimilation of law is its reception[3]. Reception of law means not only one country taking over the law of another country; it also includes the shaping of a country's legal system following the model of another country.[4] The concept of the reception of law is used most often in connection with the process of the imitation of Roman law in the countries of continental Europe. This process, which went on roughly between the 12th and the 16th centuries, left an indelible mark on the countries of the European continent of that time, from the

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[1] Rebro, K., *Rímske právo súkromné*, Obzor 1980, s. 9

[2] Knapp, V., *Velké právní systémy*, h.c. Beck 1996, s. 27

[3] detto, s. 27 a nasl.

[4] Rebro, K.: *vid' poznámku* č. 1, s. 9 a nasl.

eastern shores of the Atlantic to the western borders of Russia. Roman law is also associated with the law of universities, where it was developed and cultivated by prominent legal scholars. It was not only a propaedeutic subject, but also a living example suitable for practical applications. Finally, *ius commune* represents historic foundations for *ius commune europeo*. As a matter of interest, I would like to stress that Roman law has been taught at all Slovak law faculties right up to these days. It represents a return to the old traditions of continental Europe, and constitutes a unifying link with Western legal culture. The idea of "natural law", i.e. the law that belongs to all animals and/or living creatures, originated also in ancient Rome. Naturally, Central Europe was also influenced by canonical law – yet another unifying element in the evolution of legal thinking. In the Middle Ages, German mining and municipal rights were introduced and exercised in the territory of Slovakia. They took root in Slovakia along with technical know-how on gold and silver mining. The import of German law to Slovakia at that time represented a clearly positive moment in our legal development.

A new era of European legal history was ushered in with the emergence of natural law in the 17th century. It introduced a supranational element in the legal history of Europe. As already stated, it may be traced back to ancient Greek philosophy, and also to Roman law. However, Modern Age gave it a new, rational content. In German philosophy, this law is referred to as "Vernunfrecht". Its representative is the Dutch lawyer Hugo Grotius and his work "*De iure belli ac pacis*." The idea that there is only one law, existing independently of positive law, is as old as mankind itself. However, Grotius' teachings gave it a rational core. A rational perception of natural law heralded the advent of a new civil society.[5] Natural law theories are closely linked with the Enlightenment, and undoubtedly constitute the philosophical background for the present-day globalisation tendencies in European law as a whole. On one hand, the major European codifications of civil law reflected the national ambitions of their drafters. They are often considered as supremely national achievements of the human mind. On the other hand, almost all civil codes have their roots in Roman law, which was their unifying element. In the case of Slovakia,

[5] DAVID, R-Grassmann, G., *Die Einführung in die grossen Rechtssysteme der Gegenmart*, Beck 1988, s. 87.

the text of the Czechoslovak Civil Code was drawn up in the 1950s under the influence of "Allgemeines Buergerliches Gesetzbuch (1811)" Thus, at the early stages of the socialist period, it was still possible in Czechoslovakia to derive inspiration from a Western model. However, in the subsequent periods, the only models that were allowed in our legal system were those of other Communist countries, and in particular that of the Soviet Union. European civil codes served as a model for many countries not only in Europe, but also on other continents. The adoption of a code always means a greater clarity of the law in force, its systemisation, and a global element in legal development.

The Concept of Droit Commun de l'Humanité

The beginning of the 20th century represented a major milestone in the legal globalisation trend. In 1900, a World Congress of Comparative Law was held in Paris. The Congress focused, *inter alia*, on the development of common law. This was the time when the notion of the so-called common legislative law started to be used. Legal science of that period was also under the influence of H. Levy-Ullmann and his declarations on the creation of the world law of the 20th century. Italian lawyer del Vecchio saw the future in the comparative science of law that can effectively contribute to legal unification. The concept of the so-called *droit commun de l'humanité* proposed by Raymond Saleilles may sound like a fantasy, but it represents the basis for reflections about the so-called *ius unum*. Czech legal theoretician, Viktor Knapp, does not believe that the legal systems of individual countries are separated by insurmountable and insuperable barriers.[6] While it is true that the laws are tied to a certain territory, the law as such is not. An interesting fact is that the law is not protected by copyright. It may therefore be used at will as a model for legislative proposals, copied and exported from or imported to other countries practically without any restriction. There are scores of examples of such "robberies of law", as this phenomenon is called by certain German authors.

Transformation of Law in the Slovak Republic towards the Globalization?

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[6] KNAPP, V., *Velké právní systémy*, h.c. Beck 1996, s. 30.

In the post-1989 period, Slovakia started to transform its legal system. I know from my own experience, that these processes were often unstructured and non-systemic. Slovak lawmakers were drawing on foreign models on the basis of their subjective experience. Prevailing criteria were the knowledge of the language, personal contacts, the availability of a legal model and, sometimes, even the party affiliation of officials who wrote the legal text. Thus, the Slovak criminal law drew on certain American models, which it is very difficult to transpose into our legal reality. Alignment of Slovak law with that of the EU represented a positive moment in our legal reform. It followed a pattern, which was similar to those of other new states of the EU. The key legal instrument was the Europe Agreement on association of 1993, namely its articles 69 and 70. Under the Agreement, Slovakia gave an undertaking to align its entire existing and future legal system with the law of the EU. Legal alignment was governed by clear rules, centrally coordinated by the European Commission, and financed from EU PHARE funds. It was already clear at the beginning of this process that it would transcend the limits and barriers represented by national interests. It was a dynamic process driven by the fact that the failure to fulfil the requirements of implementing the *acquis communautaire* could mean an end to the integration ambitions of the candidate country concerned. New EU members were mutually harmonising their legal systems at a relatively fast pace, bringing them also closer to the so-called *comparandum*, i.e. EU law. Legal comparative science attaches a high value to the following attributes of the process of approximation (I will use Slovakia as an example):

- its systematic character
- its dynamic quality
- its central coordination by the EU Commission
- the high professionalism and flexibility of experts
- its informal nature based on voluntary engagement
- uniform know-how for the transposition of EU law in the new member states.

Legal approximation comprised two elements. Firstly, the alignment of the legal systems of the candidate countries with EU law, i.e. the process ensuring a certain degree of uniformity of these legal systems; secondly, legal unification. A concurrent process of the gradual elimination of the differences between the legal systems of member

states was also taking place – legal theory refers to it as the harmonisation of law. The process of legal alignment in the EU is still continuing and, at the same time, it constitutes one of the most important instruments for external relations of the EU. I will mention, by way of example, several projects that involved Slovak legal experts:

- Preparing the Ukrainian Parliament for legal approximation, the EU seat for Serbia and the transfer of experience to Belarus, approximation projects in Kazakhstan, etc. The EU provides important assistance also to non-member states of the EU in the Mediterranean area. Asian countries, especially China and Japan, also have an interest to approximate their laws with that of the EU. A course on EU law has been introduced at several major American universities. Within Slovakia, it is mainly EU competition law that draws the attention of companies, especially those with American investors. The process of legal approximation and harmonisation in the EU framework has transcended narrow regional legal concepts. It happened for the first time in the history of law that targeted activities in the legislative area have proved to be so effective. It is interesting to note that this process involves voluntary engagement, where the states are introducing elements of European law into their legal systems because of pragmatic reasons. The EU does not exert pressure on its candidate states to fulfil their commitments in the area of legal transposition. (except fulfilling the general principle *pacta sunt servanda*) The situation is different in member states where the enforcement in this area is based on sanctions and on non-contractual responsibility of the state for incorrect transposition of Community law. Alignment with EU law has undoubtedly been one of the highly successful projects of the EU. It represents a distinct move towards the concept of "*ius unum*", which certain legal sceptics are reluctant to recognise. EU law is a mix of continental and Anglo-Saxon legal systems. The new Reform Treaty, in particular, often stresses this point. It has happened for the first time in legal history that the countries of Central Europe have been experiencing such a massive influx of elements of common law. At the beginning of 1990s, I met a well-known English philosopher, Professor Roger Scruton, in Bratislava. He suggested that Slovak judges be replaced by English judges. In his view,

because of the familiar problem of corruption in the courts of several new EU members, such replacement could help deal with the critical situation. Naturally, this unrealistic proposal was turned down as slightly eccentric. After all, Great Britain had not even been able to make a more substantial influence on the law of India whose legal system is a mixture of several influences. This means that while the imposition of influence, i.e. a certain kind of legal expansion, proved to be ineffective, the same purpose may be now achieved by means of the process of approximation of national legal systems with EU law. Continental lawyers are getting used to increasingly refer to the decisions of the European Court of Justice, which often fills gaps in the EU legal system. Even more, they have an obligation to apply them in the right manner, as stated in the well-known Koebler case. Please permit me one more personal reminiscence. During my study stay at the ECJ in Luxembourg in the 1990s, I had the privilege to consult General Advocate Francis Jacobs on certain outstanding legal issues. He gave me a very a good answer to my question of "Do the Court decisions constitute the source of law of the EU?" His reply was, "We should not theoreticise too much about these questions". This, I believe, is what is behind the success of the alignment method. It is flexible, and it meets the practical needs of the new global era. It has not become an academic issue; quite the contrary; the first who must come to terms with it are lawmakers, followed by judges, and the academic institution with its comments comes only later. I could draw an analogy between this process and the reception of Roman law, where the practical needs of the period made it necessary to apply perfect legal institutions of ancient Romans. The EC/EU law represents an even greater challenge since, in several respects, it represents an absolutely original production of the human mind. Similarly to Roman law, EU law is becoming a new means of communication, at least among European lawyers. Graduates of even a short legal course, know today who was Francovich and what is Cassis de Dijon. EU legal terminology enriched the linguistic culture of all the states that adopted it, and tends to constantly develop. Multilingualism, which is a requirement today especially for lawyers, cultivates the legal

language, increasing its clarity. Obviously, there are also those who oppose and criticise this trend but, on the whole, its effect on the development of legal language and of speech in general is positive. These reflections logically lead to the conclusion that in order to be successful, legal processes connected with legal unification and/or approximation must result from practical needs. If they emerge only as the romantic idea of a group of enthusiastic visionaries, they are bound to fail. By the same token, it is not appropriate to impose the law of another country as a model, if it has no practical application. The history of law is familiar with the forcing of the states that were under the dominance of the Soviet Union to depart from their legal traditions; this did not prove to be successful, either. These states had imposed on them a legal discontinuity, which had a negative impact on their legal development for many years. A mention could be made, *inter alia*, of the forced interference with civil law in the former East Germany (DDR), but also the Civil Code enacted in Czechoslovakia in 1964, whose revised provisions continue to be in force up to the present day. Such interferences with legal continuity create very strong legal uncertainty. Another negative phenomenon is an excessive frequency of legislative changes. It would also be possible to make a critical mention in this regard of frequent amendments to the primary law of the EU. We must, however, recognise that the authors of the revisions of the EU founding treaties were often driven by the aim of making the legislation more transparent and increasing the effectiveness of EU decision-making, and by the effort of incorporating the decisions of the Court of Justice. On the whole, however, the process of the transposition of EU law into national legal systems has been very positive, and will most probably mean a significant move of the law towards a maximum achievable alignment of legal cultures. Approximation, as a new comparative method, made it possible also for the former Soviet bloc countries to accelerate the reforms of their legal systems with a view to their democratisation and modernisation.[7] An "*acquis associatif*"

[7] Šišková, N., *Základní otázky sbližování českého práva s právem ES*, Code Bohemia 1998.

already started to emerge in the pre-accession period – a mix of the legal systems of candidate countries and of the *acquis communautaire*". This mix is homogeneous and displays similarity with EU law. The complexity of issues connected with approximation made it necessary to make full use of intellectual capacities without a pressure to do so; as a result, lawyers were differentiated into those who responded to changes in a flexible manner and those who were unable to depart from their stereotypes of thinking. It is also true, however, that even a number of western European lawyers did not overcome the regional boundaries of legal thinking; they represent today the conservative wing of the legal community. I believe that the importance of the penetration of EU law through the protective shield of national law[8] will continue in the future. In spite of a certain hindrance to the application of the principle of precedence and direct effect of EU law represented by the Lisbon Treaty, where it is not declared *expressis verbis*, the case-law of the ECJ demonstrates a tendency to expand the application of this principle, at least through the dimension of indirect effect (e.g. Pupino case). The introduction of the concept of damage compensation and liability by the state for incorrect transposition are also the factors that encourage the states to fulfil their membership obligations, as evident from their increasingly uniform legal provisions. This contention may be supported also by the fact that member states, with only a few exceptions, respect the legal principle of a uniform interpretation of EU law. The transparency will be further increased as a result of the recognition of legal personality of the Union under the Lisbon Treaty, which, moreover, envisages the abolition of its three-pillar structure. For the countries of the former Soviet bloc, accession to the EU and the subsequent adoption of its legal system represented the achievement of their pre-accession ambitions. This was not a one-off process, because the preparations extended over a period of almost 10 years. This targeted and purposeful process was part of the transformation of the entire legal system of these countries and consolidated the legal environment making it more systematic,

[8] FISCHER, P., *European Law*, BVŠP 2006, str. 60

and contributed to its modernisation.(See more Allan Tatham: European Community Law Harmonzation in Hungary, Budapest 1997); Its ultimate outcome is the fact that these countries have become participants in the process that heralds new civilisation challenges.

Another important element for legal alignment in Europe has an intergovernmental character. It is the Council of Europe (1949) and, in particular, the case law of the European Court of Human Rights in Strasbourg. The recent period has seen an important increase in the number of Court decisions relating to violations of human rights guaranteed under the constitutions of member states of the Council of Europe and under international treaties. I will use the Slovak Republic as an example – by April 2007, the ECHR received as many as 537 applications against Slovakia. Most applications filed by Slovak citizens involved delays in proceedings, exhaustion of domestic legal remedies, freedom of expression, or prohibition of discrimination. The implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950 in Rome, represents a positive moment in the unification of law in the area of the protection of human rights and fundamental freedoms in the European region. The international monitoring of the decisions of national courts contributes to the stabilisation and democratisation of the judiciary, in particular in the countries that have difficulties with negative phenomena in their judiciary (corruption, lack of impartiality, lack of professional competence). Moreover, the ECHR has contributed to promoting a universalist perception of the protection of human rights and fundamental freedoms, and thanks to its understandable and transparent decisions has reached a wider audience.

Another very important international institution for the unification of private law is UNIDROIT, a Roma-based organisation founded in 1926. It made important inroads in the area of legal unification and, among its more recent activities, I would like to highlight in particular the "UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects" (in force since 1998). UNIDROIT and its activities symbolise continuity with the universalism of Roman law in private law. In my view, it made an important contribution to the globalisation of private law, and its importance will continue to grow. I assume that its activities will be harmonised with those of the EU, which has an ambition to draft a Uniform Civil Code. Mention should be made in

this connection of the importance of UNCITRAL (1966) whose field of action includes such important areas of the legal harmonisation of electronic law, transport law, public procurement of goods, arbitration principles, etc. Such processes as "Nordic unification" did not find fertile ground in the territory of our region, since regional unification based on national specificities is gradually losing its significance. This is witnessed, for instance, by the demise of uniform Czechoslovak law that followed the dissolution of Czechoslovakia, or by the rejection of the Soviet legal model. Conversely, Germany made use of one of its two legal systems, and was thus able to let the legal system of the former German Democratic Republic disappear.

Conclusions

My presentation has mentioned the most important globalisation factors in the legal development of Central and Eastern Europe (the EU law, the case-law of the ECHR, unification of private and commercial law). Because of time constraints, it has not been possible to examine the issue in more depth. However, my research demonstrates that the factors mentioned above exerted an important and, what is more, positive influence on the legal reality of the new EU member states from the post-socialist bloc. In spite of their initial legal divergences, the legal systems of these states are currently showing signs of convergence. This is a good signal, especially for advocates of globalisation and those visionaries promoting the ideas of uniform world law. The phenomenon of legal globalisation found its way also to some modern European universities. Thus, for instance, the Globalisation of Law Department of the Law Faculty in Rotterdam makes an important contribution to the dissemination of knowledge in this area. Expected developments in the world will make it necessary to push for uniform European law in the international arena, where Europe should take the lead. This need arises in particular from Europe's relations with the United States and China, countries with a uniform legal identity.

By way of conclusion, I can note that globalisation elements in law prevail. We are witnessing a re-emergence of legal comparative science which, at the micro- or macro-level, promotes the development of legal institutions and studies the compatibility of individual legal systems. Let us hope that these tendencies will continue.

IS GLOBALIZATION AN OPPORTUNITY OR THREAT TO SMALL AND MEDIUM SIZED ENTERPRISES?

por *Andrej Kumar**

Abstract

Growing impacts of economic globalization, accompanied by growing number of regional trade agreements create increasingly competitive environment. In such environment most successful business development and growth strategy is often based on mergers and acquisitions. Intensity and size of these activities, as part of business strategy implementation, differ among industries in relation to the global or regional consolidation level.

Small and medium sized enterprises (SMEs) existing for many years in smaller countries are being more and more challenged to redefine there business development strategies in relation to challenges developed by globalization and regional integration impacts. In industries which are more consolidated flexibility of SMEs' business development strategy is rather limited often leaving only the option of being eliminated of merged or taken over by larger global/regional corporations. If one of the objectives of SMEs and of smaller nations is to keep locally owned and based companies then specific development strategies have to be implemented. Like searching for growth in specifically designed product or specifically created regional market niches. The future existence of SMEs business independence in the smaller countries like in same of new EU members is difficult to secure and there is no general answer to the solution. On the other side their gradual elimination could potentially affect structure of education and advanced knowledge development in smaller countries together with national cultural and language change and decrease in practical use.

Key words

Globalization, SMEs, business growth strategy, technology, competition.

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Introduction

Analyzing the trends in production, trade, finance and capital flows among countries in global economic and business environment shows a number of new development opportunities. Specific challenges develop especially for small and medium sized enterprises (SMEs). With the SMEs we will understand all companies which are mostly nationally based and are small or medium size in global comparisons. So they might be large by the national business structure standards. The concept of so defined SMEs is intended to give opportunity to discus the chances of such companies to grow and develop their business independently as well in the future in spite of globalization changes. Their future relative independent business existence seems important to the national economic identity of many smaller nations like Slovenia and some other new EU member countries.

Economic and business globalization[1] causing on one side increasing economic and business interdependence and on other side fast growing competition on more and more open national markets. Global business environment change requires new business reasoning together with development and implementation of new strategies. New, faster and often more complex business responses are necessary to secure realization of business progress and success in the global economy. Generally there are many strategic concepts which are developed and used by large companies – multinational, transnational or global enterprises – to cope successfully with the challenges of growing global markets' openness, interdependence and competition. In the past and with growing intensity in last decade among major responses to globalization challenges of large enterprises was business expansion which has often based on different forms of mergers and acquisitions. It is logical that often SMEs were willing or unwilling partners in such global business development strategies implemented by global corporations.

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[1] Today a number of different analyses descriptions with the regard to the characteristics of the globalization process are available, like: Sheila L. Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World.* Rowman & Littlefield. (2004), or E. Stiglitz, *Globalization and its Discontents*, Joseph W. W. Norton & Company, 2002, Jagdish N. Bhagwati, *In Defense of Globalization*, Oxford University Press, USA, 2005.

Business and economic change caused by the processes of globalization is changing enterprises' strategy related due to two interconnected global developments. First is a rather slow and extremely complex development in process of so called **general multilateral global trade liberalization** (including goods and services). Process is running on the bases of the World Trade Organization (WTO) activities. Its 151 Member countries (July 2007) negotiate further liberalization in trade especially for agriculture products and services, based on Doha Agenda (Friis, Gibon, 2007). The second process of global developments includes different groups of countries who negotiate so called **Regional Trade liberalization Agreements** (RTAs)[2]. RTAs or Economic Integration Agreements (EIA) are expanding their number fast, mead 2007 reaching about 380 notified to the WTO (see fig. 2). From business development and growth strategy aspect such agreements introduce relative **fast opening** of the national markets to the competition from the companies located within the EIA. Larger opened markets of the EIAs create growingly competitive environment together with new business opportunities. New growth opportunities are available to the enterprises which are able to optimally utilize the increased business growth potential of the larger market provided by EIA implementation.

Multilateral and regional trade liberalization activities create increasing openness of national markets. Open markets constantly increase global and regional competition pressures. Large enterprises are in better position to utilize effectively large integrated markets, which are additionally interconnected too through different globalization developments. Large enterprises are as well better in keeping their market position on national, regionally integrated or global markets. SMEs are often in disadvantage especially if they operate in the more traditional industries and productions. For SMEs located in smaller economies, which were recently included into larger integration environments, like into the EU, some specific strategic business development dilemmas exist. We can mention at least the following:

- How is possible to secure fast and effective business utilization of the large open market created by the economic integration environment?

[2] See list of RTAs on WTO's interent page http://www.wto.org/english/tratop_e/region_e/region_e.htm

- Which of potential enterprise development strategies could be most appropriate for fast growth of the company and for its independent status?
- Which business development strategies can be better connected to the nation's development and other socio-cultural objectives?

Last of the dilemmas is not really often on the list of the companies' concerns, but is potentially important to the protection of national culture and identity in cases of a smaller nation integrated into the global or regional economy.

Mentioned business development strategic dilemmas are specifically accented in the case of SMEs. Further we will focus on market changes in different industries to provide some evidence for better assessing the potential for business success of SMEs located in smaller nations. Especially those which were recently included into larger integrated markets – into the EU. Integration impacts on SMEs from new EU members are simultaneously accelerated by the global business environment change and competition. This is opened to them by the existing lower level of external EU protection in comparison to the protection level they had used before joining the EU.

Our analytical assumption is that increasing openness of the markets globally and within economic integrations DEMANDS proper size of enterprises to UTILIZE fully the actual business growth benefits provided by large relatively free accessible markets within and outside of the EU integration.

In many emerging and smaller markets or economies enterprises are often the SMEs type. They often not have the "proper size" to utilize different advantages of integrated and globalized markets. This is especially the case when SMEs have not yet been taken over or merged by a larger International Corporation during the so called process of economic and political transition from non market to market economy. Existing "local" SMEs are in relative business growth disadvantage in global and integrated world. Majority of them, for example in Slovenia, are already long ago established companies with business tradition. Such companies are not having the growth and competitive efficiency of the new start ups, which have the highest potential for growth especially when are created in new technologically advanced industries. Hopefully for "older" SMEs their is not just one potential business perspective which potentially leads them to their market elimination caused by growing competition particularly

on their national part of the market. Obviously they might have two other development and business growth options to protect against their dark market elimination scenario:

- They can accept and implement **innovative** business development strategy for highly increased future business growth. Strategies have to enable SMEs to secure their position on national market and further to expand successfully on the global or integrated market.
- They can see as well if they can effectively accept and implement business growth development strategy based on the use of mergers, acquisitions or other suitable forms of capital or operational partnerships like joint-ventures, strategic alliances.

We are going to asses some of the elements relevant to the implementation of the SMEs "survival" strategies in global and integrated business environment.

About globalization and its effects – SMEs perspective

Global economy refers to the emerging international economy characterized by increasingly **free trade in goods and services, unrestricted capital flows and weakened national powers to control domestic economies.** Global economy refers to the **expansion of economies beyond national borders**, in particular, the expansion of production by transnational corporations to many countries around the world. The global economy **includes the globalization of production, markets, finance, communications, and the labor force.** Globalization introduced thorough WTO and economic integration effects, limits different forms of national subsidies to enterprises including SMEs. Subsidies to increase competitiveness, to expand exporting and similar are mostly impossible to be implemented to support SMEs growth and business adjustments. In the case of WTO and within the EU such subsidies are not possible.

The obvious dilemma whether globalization and economic integration are good or bad is developed from the perspective of SMEs and often as well from the perspective of (smaller) less developed states or from different disadvantaged groups of people. Global economy is a term for the fact that the economies of most of the world's nations have become increasingly interconnected.

For example, a computer chip designed in America may be produced in a Korean factory for use in a Japanese VCR that is sold in a dozen or more countries. It is obvious in such perspective that Economic Globalization has opened many opportunities to businesses, to nations and people. But globalization creates some problems. For example: Companies often move factories from high labor cost countries like from the US or the EU (old 15 members), and build them instead in Asia or in Mexico. Results are obvious. Decrease in employment in USA or in EU15 and employment increase in Mexico or in some Asian countries. Reasons for international movement of production are partially explained by production cycle theory (Vernon, 1966).

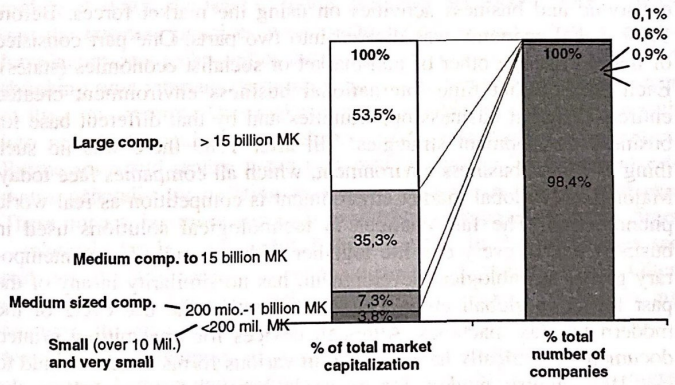
How to characterize described effects of the globalization? They have positive and negative effects on both sides. For example in USA negative effect is caused by employment is decreased. But profitability and competitiveness of the American company moving only production into Mexico is increased. In Mexico positive result is in an increased number of workers employed causing potentially higher national GDP growth. In Mexico develop simultaneously potentially some negative result. If the products are sold as well locally they might compete with similar local products, made often by the local enterprises of the SME type. Suppose lower market price of the new "American" product. Obviously a local SME will suffer reduced sales and in longer term even potential of closing down the business. Further a new foreign owned company might see business interest in expanding the control over Mexican market. Such orientation may lead to further price competition and eventually to merger and acquisition activities lead by American company. Mexican SMEs may see gradual business disappearance and closing down or may accept change of the ownership from national to foreign. Such development again might be negative for Mexico, could be neutral or in same aspects even positive. Eventual export increases after the national market consolidation, even from Mexico point of view, the results of globalization – the US investor started production in Mexico – could be accepted as net positive. The only problem might be that US investor some day in future will decide to move production to some other more labour cost competitive country. Mexico will as a nation see decrease in employment and increase in imports of the products which were before locally produced by the US owned company. If in other scenario Mexican companies on local market are strong, already as well present substantially internationally – so are in fact not of typical

SMEs type – then negative impacts related to competitive elimination of national companies will not happen or will not be so devastating.

Comparing result of both development scenarios from the perspective of good or bad nature of the globalization we can say that its impacts a great deal depend on market structure, size of national companies and their ability to effectively compete on national and international market.

Discussing positive and negative aspects of globalization today suggests the following question. Why such questions actually have not been adequately answered already? One of the answers could be that globalization effects as we understand them today are relative new phenomenon. And new phenomenon especially from the SMEs point of view. Often seen assumption for analyzing SMEs performances is the idea that they are in most cases start up companies. By the theory they will whether grow fast and become big and able to sustain competition (whether global or regional) or will be eliminated in early stages when still small or medium sized. As already mentioned SMEs in many smaller countries are not of that type, so they feel globalization pressures differently from SMEs that are mostly assumed and explained in the theory. Additionally the business structure of the global environment shows the relation between the number and the business potential of SMEs (see Fig. 1).

Fig. 1 – Structure of global business sector in 2005 – size of the enterprises



MK= market capitalization

Source: Vizjak, 2007

In fact modern globalization economic and business impacts are relative new in general not only in relation to the business development strategies of the SMEs. T. Levitt in 1983 is widely credited with coining the term globalization through the article he wrote in the Harvard Business Review entitled "Globalization of Markets", which appeared in the HBR in its May–June issue. Levitt used the term "globalization" in a 1983 article about the emergence of standardized, low-priced consumer products. **He defined that globalization as the changes in social behaviors and technology which allowed companies to sell the same products around the world.**

However, as a NY Times article notes, the term 'globalization' was in use well before (at least as early as 1944) and had been used by economists as early as 1981. However, Levitt popularized the term and brought into the mainstream business audience. It is fact that characteristics of the older types of globalization were dramatically different from the globalization started to be defined by Levitt. Let us mention just two examples of novelties witch were not included in "older" global business environments and which on other side dominantly characterize today's global business environment and crating specific environment to the creation of proper business development and growth strategy of SMEs.

From 1989 onwards global business is in fact global because with some smaller exceptions all nations around the world base their economic and business activities on using the market forces. Before 1989 global economy was divided into two parts. One part consisted of market and the other of non-market or socialist economies (states). Each part of that time international business environment created entirely different business opportunities and by that different base for business development strategies. Till after 1989 there was no such thing as global business environment, which all companies face today. Major part of global market environment is competition as real world phenomenon. The fast changes in technological solutions used in business and in every day life together with generally fast contemporary global technological development, has no similarity in any of the past forms of globalization. Let's just mention the use cycle of the modern tele-fax machines. Although devices for transmitting printed documents electrically have existed, in various forms, since the mid to late 19th century, modern fax machines became feasible only in the mid-1970s as the sophistication increased and cost of the three underlying technologies dropped. Digital fax machines first became popular

in Japan, where they had a clear advantage over competing technologies like the tele-printer, since at the time (before the development of easy-to-use input-method editors) it was faster to handwrite kanji than to type the characters. Over time, faxing gradually became affordable, and by the mid- 1980s, fax machines were very popular around the world. Today, less than 20 years after fax machines were brought into popular use, they are technologically already obsolete and mostly replaced by new technology of e-mailing and scanning.

The example shows increased speed in development and in practical use of new (high) technologies (e-mail and scanning) products. On the other side the example shows as well very fast decline in technical and market performances of a new technology (like modern tele-fax machines) which was developed as an actual technological and business revolution not so fare ago. According to production cycle theory (Vernon, 1979) becomes obvious that period when technical novelty predominantly defines the product's competitive position – close to monopoly position – on the national and global markets is getting shorter and shorter. Products move faster into the stage of standard production type, which is characterized by price competition only. The production moves from higher production (labour) cost countries towards those who have lower production costs. Such are often transitional or less developed countries.

Before modern globalization, starting in fact somewhere in the middle of 1980s, the need to follow and introduce modern technologies into the business practices were newer based on such short intervals. Introducing new technologies into business operation in short and even shrinking time intervals demands from companies a very fast turn over of their investments. That makes companies able to invest fast enough into new better and more productive and more useful technologies. Businesses could realize faster turn over of their technological investments generally by utilizing economics of scale and scope impacts. These impacts are more and more available to companies only on larger – relatively freely – accessible foreign market. In fact companies see real opportunities more and more on accessing global market. Often even the relative large national markets like of USA, or of France, are becoming to small for the companies willing to reach the needed positive effect of economics of scale and scope in globalized world.

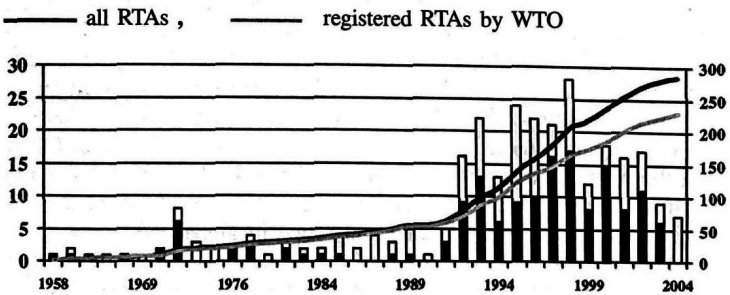
Liberalization and openness of markets global wise is becoming a growing need and interest of successfully competing companies and of national governments supporting and understanding new challenges

of globalization driven in great deal by technological advancements. The global markets liberalization and openness is increasing on the bases of negotiations within the WTO framework.

In fact WTO processes of liberalizing and opening the access to global markets are often too slow, related to the fast competitive changes pushed higher by ever faster technological growth and related competition change. One of logical practical contemporary solutions to secure companies easier and faster access to bigger foreign markets is offered via implementation of different forms of RTAs. RTAs fast growth in last ten years (see next chart) could be at least partially contributed to growing type of individual nation's response to new global competitive and technological challenges. RTAs establish necessary free access to larger outside markets. Economics of scale and scope could be performed better and on such bases much sooner new products of advanced technologies could be introduce as competitive advantage. Permanent deepening and enlarging of any integration, as was and still is the case with the EU, secures beneficial growth effects to national economies and to companies operating in increasingly global competitive environment. More details in relation to RTAs effects in the environment of expanding or deepening RTAs could be roughly illustrated by so called "J curve" (El-Agraa, 2004).

The fact is that mostly only LARGER Companies – could utilize in full scale all economics of scale and scope effects PROVIDED by large integrated (RTAs) markets.

Fig. 2 – The growth of number of RTAs – WTO figures (1958-2004)



Source. WTO, http://www.wto.org/english/tratop_e/region_e/region_e.htm

Business consolidation and SMEs position

Modern globalization and economic integration processes by changing the business competitive environment seriously challenge the strategic concept of declaring the "proper" size of the company. The concept of the proper size of the company is related to:

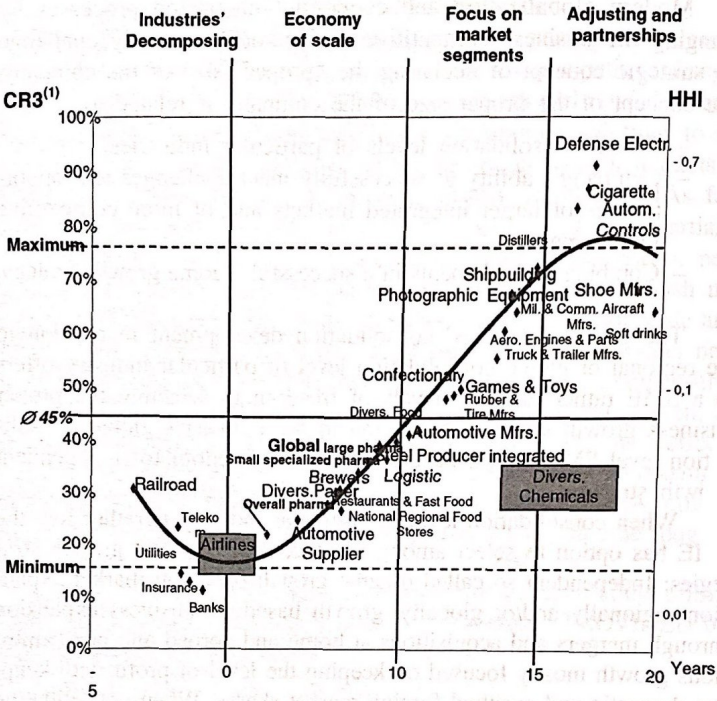
- Global consolidation levels of particular industries,
- Company's ability to successfully meet challenges and opportunities of larger integrated markets and of more competitive global markets,
- Combing both elements in a successful income growth strategy.

The global industries' consolidation development in relation to the regional or global consolidation level of particular industry offers to a SME rather different levels of freedom in selecting the proper business growth strategy. According to the industry's global consolidation level SMEs could have more or less freedom for independent growth strategy.

When consolidation level of particular industry is rather low the SME has option to select among three general business growth strategies: Independent so called organic growth based on market expansion regionally and/or globally, growth based on business expansion through mergers and acquisitions at home and abroad and non- ambitious growth mostly focused on keeping the level of profit with keeping domestic and eventual foreign market shares. When consolidation level of the industry is high (see fig. 3) chances of SMEs to select independent growth strategy are reduced. Chances to be pushed into the process of being taken over or merged are increased. Non-ambitious growth strategy in high consolidated industry will open another option too. SME could face a gradual business growth decrease based on its shrinking market share caused by the growing competition from larger competitors.

The consolidation chart is result of AT Kearney analyses producing the position of individual industries on the so called "S" curve of consolidation (Vizjak, 2007). The data show that industries are moving up by the "S" curve in time. One of the effects accompanying that upward movement of industries should be increasing use of business growth strategy based on mergers and acquisitions activities.

Fig. 3 – Industries move by consolidation curve from low to high consolidation in 20 to 25 years



1) CR3 = Market share of the three biggest in relation to the overall market size in the VBG-Database
2) HHI = Hirschman-Herfindahl-Index is equal to the sum of the squared market share of all companies; correlation of HHI and CR3 is > 90%; HHI - axis is logarithmic scale

Source: VBG – Database, A. T. Kearney Analysis

For Slovenian companies which are by global standards in majority of cases the SME sized and similarly for companies from other smaller economies which were rather closed in the past, one can often find that they belong to industries which are globally already relatively highly consolidated. Like the home appliances producer from Slovenia – Gorenje. It is still "national" company but the industry is globally highly concentrated – major market share are covered by

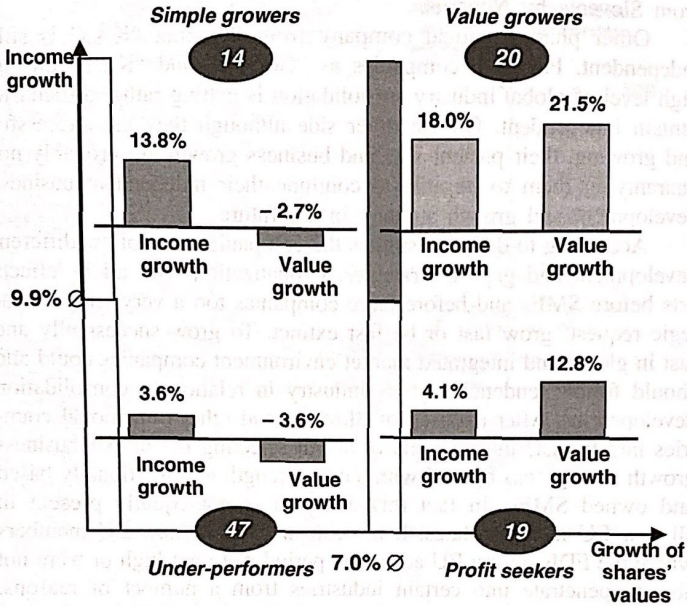
Electrolux and Whirlpool. The cars' tire producer Sava from Slovenia was already bought by Goodyear and pharmaceutical producer Lek from Slovenia by Novartis.

Other pharmaceutical company from Slovenia "Krka" is still independent. For such companies as "Gorenje" and "Krka", due to high level of global industry consolidation is getting rather difficult to remain independent. On the other side although they are successful and growing, their present size and business growth are probably not guarantying them to be able to continue their independent business development and growth strategy in the future.

According to different studies the companies can follow different development and growth strategies. Globalization with all its effects sets before SMEs and before large companies too a very simple strategic request: grow fast or be fast extinct. To grow successfully and fast in global and integrated market environment companies could and should follow tendencies of its industry in relation to consolidation developments. After entering of Slovenia and other transitional countries into the EU the dilemma of actual selecting the proper business growth strategy has opened with a new strength to all nationally based and owned SMEs. In fact this dilemma is not equally present in all new EU member states. It is stronger in those new EU members where the FDIs during EU accession period were not high or were not able to penetrate into certain industries from a number of reasons. With effects of EU internal market gradually affecting such new members' economies and their enterprises the dilemma of proper growth strategy is getting really tough. For many SMEs in new EU members when they are in higher consolidated industries the only willing or unveiling development strategy left is often to organize the process of local mergers or prepare for the process of being taken over with large outside competitors. In first case such strategy could be successful when industries' level of consolidation is not too high. Otherwise it will not bring lasting results to the independent business development.

Long term income growth of 10500 large enterprises (more then 200 millions of US$ yearly income) analyzed global vise shows that best business development results are achieved by companies, which relate their growth to mergers and acquisitions activities. Such companies are called value growers (See fig.4). Most often are from the large company group.

Fig. 4 – Average yearly growth of companies' incomes and of their share value (1988-2001) in relation to different business development strategies



Source: Vizjak, 2007

If SMEs prefer to stay independent then they can think of growth strategy created specifically on the bases of their size and including all impacts of globalized and integrated market environment. Growth strategy on the bases of acquisitions or merger for most of them is in many cases at least in Slovenia not an acceptable or willing business option. That is true especially in the cases when they operate in the higher globally consolidated industries. For Slovenian still independent companies in sectors of home appliances or in pharmaceuticals sector, due to high global industry consolidation levels, growth based on a value grower strategy concept is most probably not feasible. One of the options for them to stay independent and to meet simultaneously the globalization and internal EU market challenges is to develop strategy of growth in specifically created market niches. The success of such growth strategy is based on assumption that in spe-

cially created product or regional based market niches even the SMEs will become large. There are different ways in creating such special market niches. The problem with them always is that they normally don't last for long.

At present, SMEs contribute between 25 and 35 per cent of world manufactured exports and account for a smaller but growing share of FDI. They are becoming more involved in international strategic alliances and joint ventures both among themselves and together with the larger multinationals. More generally, networking allows SMEs to combine the advantages of small scale, e.g., flexibility, and the economies of scale and scope provided by larger firms. All such strategic activities coupled with the specific market niches creation may help SMEs from smaller economies to remain "nationally based". Such business strategic development option and its successful realization could be rather important for the future national development of smaller nations (including those in the EU) in the future.

In countries like Slovenia the success of SMEs secures the existence and benefits of variety of jobs created by their activities. Bringing and securing to the national environment a number of different classical and modern types of human professional knowledge. Industries' consolidation caused buy tendencies of today's "global value growers" could eliminate a number of professions – which are not needed by foreign owners- and by that elimination of broad areas of national knowledge; existing and potentially developed in the future – decrease in interest to study those university programs which are for example not on national job demand list. When smaller companies are taken over by large foreign companies the first thing to happen would be change of communication language. National language of a small nation, at least on management levels, is replace by world commercial language – often meaning English. SMEs additionally in extreme are important for national cultural identity through language preservation, through activities supporting national sport teams, cultural and other groups of interests.

Conclusions

How SMEs from smaller nations could remain nationally based and successful in integrated and globalize world? There is no simple answer. But there are major directions in which SMEs can seek the orientation of their development (and survival) strategy.

They may tray to become a winner in a specifically created market niches. The strategy may work especially in the industries where the level of consolidation is already rather high.

In other less consolidated industries and as well sometime in other cases SMEs may investigate some more traditional option to grow faster and to remain independent national based entities. They may develop alliances among SMEs on selected levels of business operations; marketing or, sourcing, or development of new products, or similar, like networking. It allows SMEs to combine the advantages of small scale, e.g., flexibility, and the economies of scale and scope provided by large firms.

They may as well develop a strategic towards a "value grower" type of the companies provided that consolidation in the industry or on the EU internal market is not yet too high.

What ever strategy accepted it is obvious that globalization pressures will make necessary to put it flexible and with elements of developing new ideas for future strategic change.

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POLICY CHOICES FOR LATVIA AND OUT-MIGRATION: A HARD OR A SOFT LANDING?

por *Roswitha King**
*Tatjana Muravska***

Abstract

The 2004 and 2007 EU enlargements remain a controversial topic. Central and East European countries enlarged the internal market – including the labour market – bringing with it changes in European migration flows.

This paper examines economic conditions in the Baltic States, in particular Latvia, with focus on migration from the perspective of the migration sending countries, which recently became EU member states. We take a look at the case of Latvia, where high economic growth combined with out-migration and natural population decline have already led to acute labour shortages in some sectors of the economy. The negative effects of out-migration call for policies that promote human capital development and attractive employment/ /entrepreneurial opportunities. We also look at policies that diminish inter-regional disparities within a country as a means to reduce out-migration.

Keywords: country competitiveness, labour markets, migration, regional disparities.

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Introduction

The EU enlargements of 2004 and 2007 can be characterised in many ways, however, one of them in particular stands out: the need to increase economic efficiency of the Union has become vital. The task of bringing the economies of the new members up to par with the economies of the old member states is formidable. It has been noted that the Lisbon strategy, as a framework for further development of the EU, set up a requirement to increase employment in member states. Building the sustained economic growth necessary for long-term employment creation in the new member states will require an unprecedented level of political, economic, and social cooperation among governments, business, and individuals throughout Europe.

The Baltic States have shown positive economic development. The most impressive growth rate among the Baltic States was experienced by Latvia, which is also the fastest in the EU. In 2004 the average annual growth of gross domestic product (GDP) in Latvia was 10.4% and increased in 2006 to 11.9%. GDP growth in the 4th quarter of 2007 was 9.6%. In Estonia GDP growth at the same period of 2007 was 4.5% and respectively in Lithuania-8.1%.[1] At the same time experts have repeatedly warned that Latvia needs a slowdown to avoid a "hard landing" for its economy that in general refers also to the sister states of Latvia: Estonia and Lithuania[2]. There are a number of indications regarding an economic slowdown in Latvia. A very serious concern, however, is that despite the slowing of economic growth inflation is on the rise. In January, 2008, Latvia's 12-month inflation rate hit 15.8 percent, the highest figure since late 1996. Prices for goods increased by 15.1%, and prices for services by 17.5%.[3] This is currently the highest rate of inflation in the EU.

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[1] Eurostat Flash Estimate, 14 February 2008

[2] Baltic Economy Watch http://balticeconomy.blogspot.com/; Latvia Economy Watch http://latviaeconomy.blogspot.com/EU's Barroso urges Latvia to deal with economic overheating 15 February 2008; http://www.eubusiness.com/news-eu/1203085026.71; The Economist: Worrying about a crash Jul 5th 2007 http://www.economist.com/world/europe/displaystory.cfm?story_id=9443551; Statement by IMF Mission to Latvia on 2007 Article IV Consultation Discussions Press Release No. 07/87; May 4, 2007 http://www.imf.org/external/np/sec/pr/2007/pr0787.htm

[3] Statistical Bureau in Latvia http://www.csb.gov.lv/csp/events/csp/events/?mode=arh&period=02.2008&cc_cat=470&id=5563

Another problem is the rise of unemployment according to the latest data from the Latvian State Employment Agency. The level of registered unemployment had declined steadily from 8.7 pct in late May 2004 to 4.8 pct in November 2007. Since November 2007 the tendency is now up again. The unemployment rate increased 0.1 percentage point in January 2008 over December and reached 5 pct of the economically active population. There were 53,325 unemployed registered in January 2007[4]. The Latvian government is counting on slowing consumer demand to cut the rate of growth to 6.8 percent by 2010, following warnings by economists and credit rating firms that the economy is overheating. The government's "economic scenario is attended by very high risks to macroeconomic stability, including continued overheating with a substantial risk of an abrupt slowdown at a later stage"[5].

Latvia displays an unusual combination of structural problems stemming from a number of distinct sources: the total system change following the breakdown of the Soviet Union, a radical re-orientation of trade from predominantly east to predominantly west, and, more recently, substantial inflow of foreign direct investments, EU Structural and Cohesions funds, combined with low interest rates (generating excess demand and in particular a housing price bubble) coupled with significant outflow of labour (creating acute labour shortages in crucial economic sectors). The human capital drain via out-migration is aggravated by Latvia's natural population decline, as illustrated by Figure 1 and Figure 4 below. This translates into a low number of young labour market entrants, which is expected to prevail for the coming decade. Further complications are introduced by Latvia's need of "catch-up" to the average EU living standard. This requires high economic growth rates, which Latvia has indeed experienced in the recent past – clouds, however, are gathering on the horizon with regard to future economic growth. While the recent high economic growth bodes well for the "catch-up" process, it has been accompanied by high inflation. This, in turn prevents Latvia from joining the Economic and

[4] LR Ministry of Welfare State Employment Agency http://www.nva.lv/index.php?cid=6&new_lang=lv#bezdarbs

[5] Meera Louis and Aaron Eglitis, Latvian Economy Faces Risk of 'Abrupt Slowdown,' EU Draft Warns http://www.bloomberg.com/apps/news?pid=20601085&refer=europe&sid=aI8rbhM5Tsos

Monetary Union (EMU) in the next few years. Latvia, as a small open economy will, typically, benefit from EMU membership.

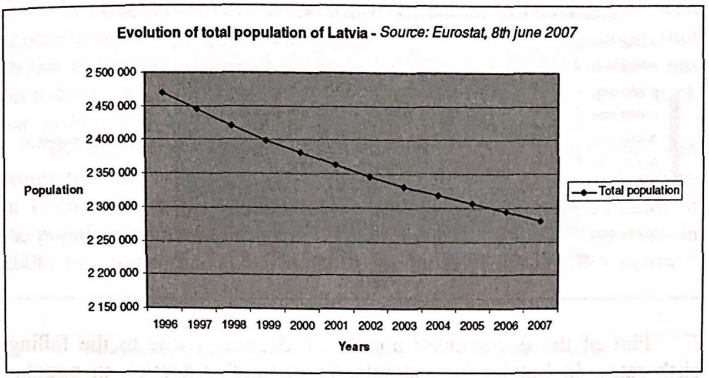
Accession to the EU has brought rapid and fundamental changes for Central and East European countries (CEEC). The CEEC enlarged the internal market of the EU, and this is expected to eventually increase the EU's global competitiveness. As many of the studies in this area show, the process did and does produce mixed results, as well as controversy. While free movement of goods, assets, people, and ideas is one of the EU's stated and known goals, when it comes to free movement of people difficulties have arisen with regard to cross-national border migration of labour.

The observed out-migration from the new EU Member States appears to confirm the findings that international migrants come from locations under rapid transformation in connection with their integration into global networks and markets. Migration patterns, however, cannot be explained by market forces alone, nor can wage differentials alone account for all observed migration flows. The effect of migration policies imposed by nation states, for example, plays a crucial role in determining the direction as well as the intensities of migration flows. In the following we view labour market policy and Cohesion policy as highly interrelated domains.

Population and migration trends in the Baltic States

Observation of population trends in the Baltic States (Figure 1, 2 and 3) show significant population declines over the past decade. This is a cause for concern since these are economies that rely on sustained economic growth in order to catch up to average EU levels of per capita GDP and living standard. A shrinking population typically is not helpful in attaining such goal.

Figure 1



As can be seen from Figure 1, population in Latvia declined from 2,469 531 in 1996 to 2,281,305 in 2007. This constitutes a decline of 188,226 people. This may not sound like a large amount, but it is 8% of entire Latvian population in 2007.

Similar trends are visible for Estonia and Lithuania in Figure 2 and Figure 3.

Figure 2

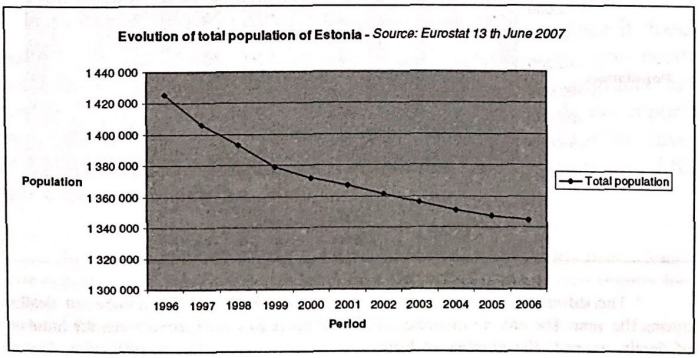
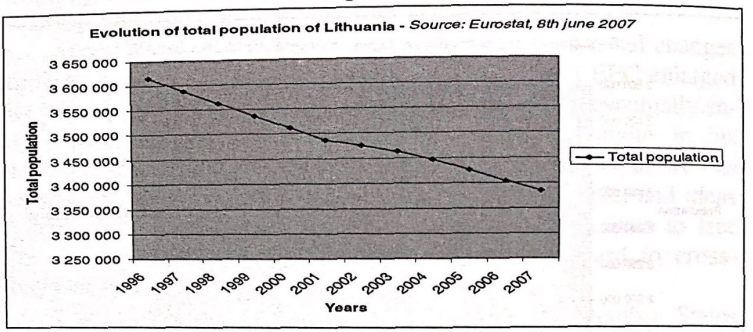
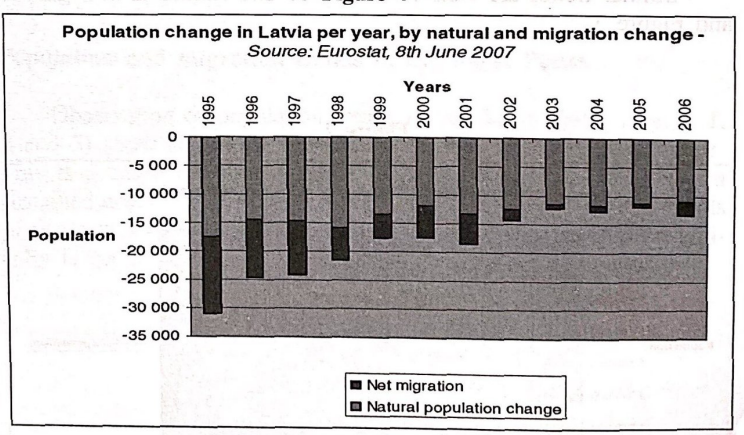


Figure 3



Part of the documented population decline is due to the falling birth rates. In Latvia, for example, the natural[6] reduction in population, according to Eurostat, in the period from 1995 to 2006 averaged around 13 000 people per year, which amounts to about 6% of the population in Latvia of 2006. This alone is already a worrisome development, as it confronts the country with a shrinking labour force in times of needed long-term economic development.

Figure 4

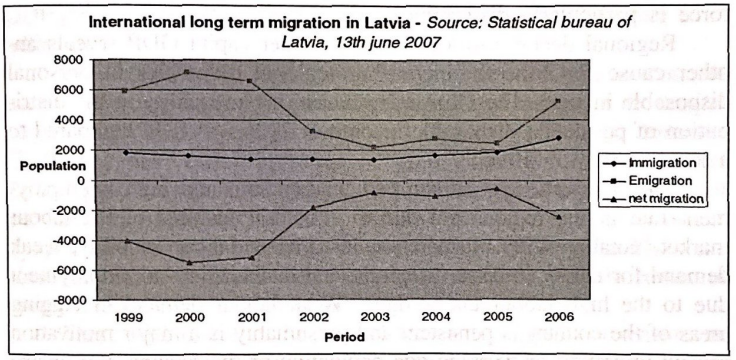


[6] The difference between the number of live births and the number of deaths during the year. The natural increase (or natural decrease) is negative when the number of deaths exceeds the number of births.

In Figure 4 the upper part of each bar represent the natural shrink--age. In addition to the natural population decline Latvia has been experiencing considerable out-migration. Although in-migration (not shown in the graph) has also accelerated, the net migration flow has been consistently negative. This can be seen in the lower part of each bar in Figure 4, which represents net migration.

In Figure 5 we decompose Latvia's net long-term migration[7] into emigration and immigration. According to the report of the Ministry of Economics of the Republic of Latvia[8] long-term out-migration of the population increased from 564 persons in 2005 to 2451 persons in 2006, i.e., more than 4 times. This can be seen in Figure 5 below.

Figure 5



A similar pattern is witnessed for Estonia and Lithuania.

The above graph under-reports total out-migration, since it does not account for temporary migrants to other EU countries who need not report their arrival in the destination country, illegal migrants, as well as permanent migrants to another EU country who do not report their change of residence. These categories are signifcant for the case of Latvia, since many of its residents have been moving to the U.K and Ireland in search for work.

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[7] In line with the definition of Latvia's Citizenship and Migration Board, *long-term migration* represents individuals who leave Latvia to settle in another country for at least one year, and who report this intention to an appropriate authority.

[8] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia, Report,* July 2007, p. 43.

Regional disparities

Latvia's recent fast-paced economic growth has been fuelled by strong and steady domestic demand, especially private consumption and gross fixed capital formation and the successful expansion of export markets.

However, behind the impressive economic growth figures hides an unfortunate truth:

Latvia has one the lowest income per capita levels in the EU. In 2006, Latvian GDP per capita in purchasing power standards was 50% of the EU average.[9] The scale of the per capita income gap emphasises the fundamental importance for Latvia to implement a comprehensive catching-up strategy. This is why the shrinkage of Latvia's labour force is particularly disturbing.

Regional decomposition of Latvia's per capita GDP reveals another cause for concern: increasing regional disparities in personal disposable income. The Gini index measuring inequality in the distribution of per capita disposable income in 2006 was 0.36 compared to a level of 0.30 in 1996.[10]

The relatively low labour participation rate and high unemployment rate in the regions are due to structural features of the labour market, notably skills mismatches, insufficient labour mobility, weak demand for labour in eastern regions, and disincentives to employment due to the high labour tax wedge.[11] Weak labour demand in lagging areas of the country is persistent and presumably is a major motivation for out-migration of working age population of the regions. For example, in 2004, GDP per capita in Riga reached 83.3% of the EU-27 average in purchasing power standards, while this indicator in the eastern region of Latgale amounted to a mere 21.1%. Hence, the difference between per capita GDP levels of these two regions is fourfold.[12]

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[9] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia, Report*, July 2007, p. 15 and Eurostat.

[10] European Foundation for the Improvement of Living and Working Conditions. http://www.eurofound.europa.eu/areas/qualityoflife/eurlife/index.php?templat=3&radioindic=158&idDomain=3

[11] European Commission (2005b), Second Implementation Report on the 2003-2005 Broad Economic Policy Guidelines. Brussels, Commission Staff Working Paper, 27.01.2005/SEC(2005)91.

[12] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia, Report*, July 2007, p. 41.

In terms of Cohesion policy, Latvia is a single NUTS 2 region and one of the poorest Member States in the EU. The geographical structure of the economy is strongly concentrated, with over 60 per cent of Latvia's GDP being produced in Riga and the surrounding area. In contrast, only three per cent of national GDP is produced in Daugavpils, which is the second largest town in Latvia.

There are also significant differences in terms of GDP per capita between the five NUTS 3 areas, as well as in terms of unemployment and employment rates. The level of GDP per capita in the poorest region of Latgale was equal to 48 per cent of the national average, compared to 56 per cent in Zemgale, 58 per cent in Vidzeme, and 182 per cent in Riga[13]. These disparities are in part due to differences in the residential and working locations of some citizens i.e. the level of GDP per capita in Riga partly reflects the effects of commuting from other areas.

The demographic and economic structure of Latvia is concentrated, with over forty per cent of the population located in the capital city of Riga, which also produces around sixty per cent of domestic GDP. The next cities in terms of their contribution to GDP are Daugavpils, Liepaja and Ventspils, which each produce around three per cent of national GDP. This means that the ongoing economic dynamism of Riga is crucial to Latvia's future catching-up. There are also significant disparities between areas within Latvia in terms of employment rates and opportunities.

There will therefore be a need for policy makers to ensure an appropriate balance within the Cohesion policy strategy on the two goals of reducing internal disparities and supporting national economic growth. In the opinion of the authors, the socio-economic gap between areas is expected to narrow in the medium term, allowing for both national and regional convergence, although some degree of regional disparities is likely to continue, as in all EU Member States. The extent of reductions in regional disparities may, however, depend on the success of regional policy and other policy instruments in providing the necessary conditions for economic development in lagging areas. The authors propose that, as well as ensuring sufficient Cohesion policy investment in Riga, funding should be targeted on a limited number of towns that have the potential to become centres of

[13] Central Statistical Bureau, Latvia's Regions in Figures. Riga, 2004. p. 61-65.

business investment and to contribute significantly to national economic growth. Investment in infrastructure should be combined with support for businesses and human resources in such locations.

A 2004 study by the Bank of Latvia and the Ministry of Regional Development and Local Governments shows regional differentiation in terms of the age groups most strongly affected by unemployment. In Riga, the highest unemployment rate is among 25–29 years old, while the highest rates in other regions are among people aged over 40 years old. In Latgale the lowest unemployment rate is among young people because these are particularly likely to migrate to other areas in search of work. Sectoral structure also varies spatially, with Riga home to most businesses engaged in producer services and more innovative manufacturing, while other areas remain dependent on natural resource based industries (in particular, wood and food processing industries), as well as on the transport and communications sector (in the form of ports and linkages with Russia's markets).

One of the reasons for regional labour market disparities is that there are obstacles to labour migration and commuting, due to poor transport infrastructure and public transport services, as well as rigidities in housing markets. Incentives for labour mobility thus seem to be limited, in spite of significant advantages to employment in Riga and other towns in terms of nominal wages (which may, however, not translate into such a clear advantage in real terms due to the costs and difficulties of housing and transport). A rural resident commuting a distance of 50 km obtains a 53 per cent gain in nominal wages *ceteris paribus* compared to non-commuters. Commuting reduces the overall wage gap and disparities in employment prospects and at least in the short run, increases national output.

However, commuting is unlikely to provide an adequate solution to unemployment in those areas that are more distant from Riga, notably the eastern NUTS 3 region of Latgale. For those people that are not within commuting distance from Riga or other larger cities in Latvia the option to migrante out of the country is particulary attractive. This can be seen in Figure 6, where net out-migration from the Latgale region, which lies outside the commuting distance from Riga, is higher than in the other regions. The high out-migration to foreign countries from Riga is, presumably, donc to the high accumulation of skilled labour in pursuit of better fortunes.

Higher out-migration to abroad was in Riga and Latgale: 1.6 and 1.4 persons per 1000 inhabitants respectively (1 per 1000 on average in Latvia).

Higher long-term migration within Latvia was observed in Vidzeme (5.2 persons per 1000 inhabitants). It is typical that inhabitants from Vidzeme are more willing to migrate to Riga or Pieriga, not abroad. (Pieriga is a geographic area adjacent to and surrounding the capital city of Riga, but not including Riga city proper). Out-migration from Vidzeme to foreign countries is two times lower than in the country on average (0.4 persons per 1000 inhabitants). Higher positive balance of migration (i.e. net in-migration) was only observed in Pieriga region. [14]

Figure 6[15]

Net Long-Term Migration of Population in 2006 _ Latvia

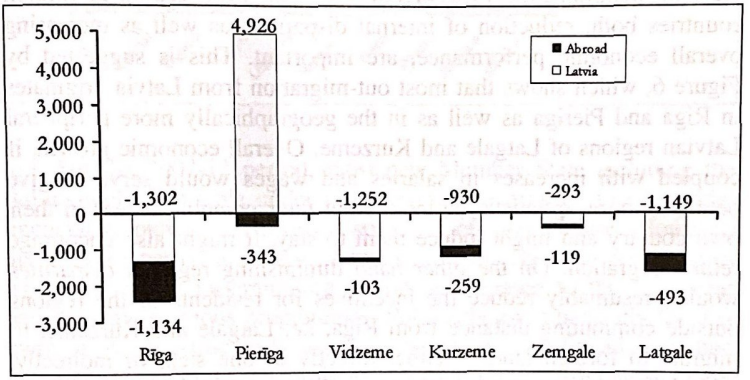


Figure 6 suggests that there are two major out-migration channels in Latvia through which Latvian residents leave their country. The first "direct" channel originates in the regions that lie outside commuting distance from Riga, such as Latgale (- 493 in 2006) and Kurzeme (-259 in 2006). The second "indirect" channel consists of two steps. In step 1, people move from the outer regions of Latvia to Pieriga.)[16] This can

[14] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia, Report,* July 2007, p. 43.

[15] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia, Report,* July 2007, p. 43.

[16] Six statistical regions of Latvia are presented in the Figure 6 according to EU directives in force from May 1, 2004, such as Rîga, Pierîga, Vidzeme, Kurzeme, Zemgale and Latgale.

be seen in Figure 6 by the considerable net in-migration into Pieriga (+4,926 in 2006). under the assumption that a significant proportion thereof consists of intra-Latvia in-migrants. Then there is population transmission between Pieriga and Riga – hidden behind the net-flow representation in Figure 6. Finally in step 2, people resident in Riga and Pieriga migrate out beyond Latvia's border (-1,134 and -343 respectively in 2006).

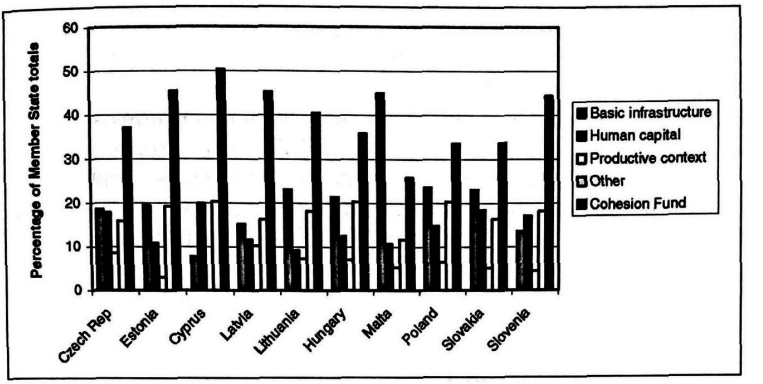
Regional policy will play an important role in this context. Policy makers need to decide whether migration and cohesion policy should aim primarily at reducing internal disparities or whether to balance this goal with overall national growth objectives. From the point of view of stemming the flow of out-migration from Latvia to foreign countries both, reduction of internal disparities as well as increasing overall economic performance, are important. This is suggested by Figure 6, which shows that most out-migration from Latvia originates in Riga and Pieriga as well as in the geographically more peripheral Latvian regions of Latgale and Kurzeme. Overall economic growth, if coupled with increases in salaries and wages would serve to give people a more optimistic outlook about their potential career in their own country and might induce them to stay. It might also encourage return migration. On the other hand diminishing regional disparities would presumably reduce the incentives for residents of the regions outside commuting distance from Riga, i.e. Latgale and Kurzeme, to migrate to foreign lands – either directly in one step, or indirectly, with a first temporary stay in or near Riga.

A key category for development will be human resources. Support should be targeted on the development of human capital by investing in education and training systems. Special attention should also be given to active labour market policies, especially training and re-training programmes for unemployed people, as well as advisory and information services. Such measures should help to tackle unemployment in the country in general and in the areas of Latgale and Kurzeme in particular – and thereby help stem out-migration.

In the 2007-2013 programming period Latvia will still face substantial bottlenecks in terms of the basic preconditions for sustainable economic growth. Choices in the allocation of public investment will therefore play an important part in ensuring that these preconditions are put in place in coming years, with gaps being filled in physical, human and knowledge capital.

Figure 7[17]

Structural and Cohesion Fund Allocations 2004-06



For the 2007-13 period, most new Member State including the Baltics will be eligible under the Convergence priority, to substantial financial resources and a broad spectrum of interventions. However, the 2007-13 period also raises new challenges. The new programmes will cover a full programming period, as opposed to the three-year period of the previous programmes. Politically and financially there is more at stake, particularly as EU programmes are linked to public investment strategies for a prolonged period. Future programmes have to respond to economic and social development in each Member State and, at the same time, reflect the Commission's new priorities, for instance, 'knowledge economy'. The importance of upgrading human and knowledge capital is recognised by many of the new Member States. However, there is some concern that too narrow a focus on the 'knowledge economy' could imply insufficient funding for other crucial interventions, notably public investment in transport and environmental infrastructure, public transport systems, education and health infrastructure. Similarly, the meaning of the 'knowledge economy' or the 'Lisbon agenda' is not always clear and in many cases might best

[17] S. Davies and T. Gross (2005) in *Implementing Structural Funds in the New Member States*: Ten Policy Challenges/Iren MacMaster, John Bachtler, EPRC, Glasgow, UK.

be interpreted as funding for human capital (education, training, life long learning and other labour market interventions), as well as technology transfer and diffusion.[18]

Investment in infrastructure can help to attract businesses, to create employment and to reduce regional disparities. Given ongoing weaknesses in infrastructure, a significant percentage of Cohesion policy expenditure should be targeted on infrastructure in terms of roads, railways, water management systems and the energy sector. We estimate[19] that there will be a need to allocate up to 60 per cent of total Cohesion Policy spending to infrastructure in 2007-2013. For example, major improvements are needed at all levels of the roads sector in Latvia, including the TEN network[20], primary roads and secondary roads.

Transport networks and Investment Strategy

The main challenges concerning infrastructure in 2007-2013 will relate to transport networks, notably the TEN-Transport networks, as well as other road and rail networks, plus airports. A first important aspect of investment in the transport infrastructure network should focus on enhancing capacities for transport flows within the capital city of Riga. A second priority should be to improve conditions for international transit flows in two major directions, namely the East--West corridor and the Via Baltica. The development of the new Rail Baltic initiative should ensure effective linkages between the Northern periphery and central regions of Europe, with a rail connection from Tallinn to Berlin. Improvements to the rail transport system should enhance Latvia's comparative advantages by reducing travel times and trade costs, and thus raise its attractiveness to business investors. Another challenge will be to upgrade the main ports of Ventspils, Liepaja and Riga, with the aim of ensuring their competitive position

[18] Iren MacMaster, John Bachtler. *Implementing Structural Funds in the New Member States*: Ten Policy Challenges/EPRC, Glasgow,UK

[19] Tatyana Muravska et al. *Study of the Potential and Needs of the New Member States*. Country Report: Latvia (2005), EC abd EPRC, Glasgow, U.K.

[20] EU co-financed project, which consists of several sections for reconstruction in the TEN-road network with the aim to increase the bearing capacity of road surfacing and bridges, as well as to improve traffic organization and safety.

vis-à-vis other ports in the region and also in the world. Such investments should facilitate transit flows, thus giving additional impetus to economic growth.

The allocation of Cohesion policy funding will need to take account of the various geographical goals. In terms of transport infrastructure, for example, investment is needed to modernise existing systems and to improve linkages with the rest of the EU. It will also be important, however, to ensure that investment in transport networks also contributes to linking the various main towns in Latvia with Riga and with external markets in order to facilitate flows of business investment to areas outside the capital city, as well as to enhance possibilities for labour commuting and mobility.

Because the mass of the population and of businesses are located in the Riga area, a large percentage of Cohesion policy funding will inevitably be targeted on this area. For example, around 56 per cent of businesses are located in Riga, which is thus likely to be the locus of many business support initiatives as well as active labour market measures. Support for higher education, as well as R&D and innovation, is also likely to be focused on Riga, not least because such interventions may be subject to increasing returns in the form of knowledge spillovers if they are spatially concentrated in the main centres of population.

However, there are also significant funding needs outside the Riga area. One option would be to focus an integrated package of funding (comprising in particular transport infrastructure, active labour market measures and business support) on a limited number of towns that could become centres of business investment and activity. Investment in these potential 'growth poles' could also include funding for R&D and technological innovation, particularly in activities oriented towards knowledge transfer and business-oriented technological development. It would also be worth considering more favourable forms of business support in such locations. For example it is argued in favour of redirecting business support away from direct grant aid for business and towards loan and venture capital funds. It would, however, be possible to retain certain forms of direct grant aid for these potential 'growth poles' or to set more attractive aid ceilings in these locations. It would be particularly important to coordinate business support measures with active labour market policies, in order to mitigate structural long-term unemployment.

There is also a need to consider whether the likelihood of further restructuring in the agriculture sector implies the need for Cohesion policy intervention in rural areas, particularly those with high rates of unemployment and social exclusion. Efforts will be needed to improve the skills and flexibility of the labour force in these areas, particularly among people in long-term unemployment. There is also a need to enhance the overall context for job creation in rural areas, which tend to be characterised by low levels of entrepreneurship and a low density of firms. In order to develop the long-term structural potential of such areas, intervention may be needed to upgrade the quality of transport and communication linkages with nearby towns that could become a focus for business activities and investment.

Investment is also needed in infrastructure and equipment in the fields of education, training and R&D/innovation in order to support the upgrading of human and knowledge capital, which will be a key to future productivity gains. The increase of Latvian GDP was mainly fostered by productivity growth and, to a smaller extent, by the increase of employment. The rate of productivity growth in the last 3 years exceeds 7%: productivity increased by 7.5% in 2004, 8.7% in 2005 and 7% in 2006. Productivity is increasing faster in trade, transport and communications, and manufacturing. However, its level in manufacturing still lags behind the indicators of several service sectors. For example, the productivity level in financial services is 2 times higher than in manufacturing.[21]

At the same time high quality equipment is needed in the secondary and tertiary education sectors, while emphasis should also be placed on building up facilities for business-oriented R&D and technology transfer in cities such as Ventspils, Daugavpils, Rezekne, and Valmiera. It will be important to build on existing strengths and to consider whether there are good prospects to move into new fields of technological specialisation.

Improvements in transport links between Latgale and Riga, as well as with external markets, could enhance the attractiveness of the region for business investment, thus leading to increased job creation. Public expenditure is also needed to raise the quality of education and training, as well as active labour market policies, including support for

[21] Ministry of Economics, Republic of Latvia, *Economic Development of Latvia*, Report, July 2007, p. 86.

entrepreneurship. These measures, while enhancing the economic potential in the regions, can be considered conducive to slowing out-migration from the regions toward the country's capital, as well as abroad.

Human resource development is one of the main backbones of a modern and competitive market economy. One of the main goals of Cohesion policy is to boost employment and to achieve a significant reduction in unemployment (linked to indicators set in the Lisbon strategy). Efforts are needed to improve the skills and flexibility of the labour force because the long-term objective of moving towards a knowledge-based economy also depends on the development of a well--educated and skilled workforce that is able to create, share and utilise knowledge.

It will also be important to develop and implement life-long learning systems, vocational training programmes, and other active and preventive measures. As well as contributing to overall productivity gains, such interventions can facilitate social equality and social inclusion via the increased labour market participation of at-risk groups[22]. In particular, efforts are needed to improve job-matching mechanisms, such as information and advisory services for young people, in order to ease the transition from education to the labour market.

These measures would serve to make Latvia a more attractive habitat for living and working, and thereby making the out-migration option relatively less desirable.

The effectiveness of the above measures will depend on improvements in administrative capacity at all levels of the public administration.

The efficiency of the public sector

The capacity and the effectiveness of the public sector have an obvious impact on economic development. Numerous reforms have been implemented, particularly in relation to establishing appropriate frameworks for the administration of EU Funds. Although considerable progress has already been made, there is a need for continuing

[22] Ministry of Economics of the Republic of Latvia, National Employment Plan 2005.

change in the structure and, especially, the practice of all levels of the public administration.

One of the main problems facing Latvia is insufficient administrative capacity at national, regional and local levels. At national level one of the main challenges is to build an effective and modern public administration, not least in order to ensure the efficient management of public funds in the coming programming period. One of the main impediments to the development of the public sector is the remuneration system, with relatively low wages compared to those in the private sector[23].

The structure of local government is too fragmented, with many small and ineffective local governments. Support should be given to promote further restructuring of local government and to create credible structures for implementing operations financed by Cohesion policy. There is still a need for far-reaching changes in the practices and operations of all levels of the public administration in order to comply with the legal framework of regulations on which Cohesion policy is based.

The efficiency of the public sector has important consequences and impacts on aspects of economic development. In the Latvian case, it is possible to highlight some serious weaknesses in public administration. There are high levels of bureaucracy in the country which affect the quality of public services to both citizens and businesses. Moreover, frequent changes in government in recent years have had negative impacts on the stability of key institutions and on the retention of staff. This is a symptom of both political instability in the country and the lack of an adequate separation between political structures and the public administration. This is one example of the ways in which short-term political concerns and pressures can affect the course and consistency of reform and the level of commitment to long-term development strategies.

Finally, regional and local administrative structures are extremely weak in the country. In particular, there is an administrative 'gap' at the regional level. Local government reform remains an outstanding issue. At the moment, there are a large number of municipalities,

[23] Tatyana Muravska et al. *Study of the Potential and Needs of the New Member States*. Country Report: Latvia (2005), EC abd EPRC, Glasgow, U.K.

which generally have very weak financial and other resources due to their small size and fragmentation.

Many of the weaknesses in the country's public administrative systems are deeply rooted and politically sensitive – such as regional reform. These will require the implementation of domestic policy reforms and sustained actions over the long-term.

Conclusion

The Baltic States and in particularly Latvia demonstrate an unusual combination of structural problems stemming from a number of distinct sources: the total system change from the command to a market economy following the breakdown of the Soviet Union, a radical reorientation of trade from predominantly east to predominantly west, and, more recently, substantial inflow of foreign direct investments, EU Structural and Cohesions funds, combined with low interest rates (generating excess demand and in particular a housing price bubble) coupled with significant outflow of labour (creating acute labour shortages in crucial economic sectors).

A comparison of population and out-migration patterns in the Baltic States before and after accession to the EU shows similar tendencies in the three countries. Significant population decline and out-migration from the three Baltic States confirms that serious problems resulted for these small and fast growing economies from their integration into the European internal market. This is a cause for concern since these are economies that rely on sustained economic growth in order to catch up to average EU levels of per capita GDP and living standards. In addition, and in particular for the case of Latvia, internal regional disparities aggravate residents' dissatisfaction with the *status quo* and provide incentives for out-migration. This requires effective policy choices for sustainable development and Cohesion policy implementation, given that the country's human resources for successful economic restructuring are limited.

It is obvious that in order to prevent further significant population outflows attention should be focused on making Latvia a more hospitable place for its own people to live and work. This brings us to the domain of Latvia's economic and social policy in the wider sense.

Priority should be directed towards basic infrastructure development. Support is also needed for R&D infrastructure in the main growth poles, as well as for human resource development. Initiatives also need to be taken to promote the competitiveness of business, new innovation driven businesses start-ups, support for education and other schemes that are components of Cohesion policy interventions. These components need to be internally coherent, and also to be consistent with the domestic policies covered in the National Development Plan for 2007-2013.

This ambitious agenda should be complemented by far-reaching changes in the practices and operations of all levels of the public administration. High professionalism on the part of public administrators at all levels is needed to ensure an appropriate balance within the Cohesion policy strategy on the two goals of reducing internal disparities and supporting national economic growth. Carrying out the above measures may considerably reduce the out-migration from the country. Much will also depend on whether the Latvian economy experiences a hard or a soft landing, as economic growth is needed to provide attractive living and working conditions for its residents. The above mentioned trends are closely linked to an increase in competitiveness of the country supported by the public development.

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SOUTH-EASTERN EUROPE BEYOND THE LAST ENLARGEMENT OF THE EUROPEAN UNION

por *Dinko Dinkov**

After the Cold War, the Balkans have undergone significant changes. The fact that the peninsula's name of Europe's "powder keg" has changed to South-Eastern Europe reflects the internal developments in the region and its structural role in the international system. There is a good chance for the most turbulent part of the continent to become an integral part of it and an important actor in shaping new Europe. Also, there is no doubt that without involving the Balkans in it, the European project cannot be complete and that leads to inevitable consequences. After the last EU enlargement (i.e. the accession of Bulgaria and Romania) the EU already has a lengthy coast on the Black Sea. That gives additional importance of South-Eastern Europe in terms of energy resources transition from Caspian and Black Sea regions to the rest of Europe. The new dimensions of South-Eastern Europe's strategic importance are prompting the need of special attention to the region in the whole range of EU policies. The Black Sea Synergy initiative of the European Commission from April 2007 is giving hopes for finding the framework for effective coordination within the EU. It could enhance fruitful political dialog with the other Black Sea countries and help build confidence as a basis for further cooperation.

Because of many historic reasons the Balkans have missed such important developments as the Enlightenment, the industrial revolution, the advent of nations and nation-states. The state building process in South-Eastern Europe has started later than in the rest of the

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continent. That provided opportunities for intervention of the other more advanced European states. The national liberation movements have created national mythologies which in combination with the interests of the Great Powers have shaped the political map of the Balkans in the 19-th and early 20-th century. The late appearance of the Balkan states at the modern European scene with the intervention of external factors has drawn borders, neglecting historically and ethnically formed communities. That has given a solution to the national problem in the region that does not have much in common with the nation-state idea. The way of the Balkan people to modernity has turned to be troublesome and bloody. Their efforts to overcome the backwardness have proven to be not very successful. The dictates of the Great Powers and the servile politics of local elites have left many problems unsolved. The changes in the world in the transitional period after the Cold War are catalyzing revival of problems that have stayed frozen for long time, now freshly overburdened with nationalistic feelings.

It is the European orientation that dominates the policy of all states in the Balkans. For the countries of Southeast Europe, overcoming their economic backwardness and making the region more stable is an important priority. Resolution of these tasks is a precondition of their integration into European structures. Therefore, the efforts of developing cooperation in the region have a deep sense in the context of its Europeanization.

The process of Europeanization of the Balkans involves the following important elements:

- Political and economic changes in the countries of the region;
- EU's enlargement in that direction – Bulgaria, Romania, Slovenia (they have also become members of NATO);
- The status of Croatia, Macedonia, and Turkey as candidate countries;
- Advancement in the process of stabilization and association of the Western Balkans: agreements were signed with Macedonia and Albania; Montenegro has finished the negotiations; Serbia and Bosnia and Herzegovina are negotiating;
- All Western Balkan countries are reaffirming their will of becoming EU members. They are involved in NATO's Partner ship for Peace program;

- Since the Thessalonica European Council in 2003, the EU on its side is reaffirming its commitment for eventual EU membership of the Western Balkan countries, provided they fulfill the accession criteria. Nevertheless, the Western Balkan countries are at different stages on their road to EU membership.

Nonetheless, as it was put on the cover of the Economist, the Balkans are still the Balkans and they have the potential to "Balkanize" Europe:

- they were the theatre of Europe's last military conflict;
- the process of democratization is incomplete;
- the pace of the economic reform in some of the countries of that region is slow and the economic growth is unsustainable;
- the progress towards stable democratic statehood is not satisfactory (confirmed by the annual European Commission's Progress Report on each country);
- The Western Balkans are a mixture of weak states and international protectorates with unclear vision of the international community for their future;
- The region has gained the reputation as area for organized crime and illegal trafficking;
- Statehood dreams and ambitions are shaping "states-in--waiting" – there is no better example than Kosovo;
- The efforts of the international community and mainly of the EU could not bring security and failed to lay the foundations of sustainable regional cooperation for changing the notorious features of the Balkans.

Obviously, there is a problem in developing South-Eastern Europe and to a great extent it becomes a part of the problems for constructing the new Europe, prompting serious consequences. The Balkans started accession to political modernity in the 19-th century by establishing national states and it seems that this process has still not been finalized.

The Kosovo problem itself may divide the EU member states and paralyze the efforts to enforce the new Reform Treaty. On the occasion of last week's elections in the province somebody has counted that 22 EU-member states may recognize eventual Kosovo's independence, but 5 would not. The Western Balkans may draw new dividing lines within the EU.

The capabilities of the EU to behave as a real factor in shaping the processes in South-Eastern Europe depend on its capacity to devise and follow effective policies, supported by consistent instruments in the framework of the Second Pillar, i.e. maintaining coherence among all member countries and institutions. The EU's experience in South-Eastern Europe by now is a value in itself. Simply to mention the role of the Stability Pact for South-Eastern Europe in providing not only donors but also in reaching a better understanding of the region. The recent EU's initiative of Black Sea Synergy was started in April this year – obviously, in order to strengthen the positions of the European Union in the region. It was very carefully defined, taking into account the specific characteristics of the layout of power in this strategically important part of the world. The European Union already has a Black Sea outlet. The notion of synergy should be understood as joint actions and does not include any exaggerations or unrealistic cooperation slogans. The initiative does not encompass any special financial instruments, so it has been inappropriately interpreted by some as a reallocation of European Union resources for the development of regional cooperation. It is rather a political construct in the context of EU interests in the field of energy, which encourages interested countries to evaluate new opportunities for interaction.

On the other hand I doubt the relevance of the well known conditionality policy in its traditional dimensions applied to the Western Balkans. In my mind the challenge is to find a way to let the countries in that region to accept and follow a self-imposed conditionality. The EU has to find more "carrots" for the case. We have to accept that it is not enough to reach compliance with the economic criteria for EU membership. The aspiring countries have to bring their views on Europe's future in line with the EU's model of society, but specific incentives have to be found.

The EU has already taken a huge burden on its shoulders. As an example, the Stabilization and Association Process has secured:

- an asymmetric liberalization of trade with those countries;
- an economic and financial aid;
- support for establishing democratic institutions and strengthening the civil society;
- humanitarian aid for displaced people;
- EU's special attention to creating capacity in the Western Balkan countries to cope with all kinds of criminal activities and corruption;

– EU's close engagement in all aspects of governance in Kosovo:
  - The EU is the main contributor to UNMIK – the administration running the province.
  - The EU is the main aid donor.
  - The EU helps the Provisional Institutions of Self Governance to develop as a local authority.
  - The EU is actually running the Province's Customs Service and the bank services.
  - The fact that official currency in the province is the Euro is an additional burden for the EU.

Obviously, the EU appears as a kind of a state builder in Kosovo as it plays a fundamental role in the process for determining its final status. Yet, the way out is risky and unclear. The rejection of Mr. Ahtisaari's plan for "supervised independence" of Kosovo proves that. There is no chance the idea for "Independent Kosovo" to be accepted by Belgrade. For the EU, involved in the game with other players, it is essential to reach unity within itself, or to find a way to speak "with one voice," which by now prompts very limited optimism. One should bear in mind that at this very moment the rivalry between national and supranational is crucial for the future of the European Union. In its essence the Union is shaking the nation-state idea, the sometimes modernity, but still inspiring people in the Balkans. The European Union – the symbol of neglecting the nation-state paradigms, is involved in state building.

I think we should keep in mind also that Kosovo has become a part of an argument between the West and Russia, which has little to do with the problem itself. Russia's interest is to exploit Kosovo's problem to provoke differences among the EU member-states. Concentrated on the search for new institutional equilibrium the European Union has to take into consideration also the geopolitical aspects of the developments in South-Eastern Europe.

I will try to give you some idea of the outlook on the Western Balkans from Sofia, from Bulgaria:

– Bulgaria has a special reason in securing stability in the region. That is the environment in which Bulgaria has to follow its own interests.

Bulgaria has some advantages for playing a positive role in the region:

- it maintains good relations with all countries in the region and has no open issues with any of them;
- it is involved in all regional initiatives;
- last May, Bulgaria has taken the chairmanship of the Process of Cooperation in South-Eastern Europe with a very ambitious program that includes: the transformation of all regional initiatives, including abandoning the Stability Pact for South-Eastern Europe; the establishment of a new Council for Regional Cooperation for the enhancement of the economic growth, cooperation in solving the energy, infrastructural and environmental problems in the region, and fostering cooperation in justice and home affairs.

For Bulgaria there is no doubt that the future of the region depends on its European perspective. Its view is that the requirements for EU and NATO membership of the Western Balkan countries are a kind of a "road map" to peace and stability in the region and the country follows this perspective on a bilateral and regional basis. Moreover, it considers the international presence in the region as a fundamental factor for its stability.

In the case of Kosovo, Bulgaria stands on the position that it is in the common interest of Serbia, Kosovo, and the international community to find a legitimate solution of the problem, acceptable for both parties involved. The Kosovo status should be determined through a UN Security Council resolution.

- Bulgaria is not trying to give prescriptions for solutions, but it is ready to support any agreement between the involved parties;
- Bulgarian diplomacy has made practical steps in maintaining the dialog between Belgrade and Pristina. For example, the Bulgarian Minister of Culture initiated and was an intermediary in the efforts for preserving the cultural monuments on Kosovo's territory.

The differences in Belgrade's and Pristina's positions are not prompting optimism. Politicians in Belgrade are ready to discuss any alternative, but not independence. At the same time for the Kosovars there is no alternative but independence. These positions give plenty

of opportunities for the involvement of experts and diplomats, yet the deadline is December 10, 2007. That is the term for continuing the negotiations between the two parties with a role of the contact group.

My vision, which I have introduced in Bulgaria, is that Serbia with Kosovo, or Serbia and Kosovo in the EU in the foreseeable future will give better chances for negotiating the status of Kosovo. A clear European prospect for both Serbia and Kosovo and free of any doubts common future for them in the EU would prove that all nationalistic clashes are in vain. Here comes my conclusion that the EU's responsibility in the case of South-Eastern Europe is great. It has to match with the great ambitions of the EU to revive Europe's role as an important factor and driving force in changing the world for the better.

November, 2007

A ADESÃO DA TURQUIA E A QUESTÃO DOS ALARGAMENTOS E DAS FRONTEIRAS DA UNIÃO EUROPEIA

por *Augusto Rogério Leitão**

Introdução

A questão da adesão da Turquia à União Europeia tem, e terá sempre, de ser pensada e analisada com a maior serenidade possível! Desde logo, porque não é uma questão da actualidade imediata da construção europeia e se tal adesão vier a realizar-se, só terá lugar, na melhor das hipóteses, após 2013.

Em seguida, a análise, o balanço e o entendimento das relações entre a União e a Turquia têm necessariamente de basear-se na abordagem das suas múltiplas dimensões – políticas, jurídicas, económicas, societais, etc. – mantendo-se sempre o axioma de que a Turquia é, e será (ou deverá ser) cada vez mais, um importante parceiro da UE, quer esteja dentro, quer esteja nas suas margens político-instituicionais ("pois, ficará sempre profundamente ancorada nas estruturas europeias através dos mais fortes laços possíveis")[1].

Por outro lado, é certo que a Turquia se configura, em termos geográficos, como uma entidade que compreende 5% do seu território na Europa, parcela que abriga 15% da sua população, situando-se o resto do seu território e da sua população na Ásia Menor, isto é, na Anatólia.

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[1] Conclusões do Conselho Europeu de Bruxelas, de 16 e 17 de Dezembro de 2004, p. 7.

E o que diz o *Tratado da União Europeia* em vigor? Que "qualquer Estado europeu que respeite os princípios enunciados no n.º 1 do artigo 6.º pode pedir para se tornar membro da União" (artigo 49.º do TUE), desde que respeite, pois, "os princípios da liberdade, da democracia, do respeito pelos direitos do Homem e pelas liberdades fundamentais, bem como do Estado de direito".

Contudo, o TUE não define o que deve entender-se por "Estado europeu", sabendo nós somente que o Mediterrâneo separa o Continente europeu do norte do Continente africano, dado que foi esse o fundamento da recusa preliminar do pedido de adesão de Marrocos[2]. Aliás, o "defunto" *Tratado que estabelece uma Constituição para a Europa* também nada dizia sobre a noção de "Estado europeu" (artigos I-58.º e 59.º), referindo-se, todavia, a "valores" e à "sua promoção em comum", tal como o *Tratado Reformador*, dito *de Lisboa*, que retoma quase *ipsis verbis* essas mesmas disposições (artigo 34.º do TUE revisto).

A Turquia, um Estado europeu?

Há já há várias décadas que, em termos de "senso comum" e "imaginário" políticos, quer dos "eurocratas", quer dos dirigentes políticos ocidentais, Malta, Chipre e a Turquia fazem parte da Europa[3]; uma *doxa* que o contexto da Guerra-fria acabou por reforçar, tendo a Turquia aderido ao Conselho da Europa, em 1949, e à NATO, em

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[2] Marrocos apresentou o seu pedido de adesão em 20 de Julho de 1987 e foi quase imediatamente indeferido.

[3] Como é sabido, a génese do processo da primeira "europeização" da Turquia situa-se na Revolução Kemalista, entre os anos '20 e '30 do século passado, que adoptou o "modelo europeu" de Estado para "turquizar, modernizar e ocidentalizar" a nação otomana através, é certo, de um laicismo autoritário e nacionalista. Contudo, tal processo revolucionário assentará num nacionalismo anti-Tratado de Sèvres (1920), consagrado no Tratado de Lausanne (1923), com o abandono dos projectos políticos para as nações arménia e curda, que determinará uma configuração particular da "soberania" e da "identidade nacional" centrada nas forças armadas turcas e no seu *imperium* sobre este novo espaço geopolítico turco-otomano e daí a obsessão da integridade territorial. Assim, a "soberania" e a "identidade nacional" turcas afirmar-se-ão em relação ao "outro" internamente, dando origem ao genocídio dos arménios e à "questão curda". Cf., entre muitos, Hamit Bozarslan, *Histoire de la Turquie contemporaine*, Paris: La Découverte, 2004.

1952, tornando-se numa entidade primordial do dispositivo estratégico ocidental no Mediterrâneo oriental, isto é, configurando uma *special relationship* com os EUA no seio da Aliança Atlântica. E, logo, em Setembro de 1959, seis meses após a Grécia, a Turquia apresenta à CEE a sua candidatura como membro associado.

Em seguida, a 12 de Setembro de 1963, a Turquia e a CEE assinam um Acordo de Associação[4], que entrará em vigor a 1 de Dezembro de 1964, visando promover, fundamentalmente, o estabelecimento de uma União aduaneira entre as duas Partes.

Ora, não podemos deixar de relembrar que o artigo 28.º desse Acordo previa que as Partes, em função dos progressos da integração da economia turca, examinassem "a possibilidade de uma adesão da Turquia às Comunidades". E que, além disso, o Presidente da Comissão da CEE, na época, Prof. Walter Hallstein, afirmou no seu discurso, na cerimónia da assinatura do dito Acordo, que "a Turquia faz parte da Europa" e daí que o grande objectivo desta "associação seja o de permitir que a Turquia se torne membro de pleno direito das Comunidades".

Contudo, tais expectativas conhecerão muito poucos desenvolvimentos até meados dos anos '80 do século passado. Os golpes de estado militares de 12 de Março de 1971 e de 12 de Setembro de 1980, intercalados com a intervenção militar turca em Chipre, em 1974, acumularam e reforçaram receios e pessimismo por parte de muitos países, tendo mesmo a CEE suspenso as relações com a Turquia, entre 1980 e meados de 1983, isto é, até à convocação de eleições multipartidárias.

A Turquia só reaparecerá, como entidade candidata a protagonista da agenda das Comunidades Europeias, a partir de 14 de Abril de 1987, momento em que o segundo governo de Turgut Ozal apresenta um pedido formal de adesão. Mas será logo subalternizada, na medida em que a Comissão só emitirá o seu parecer em 20 de Dezembro de 1989, opondo-se claramente à abertura de negociações, tendo o Conselho ratificado tal parecer, em 5 de Fevereiro de 1990.

Detenhamo-nos, um pouco, sobre esse parecer da Comissão, porque se trata de um documento de grande importância política (pelo menos, em termos de sociologia política da história), dado que exprime a posição dominante, na época, acerca de futuros alargamentos das Comunidades. E de facto, o parecer começa logo por afirmar o princí-

[4] Cf. http://europa.eu.int/comm/enlargement/turkey.

pio de que, antes que a CEE realize o seu Mercado interno ou único, até finais de 1992, a abertura de negociações com vista à adesão constituiria um elemento desagregador do objectivo fundamental do *Acto Único Europeu*.

Ora, a importância de tal posição de princípio será ainda mais bem compreendida se contextualizada: tal parecer foi ultimado a seguir à queda do muro de Berlim e é posterior à decisão do Conselho Europeu de Madrid, de Junho de 1989, no sentido de "realizar progressivamente a União Económica e Monetária".

Por outro lado, no que diz respeito à Turquia, o parecer começa por sublinhar que, em razão da sua dimensão, da sua população e dos seus atrasos económico-sociais, uma hipotética abertura de negociações colocaria às Comunidades e aos seus Estados-membros problemas de grande complexidade política, político-institucional e financeira! E que, de qualquer modo, a hipótese de negociações nunca poderia ser aventada por razões referentes, nomeadamente, ao respeito dos direitos e liberdades fundamentais, ao direito das minorias, aos contenciosos, sobretudo fronteiriços, existentes com um Estado-membro (Grécia) e à situação político-militar em Chipre.

Contudo, a Comissão propõe que as Comunidades adoptem medidas que permitam finalmente realizar a União aduaneira, prevista no Acordo de Associação de 1963, e outras visando "modernizar" a Turquia para que num futuro – que aí se vislumbra longínquo – possa aderir às Comunidades!

A Turquia e os últimos alargamentos

O processo de integração europeia vai viver, entre 1989 e 1995, um período complexo e difícil, caracterizado, entre outros, pela queda do muro de Berlim, pela reunificação da Alemanha, pela "refundação" das Comunidades numa União Europeia (*Tratado de Maastricht*), pelas crises etno-políticas na ex-Jugoslávia, que revelarão incapacidades de agir em comum e pela necessária ajuda financeira aos "novos" países do Centro e Leste europeus (os PECO).

Daí que a questão dos alargamentos passe a estar no centro das reflexões políticas, quer dos dirigentes nacionais, quer das instituições comunitárias, procurando todos, ou quase todos, numa primeira fase, encontrar fórmulas de integração, que não a adesão, para oferecer aos

potenciais candidatos, em especial, aos PECO. Existiu, pois, um largo consenso de que a adesão era impossível porque seria muito negativa para o estabelecimento do Mercado interno e para a realização a médio prazo da União Económica e Monetária.

Jacques Delors, que desde 1987 defendia o esquema, ou projecto, de um "Espaço Económico Europeu" (EEE), dada a pressão para a adesão de certos países, como, além da Turquia, a Áustria (1989), Malta e Chipre (1990), a Suécia (1991), a Finlândia (1992), a Suíça (1992) e a Noruega (1992), só conseguirá a institucionalização desse EEE com o Tratado assinado no Porto, em 2 de Maio de 1992, entre a CEE e os países da EFTA. Era, pois, uma forma de afastar o mais possível a questão dos alargamentos das preocupações centrais da construção europeia. No entanto, todos nós conhecemos hoje a quase insignificante importância de tal projecto, desde logo porque a Suíça através de referendo recusou aprovar o Tratado EEE, mas também porque quase simultaneamente foram abertas as negociações com outros membros da EFTA com vista ao alargamento que teve lugar em 1995.

Quanto a dirigentes políticos, o Presidente François Mitterrand, em finais de Dezembro de 1989, num discurso, faz uma proposta, especialmente dirigida aos PECO, para a criação de uma "Confederação Europeia" que teria por base um projecto de integração económica tipo EEE, revestida, no entanto, de dimensões de cooperação política de natureza "constitucional". Tal "confederação" – espaço económico e político – deveria permitir a reconstrução e a estabilização dos PECO e, a médio prazo, possibilitar, também, àqueles que estivessem em melhores condições, "estagiar" com vista a uma adesão ao núcleo duro da "confederação", isto é, às Comunidades/União Europeia! Contudo, tal proposta foi muito mal preparada e quase nada trabalhado no plano diplomático. Daí que tenha sido mal compreendida e/ou objecto de indiferença por parte dos governos dos Estados-membros e, por outro lado, de hostilidade expressa por certos dirigentes de países do centro da Europa[5].

No entanto, a partir de 1991, o Reino Unido mostra-se sobretudo interessado no alargamento do Mercado interno e a Alemanha, uma vez reunificada, será pressionada pela *Mittelleuropa*, e passa a defen-

[5] Cf., entre outros, Pierre Gerbet, *La construction européenne*, Paris: Imprimerie Nationale, 1999; Jean Joseph Boillot, *L'Union européenne élargie. Un défi économique pour tous*, Paris: ed. La Documentation française, 2003.

der abertamente o alargamento aos PECO, sobretudo por razões de estabilidade política.

Foi assim, e neste contexto, que os alargamentos se transformaram numa prioridade política da acção externa das Comunidades/ /União Europeia.

O Conselho Europeu de Lisboa, de Junho de 1992, mesmo antes do processo de ratificações do *Tratado de Maastricht* estar terminado, estabelece as condições de admissão dos Estados candidatos da EFTA, o que dará lugar ao 5.º alargamento, em 1 de Janeiro de 1995, com a admissão da Áustria, da Finlândia e da Suécia.

E, em Junho de 1993, ainda o *Tratado da União Europeia* não tinha entrado em vigor, o Conselho Europeu de Copenhaga decidia já "que os países da Europa central e oriental, se desejarem, poderão tornar-se membros da União Europeia" desde que tenham: "instituições estáveis que garantam a democracia, o Estado de direito, os direitos do Homem, o respeito pelas minorias e a sua protecção"; "uma economia de mercado em funcionamento e capacidade para responder à pressão da concorrência e às forças de mercado dentro da União" e, ainda, "capacidade para assumir as suas obrigações, incluindo a adesão aos objectivos da união política, económica e monetária". Estes são os chamados "critérios de Copenhaga" que devem ser lidos com um 4.º critério, aplicável à União Europeia, segundo o qual "a capacidade da União para assimilar (*absorption*, em inglês) novos membros mantendo contudo a dinâmica da integração europeia, constitui igualmente um elemento importante que corresponde, aliás, ao interesse geral, tanto da União, como dos países candidatos"[6].

O próprio *Tratado de Maastricht*, assinado em Fevereiro de 1992, e em vigor a partir de 1 de Novembro de 1993, prevê uma revisão dos tratados para 1996 e que na agenda dessa conferência intergovernamental (CIG) constem "as reformas necessárias tendo em vista os futuros alargamentos".

Contudo, a CIG de 1997, que elaborou o *Tratado de Amesterdão*, acabou por não se ocupar da reforma das Instituições na perspectiva do alargamento, deixando esses *left overs* para a CIG de 2000 que

[6] Este último critério, que esteve "adormecido" durante mais de uma década, ressurgiu agora no âmbito do discurso político europeu sobre a actual crise da União acerca dos futuros alargamentos, da política de vizinhança e das fronteiras.

elaborará o *Tratado de Nice*, e que, efectivamente, realizará tal reforma, ainda hoje em vigor[7].

Mas, os Estados-membros, no próprio momento da aprovação do Tratado de Nice, em Dezembro de 2000, consideraram insuficiente a reforma aí consagrada e avançaram logo com o projecto de uma nova revisão a ser realizada por uma Convenção, o que dará origem posteriormente ao *Tratado que estabelece uma Constituição para a Europa*, assinado em Roma, em Junho de 2004.

Mas, relembremos ainda que a Declaração de Laeken, de Dezembro de 2001, que estabeleceu o mandato da *Convenção sobre o Futuro da Europa*, começa por se interrogar sobre qual deverá ser o papel da "Europa finalmente unida" "neste mundo alterado"? E explicita em seguida:

- em primeiro lugar, reforçar a sua "unidade na diversidade", pois, "a *única fronteira* que a União Europeia estabelece é a da democracia e dos direitos humanos. A União está aberta aos países que respeitem os valores fundamentais, como eleições livres, o respeito pelas minorias e o respeito pelo Estado de direito"[8];
- em segundo, "a Europa deverá desempenhar um papel de vanguarda numa nova ordem planetária", isto é, "o de *uma potência*[9] que está em condições de desempenhar um papel estabilizador ao nível mundial e de constituir uma referência para inúmeros países e povos";
- por último, dado "o mundo globalizado, mas simultaneamente muito fragmentado, a Europa deve assumir as suas responsabilidades na gestão da globalização", configurando-se como "*uma potência* que luta decididamente contra todas as formas de violência, terror ou fanatismo, mas que também não fecha os olhos às injustiças gritantes que existem no mundo", isto é, "*uma potência* que se propõe alterar as condições no mundo por forma a que não ofereçam vantagens apenas aos países

[7] Cf., entre outros, AUGUSTO ROGÉRIO LEITÃO, "O Tratado de Nice: preliminares de uma Europa-potência?" *in* M.ª MANUELA T. RIBEIRO (org.) *Identidade europeia e multiculturalismo*, Coimbra: ed. Quarteto, 2002, p. 353 a 373.

[8] Itálico nosso.

[9] Itálico nosso. A "Europa potência", nesse contexto político, deixou de ser um tabu, tendo a expressão sido mesmo utilizada por Tony Blair.

ricos, mas também aos países mais pobres. *Uma potência* que pretende dar um enquadramento ético à globalização, ou seja, inseri-la na solidariedade e no desenvolvimento sustentável"[10].

Assinalemos ainda, e desde já, que no quadro das preocupações ligadas à problemática dos alargamentos, e agora já também ligadas à questão das fronteiras, a União vai desenvolver, a partir de 2003, uma *Política de Vizinhança*, visando criar parcerias estratégicas com os novos países fronteiriços procurando, deste modo, transformar, em termos de estabilidade, desenvolvimento e segurança, esses novos espaços-fronteiras que se estenderão (e já se estendem) em curva desde do Báltico até ao sul do Cáucaso[11].

A Turquia na via da adesão à União

Retomando as relações da Turquia com a UE, relembremos então que estas só reaparecem na agenda política da União, nos inícios de 1995, quando finalmente o Conselho decide adoptar algumas das medidas que tinham sido propostas pela Comissão no seu parecer negativo quanto à adesão, de finais de 1989.

A Comunidade Europeia reanima, assim, o Conselho de Associação CE-Turquia e em de Março de 1995 é adoptado o Acordo de Ankara[12], que entrará em vigor, no dia 1 de Janeiro de 1996, estabelecendo as medidas necessárias à finalização da União aduaneira, projecto que vinha do Acordo de Associação de 1963[13].

E esta decisão só foi possível, porque o Conselho Europeu aceitara, entretanto, a exigência da Grécia, segundo a qual a adesão de Chipre à União deixaria de ficar dependente da sua prévia reunificação. Um erro, segundo nós, que a União, ou melhor, certos dos seus membros tentam agora utilizar como instrumento "compensador" da

[10] Itálicos nossos.

[11] Cf. *Politique européenne de voisinage*, Comissão, COM(2004)373 final, de 12.05.2004 e, em termos de análise política, o excelente artigo de Gilles Lepesant, "L'Union européenne et son voisinage: vers un nouveau contrat", *Politique Étrangère*, n.º 4, 2004, p. 795 e s.

[12] J.O.C.E. de 13.02.1996, n.º L 35, p. 1 e s.

[13] A Turquia é o único país que até hoje constituiu uma União aduaneira com a Comunidade Europeia.

ambiguidade das suas posições em relação ao processo de adesão da Turquia.

No entanto, a Turquia não fará parte nem do primeiro grupo de países admitidos a negociações para a adesão (Conselho Europeu do Luxemburgo de Dezembro de 1997)[14], nem do segundo (Conselho Europeu de Helsínquia de Dezembro de 1999)[15], embora este último Conselho Europeu lhe tenha concedido o estatuto de "candidata a candidato" ("a Turquia tem vocação a aderir à União com base nos mesmos critérios que se aplicam aos outros candidatos"), enquadrado numa "parceria estratégica de pré-adesão" que será objecto de avaliações regulares até finais de 2004.

Também esta nova decisão do Conselho Europeu só foi possível porque a Grécia, a partir dos inícios de 1999, estabelece um novo relacionamento bilateral com a Turquia baseado num duplo acordo: a Turquia aceita que Chipre adira à União independentemente da resolução política da sua divisão; e, ambas as Partes, comprometem-se a submeter à jurisdição do Tribunal Internacional de Justiça todos os diferendos territoriais e os relativos à plataforma marítima, que não sejam resolvidos pela negociação. E podemos mesmo sublinhar que a Grécia passará então a inscrever na sua política externa as dimensões positivas de uma futura adesão da Turquia, sobretudo nas suas vertentes económica, estratégica e geopolítica[16].

Por seu lado a Turquia reforçará tais expectativas, entre 2000 e 2002, realizando revisões constitucionais e reformas legislativas importantíssimas que acelerarão de forma relevante o processo de "europeização" do Estado e da sociedade turca[17]. Daí que o Conselho Europeu de Copenhaga de Dezembro de 2002 tenha previsto que "em Dezembro de 2004, o Conselho Europeu decidirá, com base num relatório e numa recomendação da Comissão, se a Turquia cumpre os critérios políticos de Copenhaga e, no caso afirmativo, a União Europeia iniciará logo que possível as negociações de adesão com esse país". Acrescente-se também que o ritmo de tais reformas se acelerou particularmente a partir de 2003, com a vitória nas eleições legislativas

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[14] República Checa, Chipre, Eslovénia, Estónia, Hungria e Polónia.

[15] Bulgária, Eslováquia, Letónia, Lituânia, Malta e Roménia.

[16] Cf., entre outros, SMIH VANER, "Vers un rapprochement avec la Grèce?", *Géopolitique*, n.º 69, avril 2000, p. 80 e s.

[17] Cf., entre outros, ALAIN BOCKEL e ISIL KARACAS, "La réforme constitutionnelle et les droits de l'homme", *Questions Internationales*, n.º 12, mars-avril 2005, p. 33 e s.

do Partido da Justiça e do Desenvolvimento (AKP) dirigido por Recep Erdoðan[18].

A Comissão apresentará a sua recomendação, em 6 de Outubro de 2004, "relativa aos progressos realizados pela Turquia com vista à adesão"[19] considerando, desde logo, que "tendo em conta o avanço global em matéria de reformas de natureza constitucional e legislativa", e o facto de entretanto poderem entrar "em vigor a lei sobre as associações, o novo Código Penal, a lei orgânica dos tribunais de apelação de 2.ª instância, o Código de Processo Penal e a lei sobre a execução das penas", deve considerar-se que a Turquia cumpre "de modo suficiente os critérios de Copenhaga". Contudo, a Comissão sublinha que a Turquia ainda tem muito que reformar para atingir o patamar "da política de tolerância zero na luta contra a tortura e maus tratos, nas liberdades de expressão, religiosa e sindical e nos direitos das mulheres e das minorias".

Por outro lado, a Comissão considera também que as negociações constituirão "um grande desafio" para ambas Partes "cujo resultado final não pode ser garantido previamente" e que, de qualquer modo, ficará ainda "dependente [do sentido] das ratificações nacionais". E, em seguida, faz o levantamento das questões fundamentais que terão de ser analisadas "num quadro específico de negociações", apontando ainda a Comissão o problema dos contenciosos que a Turquia mantém com os seus vizinhos (como por exemplo, com a Arménia e a Síria) e que terão de ser resolvidos de acordo com o "princípio da reconciliação", dependente, em grande parte, e ainda segundo a Comissão, da capacidade da União Europeia se afirmar "como verdadeiro actor de política externa em regiões tradicionalmente marcadas pela instabilidade e por tensões, tais como o Médio Oriente e o Cáucaso". É evidente que a Comissão está a pensar na nova Política de Vizinhança!

A questão da abertura oficial das negociações com a Turquia, com vista à sua adesão à União Europeia, foi finalmente decidida pelo

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[18] Sobre o AKP, partido islâmico, mas não islamista, que reivindica ser equivalente à democracia cristã europeia e as dimensões sociológicas da sua inscrição e inserção na sociedade turca, não nos alongaremos neste estudo. Temos, no entanto, de sublinhar que, desde que é poder legítimo, este partido fez mais pela democratização do regime e pela aproximação da Turquia com a União Europeia que todos os partidos "laicos" que o precederam.

[19] COM(2004)656 final, de 6.10.2004, não publicada no J.O. "Recommandation de la Commission européenne concernant les progrès réalisés par la Turquie sur la voie de l'adhésion".

Conselho Europeu de Bruxelas, em 17 de Dezembro de 2004: "O Conselho Europeu convidou a Comissão a apresentar ao Conselho uma proposta de quadro de negociações com a Turquia [...] e solicitou ao Conselho que aprove esse quadro de negociações na perspectiva de dar início às negociações em 3 de Outubro de 2005"[20]. Pois, a partir de agora, "as negociações com cada um dos Estados candidatos basear-se-ão num quadro de negociações [...]", sendo cada um "definido pelo Conselho sob proposta da Comissão, tendo em conta a experiência do quinto alargamento e a evolução da aplicação acervo comunitário", passando a exigir-se do candidato provas, em cada fase do processo, de que o *acquis* está efectivamente a ser cumprido[21].

A controvérsia acerca da adesão da Turquia: alargamentos, vizinhança e fronteiras da União

Alargamentos, vizinhança e fronteiras são hoje os grandes temas invocados e suscitados pela reflexão sobre a acção externa da União Europeia que procura, em certa medida, estabelecer um quadro referencial de uma identidade estratégica e geopolítica para a "Europa alargada".

A questão dos alargamentos e fronteiras da União passou a revestir uma certa importância, e logo mediática, a partir do momento em que Valéry Giscard d'Estaing, ainda Presidente da *Convenção sobre o Futuro da Europa*, declarou, numa entrevista a um jornal, nos finais de 2002, opor-se à adesão da Turquia[22]. Segundo ele, a adesão da Turquia provocaria "o fim da União Europeia", porque, por um lado, este país quase nada tem a ver com a Europa "nos planos geográfico, cultural, religioso...", e, por outro, porque a sua adesão obrigaria a União a aceitar alargar-se a países como, a Ucrânia, a Moldávia, a Geórgia, à Síria, ao Iraque, etc. Para Giscard, uma dinâmica de alargamentos deste tipo (des)configuraria a construção europeia e "transformaria necessariamente o seu espaço numa simples zona de livre comércio", pondo fim, assim, ao processo de construção ou integração

[20] Conclusões da Presidência do Conselho Europeu de Bruxelas, 16 e 17 de Dezembro de 2004, p. 6.

[21] Cf., entre outros, Deniz Akagul e Semih Vaner, *La Turquie avec ou sans Europe*, Paris: Ed. Organisations – Eyrolles, 2005.

[22] *Le Monde* de 9 de Novembro de 2002.

política da Europa. Além disso, a partir deste momento, a questão da adesão da Turquia passou também a estar associada, desde logo em termos de opinião pública, à questão da aprovação da *Constituição Europeia*[23]!

Mas, já em Agosto de 2002, Javier Solana, Alto Representante para a PESC, e Chris Patten, ainda Comissário responsável pelas relações externas da CE, tinham enviado uma carta ao Conselho, alertando os Governos dos Estados-membros para a necessidade da "Europa alargada" (*The Wider Europe*) "repensar politicamente" as suas relações com os seus novos vizinhos de Leste, renovando, simultaneamente, as suas relações com os seus vizinhos do Sul que vinham sendo desenvolvidas, desde 1995, no contexto do chamado Processo de Barcelona.

A Comissão, impulsionada pelo Conselho, apresentará, em Março de 2003, uma Comunicação intitulada "A Europa alargada – vizinhança: um novo quadro para as relações com os nossos vizinhos de Leste e do Sul", propondo as grandes linhas desta nova política externa apelidada de Política de Vizinhança.

O Conselho Europeu de Salónica, de Junho de 2003, aprova as orientações da Comissão e estabelece que a partir de 2004 se deverá começar a elaboração e negociação dos Planos de Acção com cada um dos países vizinhos. E, em Junho de 2004, o Conselho Europeu decide incluir na Política de Vizinhança a Arménia, o Azerbeijão e a Geórgia, enquanto a Bielo-Rússia ficaria de fora até os seus dirigentes demonstrarem vontade de respeitar os valores democráticos e os princípios do Estado de direito.

Já quanto à Federação Russa, inicialmente incluída nesta política externa, será excluída a seu pedido (ou melhor, por sua exigência), dando-se, então, início a uma parceria estratégica específica com este Estado, no âmbito dos chamados "quatro espaços comuns" (económico; de liberdade, de segurança e de justiça; de segurança externa, e de investigação e educação) cujos principais objectivos foram acordados na cimeira UE-Rússia de Maio de 2003.

Em Maio de 2004, o Conselho aprova a Comunicação da Comissão intitulada "Política de Vizinhança: documento de Estratégia" que estabelece os objectivos, os princípios e a dimensão geográfica desta

[23] Cf. A. Rogério Leitão "Quem tem medo da Turquia no seio da União Europeia?", *Relações Internacionais*, n.º 05, Março, 2005, p. 41 e s.

política, assim como os métodos a utilizar na elaboração dos Planos de Acção.

De modo muito sintético, lembraremos ainda que actualmente o campo geográfico desta Política de Vizinhança abrange 16 países: 9 países do Sul (Marrocos, Argélia, Tunísia, Egipto, Israel, Autoridade Palestiniana, Jordânia, Síria e Líbano); 5 países de Leste (Ucrânia, Moldávia, Geórgia, Arménia e Azerbeijão); e ainda 2 países com vocação a ser integrados (Líbia e Bielo-Rússia), dependendo da normalização das suas relações com a União Europeia.

E assinalemos, também, que a UE, a partir do início das negociações com a Turquia com vista à sua adesão, decidiu estabelecer um novo quadro para os novos processos de adesão, muito mais exigente para com os candidatos e com dimensões de avaliação e de fiscalização novas.

Constatamos, assim, que as actuais preocupações da acção externa da União parecem, pois, centrar-se nas questões dos alargamentos e/ou das suas fronteiras.

A União diz, em princípio, sim à Turquia, mas logo se verá em 2013. Quanto aos países dos Balcãs e, na actualidade, em relação à Croácia, a UE comprometeu-se a recebê-los e a ajudá-los, para que as suas adesões se realizem nas melhores condições, a curto, médio e longo prazo. Mas já relativamente aos países de Leste, como a Ucrânia, e aos países do Cáucaso do Sul, a União tem tendência a transmitir a mensagem seguinte: "como países vizinhos não têm vocação para aderir à União Europeia". Será esta uma resposta definitiva?

Devemos, contudo, afirmar que o critério geográfico de "Estado europeu", consagrado no Tratado da União Europeia, permitiu responder aos pedidos de adesão apresentados por países do Norte, do Oeste e o do Sul da Europa. E daí a rápida e simples rejeição da candidatura do Reino de Marrocos apresentada às Comunidades em 1987.

No entanto, a aplicação deste critério, no contexto actual, aos países de Leste e do Sudeste da Europa, afigura-se como sendo vago e impreciso. E isto porque, a abertura das negociações com a Turquia, com vista à sua adesão, e as perspectivas e expectativas de novos alargamentos transformaram a natureza e a dimensão da questão das fronteiras da União Europeia.

Assim, não é de admirar que exista uma certa tendência, no seio da União, no sentido de rejeitar a Europa dos 46 Estados (hoje 47, com a República do Montenegro) do Conselho da Europa, que abrange a

Rússia. Mas será só por causa da inclusão da Rússia? E dos países do sul do Cáucaso? Ou porque o projecto da integração/construção europeia é de natureza diferente?

Na realidade, quer ao nível do Conselho Europeu, quer ao nível de outros palcos europeus, formais ou informais, a questão da definição das fronteiras da União Europeia revela, actualmente, uma grande diversidade de opiniões, embora, segundo nós, tal questão tenha estado sempre presente, por vezes de forma subjacente, durante os períodos de 1991-1995 e de 2000-2005, nos debates e projectos relativos à configuração ou arquitectura política da UE.

É certo que a *Constituição Europeia* espelhou consensos quanto ao reforço da dimensão externa da União, mas só sob o ponto de vista operacional, sem contudo adoptar e definir um projecto comum, um desígnio estratégico e geopolítico para este actor premente. Posição essa que, aliás, será adoptada pelo *Tratado Reformador*, ou *de Lisboa*, que retoma, em termos de revisão do TUE, a maior parte desses consensos e desenvolvimentos operacionais.

A questão das fronteiras está, assim, fortemente ligada à opção de um projecto político comum para a União Europeia. Desde logo, porque, apesar de incompleta e inacabada, a UE tem vocação (e é cada vez mais suscitada) para se transformar, a prazo, num actor global cada vez mais integrado no sistema internacional[24].

Por outro lado, as divergências existentes entre os Estados acerca do futuro da Europa podem ser explicitadas *grosso modo* através do seguinte binómio-dilema: ou a União opta por ser fundamentalmente uma zona de livre comércio, estruturada pela paz, desenvolvimento e valores, com algumas políticas comuns centradas na ajuda aos Estados-membros mais débeis, e as suas fronteiras poderão alargar-se de modo extensivo; ou opta por uma união política, que exige uma maior partilha das soberanias e uma configuração como potência regional ou mesmo mundial, e as suas fronteiras terão de ser necessariamente menos extensas.

Contudo, a adesão da Turquia coloca à União Europeia questões sobretudo de natureza geopolítica e estratégica. Diremos, mesmo, que

[24] "It is in this wider Europe that the EU as 'process' meets the EU as 'actor'. It is here that its 'gravitational power' meets its 'normative power'. It is here that the EU as a *sui generis* governance system meets the EU as a nascent foreign policy player", Fabricio Tassinari, *Variable Geometries: mapping ideas, institutions and power in the wider Europe*, Bruxelas, CEPS, W. Doc. N.º 254/Nov. 2006, p. 31.

se trata das questões mais importantes desta natureza até hoje colocadas à construção europeia e que, uma vez consumados os últimos alargamentos, se inscreveram nos pontos centrais da agenda política da União. Ora, na actual conjuntura internacional, com as suas especificidades regionais, a adesão da Turquia tem de ser essencialmente encarada em termos estratégicos, muito especialmente, nas suas dimensões geopolítica e de segurança, uma vez que este Estado poderá constituir uma peça importante nas relações da UE com o Médio Oriente, com o Cáucaso e a Ásia Central, regiões de crise e de núcleos estratégicos vitais, tanto para os europeus, como para os americanos.

De qualquer modo, somos confrontados com um grande paradoxo inscrito no facto desta questão suscitar efectivamente à União Europeia grandes questões geopolíticas e estratégicas, quando a União ainda não é, hoje, uma entidade geopolítica coerente e, muito menos, dispondo de uma cultura estratégica comum. As divergências internas acerca da adesão da Turquia revelam claramente a ausência de uma arquitectura coerente desta entidade geopolítica e, simultaneamente, o peso das diferentes culturas estratégicas nacionais, pelo menos dos "grandes" Estados-membros, na configuração da Política Externa e de Segurança Comum da União.

As negociações com vista à adesão da Turquia

Os 25 Estados-membros decidem, pois, em Dezembro de 2004, que as negociações com a Turquia teriam início em Outubro de 2005, num quadro de exigências e controlos apertados e "cujo resultado final não pode ser garantido previamente". Sabendo todos nós, por outro lado, que certos governos, ou melhor, certos dirigentes políticos nacionais aceitaram a abertura das negociações porque convencidos de que a Turquia, mais cedo ou mais tarde, seria obrigada a abandoná-las em razão da sua incapacidade (intrínseca ou estrutural?) em cumprir os critérios impostos pelo Conselho Europeu.

No entanto, antes da abertura das negociações, e em virtude do alargamento de 2004, foi necessário negociar um Protocolo, entre a Comunidade Europeia e a Turquia, a anexar ao Acordo de Ankara, associando os dez novos Estados-membros como Partes da União aduaneira, já institucionalizada desde 1996. A Turquia assinará esse Protocolo no dia 1 de Julho de 2005, precisando contudo que tal

assinatura não significava o reconhecimento da República de Chipre. O que levou o Conselho da União a reagir através de uma Declaração, de 21 de Setembro de 2005, onde lamenta a posição turca considerando-a "unilateral, e logo como não fazendo parte do protocolo, e sem efeito jurídico relativamente às obrigações que incumbem à Turquia". Acrescentando ainda que o não cumprimento "em relação a todos Estados-membros da União" terá necessariamente consequências no desenrolar das negociações para a adesão "que serão avaliadas nos finais de 2006."

Nesta primeira fase, as negociações para a adesão, que decorreram até finais de 2006, revelaram, efectivamente, um fraco dinamismo no concernente à abertura dos 35 capítulos negociais[25], consequência, em grande parte, da crise de legitimidade interna da União provocada pelos "não" dos referendos francês e holandês. Mas também porque certos panoramas nacionais ajudaram a deprimir a sua conjuntura: a França refém de um referendo, introduzido na sua Constituição pelo Presidente Chirac, para as novas adesões à União Europeia e de um ainda candidato a Presidente, Sarkozy, a defender abertamente o "não" à adesão da Turquia; a Alemanha, com a Chanceler Ângela Merkel e o seu partido a proporem uma "parceria privilegiada", em vez da adesão, para a Turquia; Chipre e a Áustria com insinuações e acções de guerrilha diplomática, etc.[26]

Enfim, a Comissão adopta, em Novembro de 2006, uma comunicação dirigida ao Conselho relativa às negociações com a Turquia, onde constata progressos, mas também a necessidade deste país levar ainda a cabo reformas fundamentais da sua organização política, social e económica. Contudo, a Comissão verifica que a Turquia continuava sem ratificar o Protocolo de 2005 e a recusar abrir os seus portos e aeroportos ao comércio com a República (grega) de Chipre e, em consequência, propõe o congelamento das negociações relativamente a oito capítulos em conexão com a União aduaneira. Apesar de certos países, como o Reino Unido, a Espanha, a Itália, Portugal, a

[25] No fundo, não se trata de verdadeiras negociações uma vez que a Turquia (ou qualquer Estado candidato) não pode negociar o "acervo comunitário", que lhe é imposto.

[26] Augusto Rogério Leitão e André Barrinha "A União Europeia e a Turquia: ambiguidades e indefinições para a Presidência portuguesa", *Relações Internacionais*, n.º 14, Junho, 2007, p. 131 e s.

Suécia, considerarem a sanção excessiva, o Conselho Europeu, de 11 de Dezembro de 2006, acabou por aprovar a proposta da Comissão[27-28].

Resumidamente, podemos hoje afirmar que esta "suspensão parcial" das negociações acabou por permitir, tanto à UE como à Turquia, "ganhar tempo": para a União resolver a sua chamada crise política e institucional cujo "termo" se explicitou na assinatura do *Tratado de Lisboa* ("É uma vitória da Europa. Com este Tratado, estamos em condições de sair do impasse", exclamou o Primeiro-ministro português, José Sócrates); para a Turquia poder enfrentar o seu calendário eleitoral que se anunciava tenso e se revelou, depois, de grande complexidade política.

Com efeito, o ano de 2007 foi para a Turquia de grandes preocupações políticas internas: boicote dos partidos da oposição na Grande

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[27] Adesão de Chipre à União Europeia foi considerada sob o ponto de vista jurídico-político como englobando todo o território da ilha (protocolo n.º 10 do Tratado de Adesão de 2003), contudo a aplicação do 'acervo comunitário' ficou suspensa nas zonas 'cipriotas turcas' até se realizar a reunificação. Tal suspensão do acervo não se aplica aos direitos individuais dos cipriotas turcos, considerados cidadãos da República de Chipre e logo cidadãos da União Europeia.

[28] Citemos algumas das reflexões de Joschka Fischer, antigo Ministro dos Negócios Estrangeiros da Alemanha, sobre esta situação: «La Turquie a refusé d'ouvrir ses ports, ses aéroports et ses routes à la Republique de Chypre, alors qu'elle y est ténue par le protocole de Ankara. La Turquie justifie son refus par l'échec de l'Union européenne à respecter son engagement de développer les échanges commerciaux avec la partie nord de Chypre, régie par la Turquie. L'Union européenne s'y était engagée au Conseil européen en décembre 2003, puis officiellement au Conseil des ministres des Affaires étrangères en avril 2004, mais à ce jour, elle n'a toujours pas tenu ses promesses. C'est donc Ankara – et non l'Union européenne! – qui a raison sur ce point (...) Il serait profondément injuste et totalement déplacé que le rapport de la Commission européenne tienne la Turquie pour seul responsable du refus de faire des concessions à la partie grecque de l'île (désormais membre de l'Union) et qu'il se garde de blâmer le gouvernement de Nicosie véritablement à l'origine du blocage» in « La Turquie et l'Europe vont-elles droit à l'affrontement? », *Le Figaro* de 02.10.2006.

Acrescentemos, ainda, que, só em 27 de Fevereiro de 2006, o Conselho da União adopta o Regulamento (CE) n.º 389, que estabelece um instrumento de apoio financeiro para a promoção do desenvolvimento da comunidade cipriota turca. Concretizando, assim, uma decisão do Conselho, de 26 de Abril de 2004, após o referendo inconclusivo acerca da reunificação, constatando que "a comunidade cipriota turca exprimiu claramente a sua vontade de garantir o seu futuro no seio da União Europeia. Daí que o Conselho esteja determinado a pôr termo ao isolamento desta comunidade e a facilitar a reunificação de Chipre promovendo o desenvolvimento económico da comunidade cipriota turca".

Assembleia Nacional à eleição para Presidente da República de Abdullah Gul, membro do AKP e ministro dos Negócios Estrangeiros; boicote do Tribunal Constitucional a essa mesma eleição; ameaça de golpe de estado por parte do Chefe das Forças Armadas, General Buyukanit; adopção pelo Parlamento de uma reforma constitucional que modifica as instituições e prevê, especialmente, a realização de eleições legislativas de 4 em 4 anos, bem como a eleição de Presidente da República por sufrágio universal com um mandato de 5 anos renovável; boicote (veto político) do Presidente da República, Ahmet Sezer; convocação de eleições legislativas antecipadas (e dum referendo para aprovação da revisão constitucional) para o dia 22 de Julho de 2007... tendo, contudo, o AKP de Recep Erdogan conseguido gerir a crise e reforçado a sua legitimidade democrática.

Assim, o AKP vence as legislativas antecipadas com 47% dos votos expressos nas urnas, permitindo-lhe uma representação no Parlamento na ordem dos 61% e Abdullah Gul é eleito Presidente da República, em 28 de Agosto de 2007. O Partido da Justiça e do Desenvolvimento passa a dominar o Governo e o Parlamento, mas também a Presidência da República encarregada de os controlar, permitindo-lhe, em princípio, reforçar a dinâmica de abertura política pela via da "europeização" do regime kemalista. Tal legitimidade democrática será ainda acrescida pelo referendo de 21 de Outubro passado, através do qual 70% dos eleitores turcos ratificaram a reforma constitucional do AKP, em especial, as novas regras relativas à eleição do Presidente da República.

Mas, a estabilidade interna continua fortemente dependente das forças militares kemalistas, e das elites ortodoxas instaladas à sua sombra, que continuam a defender um laicismo autoritário e nacionalista e que oporão certamente ainda forte resistência à próxima reforma constitucional fundamental visando submeter o governo das forças armadas ao poder civil. E uma das vias para tentar enfraquecer e desacreditar internamente o AKP e o seu Primeiro-ministro Erdogan tem sido a "questão curda", que este último tem sabido gerir com grande ponderação[29] e que as últimas eleições legislativas antecipadas pareceram ter aberto uma porta ao permitir ao Partido da Sociedade Democrática (DTP) eleger 20 deputados curdos.

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[29] *Cf.* Emrullah Uslu, "Turkey's Kurdish problem: steps toward a solution", *Studies in Conflict & Terrorism*, n.º 30, 2007, p. 157 a 172.

Contudo, a partir dos finais de Setembro último assistiremos ao recrudescimento de acções terroristas do Partido dos Trabalhadores do Curdistão (PKK) nas zonas fronteiriças com o Iraque, provocando a morte a algumas dezenas de soldados turcos. Perante tal situação e desafio, Recep Erdogan não podia deixar de apoiar o reforço dos dispositivos de segurança e de propor ao Parlamento que aprovasse uma autorização para as forças armadas turcas intervirem no Curdistão iraquiano, algo que as chefias militares vinham reclamando há meses.

O certo é que, entre Outubro e Novembro de 2007, a "questão curda" da Turquia rapidamente se transformou numa questão internacional de grande gravidade para o Médio Oriente, na medida em que facilmente se podia transformar na abertura de uma nova frente de guerra no Iraque. No entanto, como é sabido, esta crise, e a própria intervenção militar turca no Curdistão iraquiano, tem vindo a ser gerida com grande equilíbrio, em certa medida inesperado, através de uma cooperação entre Erdogan e Talabani (actual presidente do Iraque) e Barzani (chefe do governo do Curdistão iraquiano), com o apoio muito atento dos EUA.

Trata-se, no entanto, de um "quebra-cabeças" (ou de uma "ratoeira", se preferirem) para Erdogan e para o processo de modernização política e económica do regime kemalista: por um lado, não será fácil, talvez mesmo impossível, resolver a questão do PKK através de uma invasão ou de incursões no Iraque, daí a necessidade de a Turquia se preparar para uma presença alerta e demorada das suas forças armadas no Curdistão; por outro, tal situação não pode ser o pretexto para os militares recuperarem o poder e o lugar que ocuparam até há uns anos atrás, num país que vive de maneira obsessiva a questão da sua integridade territorial.

E as negociações com vista à adesão à União Europeia?

Antes de tudo, teremos de constatar uma falta de sensibilidade, de compreensão e de solidariedade, por parte da maior parte dos governos dos Estados-membros, em relação aos graves problemas internos da Turquia; e, também, de lembrar que, a partir de meados de 2007, quem vai dirigir a guerrilha diplomática, no seio da União, contra a hipótese de adesão da Turquia, será o novo Presidente da República francesa, Nicolas Sarkozy.

Com efeito, as negociações serão retomadas, no dia 26 de Junho, sob a Presidência alemã. A Chanceler Ângela Merkel tinha proposto à Turquia e aos representantes dos Estados-membros a abertura de três novos capítulos. Mas, à última da hora, a França de Sarkozy opor-se-á

a abertura do capítulo relativo à "política económica e monetária", sabendo que nesta matéria a Turquia teria muito poucas dificuldades em provar estar em condições para adesão.

Sarkozy explicitará a sua posição, já como Presidente da República francesa, do modo seguinte: "Não me esconderei atrás da exigência de um referendo para recusar a entrada da Turquia na UE" porque "considero que há que inventar um papel à medida da Turquia, grande potência mediterrânica, grande potência da Ásia Menor"; daí que "a ideia segundo a qual a única maneira de estabilizar a Turquia é a adesão à União, me pareça muito arrogante, muito colonialista"[30-31]. Acrescentando que a questão da adesão da Turquia e a das fronteiras serão os temas principais da União a partir do Conselho Europeu de Dezembro de 2007, onde proporá a criação de um Grupo de Sábios ("grupo de reflexão independente") que elaborará um relatório sobre essas questões. Simultaneamente, vai falando sobre a necessidade da criação de uma "Union médeterranéenne" que incluiria a França e a Turquia, além de outros países europeus e do norte de África; projecto esse até hoje muito vago e que tem sido encarado com muita desconfiança, quer por parte dos seus parceiros europeus, quer por parte dos outros países membros da "parceria euro-mediterrânica"[32].

Assinalemos, também que todo este activismo de Sarkozy resulta, em grande medida, do facto de ele considerar que o *Tratado de Lisboa* "resolve a crise institucional, mas não resolve a crise moral e política

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[30] Tal ideia deveria ter sido afirmada em 1959 quando a Turquia solicitou a sua associação à CEE e seguramente não teria sido humilhante. Tal como disse HUBERT VÉDRINE, desse modo «les européens n'auraient pas eu, quarante ans plus tard, à invoquer des arguments contestables, culturels ou religieux, pour retarder l'heure de la vérité », *Le Monde*, 06.12.2002.

[31] *Le Monde* de 26.10.2007.

[32] Em primeira análise, parece tratar-se da constatação do falhanço da Parceria euro-mediterrânica (Processo de Barcelona, iniciado em 1995). Contudo, Sarkozy, ao propor a constituição de um espaço euro-mediterrânico mais reduzido (do lado europeu: França, Espanha, Itália, Grécia, Portugal, Chipre e Malta; e da margem sul do Mediterrâneo: os países do Magreb, Egipto, Turquia e, numa fase posterior, Líbano e Israel) e com uma forte dimensão político-institucional pretende, por um lado, configurar para a Turquia uma alternativa à adesão e, por outro, perante a perda de peso político da França nesta União a Vinte Sete, revitalizar a política externa francesa relativamente a espaços de protecção tradicional. Ao mesmo tempo, Sarkozy tenta contrabalançar, também, o empenho da Alemanha de A. Merkel em reforçar a Política de Vizinhança (PEV) com os países da Europa de Leste e do sul do Cáucaso ("Associação para a modernização").

da Europa (...) não define a Europa do futuro e não oferece razões para aqueles que deixaram de acreditar na Europa nela retomem confiança (...) como poderá a Europa ser independente, ter influência política no mundo, ser um factor de paz e de equilíbrio se não é capaz de assegurar a sua própria defesa"[33].

A Comissão, na sua comunicação de 6 de Novembro de 2007, constata que o último ano de negociações conheceu poucos progressos, adoptando, contudo, uma atitude de certa compreensão em relação à Turquia dado os problemas e as dinâmicas internas que teve (e tem) de enfrentar, mas insistindo na necessidade da realização de reformas fundamentais, em especial, nos domínios da organização política e das liberdades e direitos fundamentais da sociedade civil e das minorias étnicas e religiosas.

Entretanto, uma outra manifestação política da guerrilha de Sarkozy contra a adesão da Turquia terá lugar no Conselho de Assuntos Gerais, de 10 de Dezembro de 2007, que aprovou as conclusões sobre o alargamento, especialmente em relação à Turquia e à Croácia. A França exigirá, após negociações laboriosas só concluídas a nível ministerial, que, contrariamente às conclusões precedentes, a expressão "conferências de adesão" fosse substituída pela de "conferências intergovernamentais", para sublinhar que este tipo de negociação não garante, nem determina que a fase final seja a adesão à União.

Após esta *vitória semântica*, Sarkozy investe, logo a seguir, o Conselho Europeu de Bruxelas, de 14 de Dezembro último, que simbolicamente encerrou a Presidência portuguesa, com o seu projecto de constituição de um "Grupo de Sábios" para reflectir sobre os alargamentos e as fronteiras da EU, isto é, para encontrar uma forma "neutra" de afastar a hipótese de uma adesão da Turquia.

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[33] Discurso no Parlamento Europeu, em 13 de Novembro de 2007. Logo, para Sarkozy a construção europeia é fundamentalmente um projecto político que exige identidade, quer política, quer territorial, assente num quadro único de civilização que deverá assegurar a sua própria protecção contra forças externas que possam pôr em causa esse mesmo quadro ("Europa-potência"). Já para David Miliband (cf. Conferência no Colégio de Bruges, 15 de Novembro de 2007) a construção europeia é antes uma dinâmica ou dialéctica da diversidade na unidade que tende a "expandir estabilidade e democracia". Exemplo: a dinâmica dos alargamentos à Grécia, Portugal, Espanha e aos antigos países do bloco comunista ("Europe-model power of regional cooperation" *dixit* D. Miliband). Cf. Augusto Rogério Leitão "A crise existencial da União Europeia: entre revisões, alargamentos, fronteiras e o futuro", estudo a ser publicado no próximo n.º da revista *Estratégia*, do IEEI.

Tal objectivo, e então após a guerrilha semântica da França no Coreper e no Conselho, tornou-se de tal maneira evidente que obrigou os Chefes de Estado e de Governo tentar esvaziá-lo, afastando claramente a questão das fronteiras, dos alargamentos e da adesão da Turquia da agenda do "Grupo de Reflexão": "O Grupo conduzirá a sua reflexão no quadro definido no Tratado de Lisboa. Não discutirá, por conseguinte, questões institucionais. Tendo em conta a sua natureza de longo prazo, não deverá tão pouco a sua análise constituir uma avaliação das políticas em curso ou abordar o próximo quadro financeiro da União (...)". O Grupo terá como missão "identificar as grandes questões e evoluções que a União deverá enfrentar e analisar o modo de lhes dar resposta" tais como "o aumento da produtividade da UE, o desenvolvimento sustentável, a estabilidade mundial, as migrações, a energia e a protecção do clima, a criminalidade e o terrorismo internacionais (...)". E a única concessão a Sarkozy parece resultar do facto do Conselho Europeu ter aceite *in fine* que a reflexão tenha "em linha de conta os desenvolvimentos prováveis dentro e fora da Europa e analisar, em especial, o modo como a estabilidade e a prosperidade, tanto da União, como da região mais alargada, melhor poderão ser asseguradas a longo prazo"[34].

Será só após esta *mise en scène à la Sarkozy*, que os Vinte e Sete puderam decidir, no dia 19 de Dezembro último, ainda sob a presidência do Ministro dos Negócios Estrangeiros português, a abertura da nova fase das negociações com a Turquia em relação a dois novos capítulos, elevando-se, assim, para cinco as áreas em discussão desde o arranque formal das negociações, em Outubro de 2005, continuando, contudo, congelados os oitos capítulos relacionados com a União aduaneira.

Os desafios da adesão da Turquia

Se olharmos para um mapa da Europa constatamos que a União ainda apresenta certos espaços lacunares, muito especialmente: a Islândia

[34] Conclusões da Presidência, Conselho Europeu de Bruxelas, de 14 de Dezembro de 2007, p. 2 e 3. O Grupo de Reflexão será presidido por Filipe González, assistido por dois Vice-Presidentes, Vaira Vike-Freiberga e Jorma Ollila e os outros nove membros serão aprovados durante a Presidência francesa. O grupo apresentará o seu relatório à reunião do Conselho Europeu de Junho de 2010.

que prefere as suas pescas ao seio da União; a Noruega cujo povo já por duas vezes recusou a adesão; a Suíça que nem candidata a "candidata a candidato" pretende ser; e a parte da ex-Jugoslávia mais enferma, isto é, a Sérvia e Montenegro (com o Kosovo), a Macedónia e a Bósnia e Herzegovina, não esquecendo a paupérrima Albânia, desenham uma região onde a UE tem pela frente uma tarefa de reconstrução e de estabilização para durar uma, ou melhor, duas décadas!

Por outro lado, a adesão da Turquia reforçará as pressões, algumas, aliás, já existentes, mas actualmente um pouco diluídas[35], de um alargamento em direcção à planície russo-ucraniana e ao Mar Negro, regiões atravessadas pelo actual desafio geopolítico relativo à reorganização do continente europeu no seu todo: deverá manter-se a Europa partilhada em zonas de influência, tal como aconteceu durante a Guerra-fria, e como pretende o actual "imperialismo" de Poutine; ou deverá antes estabelecer-se o princípio da cooperação que pressupõe a independência e a igualdade entre os Estados? Daí as tensões e ambiguidades das relações entre a UE e a Rússia, uma vez que a via seguida pela UE assenta na segunda opção, expressa, muito especialmente, na sua nova Política de Vizinhança reforçada com a inclusão, em Junho de 2004, do Azerbeijão, da Arménia e da Geórgia[36].

Contudo, não podemos deixar de constatar que esta reorganização do continente europeu no seu todo tem vindo a ser realizada particularmente através dos alargamentos da NATO, já concretizados e a concretizar, cujos últimos traços foram decididos na cimeira da

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[35] De facto, a política de alargamento da UE está a perder a sua credibilidade, não só internamente, como o demonstra as divisões entre os Estados-membros acerca da adesão da Turquia, mas também externamente através das ambiguidades políticas que têm envolvido as negociações com esse país.

[36] Cf. Maria Raquel Freire e Licínia Simão, *The Armenian road to democracy: dimensions of a tortuous process*. Bruxelas: CEPS, Working Paper, n.º 267/May 2007. Citemos ainda Gaidz Minassian, *Caucase du Sud: la nouvelle guerre froide*. Paris, Éditions Autrement, 2007, p.172 : "De toutes les puissances en jeu, l'Union européenne est la seule à avoir en main la carte de la paix pour le Caucase du Sud. Au nom de valeurs communes, l'Europe peut rassurer les États-Unis. Au nom d'une histoire commune, elle peut tranquilliser la Russie (...) Le futur de la Grande Europe libre, démocratique et en paix, qui s'étendrait de l'Atlantique au Caucase, pourrait se jouer ici, en convoquant, pourquoi pas, une conférence internationale sur les problèmes régionaux à l'issue de laquelle un calendrier élaborerait un pacte de stabilité pour le Caucase de Sud. Labyrinthe de l'Histoire, **le Caucase du Sud deviendrait ainsi le laboratoire de la future Europe**" (sublinhado nosso).

Aliança Atlântica de Istambul, de 28 a 29 de Junho de 2004. Assim, entraram como membros da NATO a Eslovénia, a Bulgária, a Roménia, a Lituânia, a Letónia e a Estónia, ficando a Albânia, a Croácia e a Macedónia com o estatuto de "candidatos oficiais", porque integrados no plano de acção para adesão (MAP), tendo a Ucrânia e a Geórgia sido consideradas "potenciais candidatos"[37].

De qualquer modo, tem-se constado uma equivalência estrutural (e mesmo sistémica, na perspectiva da Administração americana que pugna por uma "aliança global das democracias") entre a dinâmica de alargamento da NATO ("uma espécie de bilhete de entrada na UE") e a dinâmica de alargamento da União Europeia. E os Estados, simultaneamente membros da União e da NATO, têm vindo a apoiar esta transformação de uma "aliança de defesa" numa "comunidade de segurança europeia", ou "aliança de segurança alargada", que se configura numa dimensão transeuropeia, na qual se procura envolver países que vão do Mediterrâneo até ao mar Cáspio[38].

Estratégia esta que é contestada pela Rússia de Poutine, umas vezes em voz alta, outras em surdina, e, actualmente, cada vez mais, através da sua afirmação de "potência energética", que recusa o cerco das suas fronteiras do Oeste e do Sul por um "cordão sanitário democrático" de inspiração transatlântica.

É evidente que a adesão da Turquia suscita outros grandes problemas e questões, para além dos de natureza geopolítica e estratégica,

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[37] Ronald Hatto e Odette Tomescu, *Les États-Unis et la "nouvelle Europe"*, Paris, Éditions Autrement, 2007, p. 123-124: "En réaction à la realpolitik de l'Europe occidentale et de la Russie, les États d'Europe centrale et orientale cherchent à s'en remettre à l'équilibre des puissances (*balance of power*) en invitant les États-Unis à jouer le role de balancier ou d'égalisateur entre l'UE et la Russie. Cela ressemble à une forme adoucie de l'ancien équilibre européen du XIX siècle. Cette région combine en fait les deux modèles chers aux analyses réalistes: le *balancing* et le *bandwagoning*. Pour équilibrer l'alliance UE-Russie qui se déploie au-dessus de leurs têtes, les États d'Europe centrale et orientale (plus particulièrement les pays Baltes, la Pologne et la Roumanie) cherchent à monter dans le train militaire tiré par la locomotive américaine (*to bandwagon*)".

[38] Atente-se também que a dinâmica de alargamento da NATO acaba por reforçar a dinâmica de uma nova "defesa europeia" e de uma nova "arquitectura" da segurança colectiva, no âmbito da qual a actual parceria UE-NATO e as suas cooperações já institucionalizadas, tendem a constituir o núcleo "epistémico" dessa nova "comunidade de segurança" cada vez mais alargada. Tese que temos vindo a defender desde Augusto Rogério Leitão, "Política Europeia de Segurança e Defesa: que futuro?", *Estratégia*, n.º 18 e 19, 2003, p. 335 a 346.

nomeadamente os graves problemas de natureza financeira com os quais a UE seria confrontada, mantendo-se o actual quadro financeiro da União, considerados por alguns investigadores insolúveis e os relativos ao equilíbrio da relação (balança) de poderes entre os Estados-membros no seio das Instituições da União.

Parece-nos, contudo, que o núcleo central desta problemática reveste *grosso modo* duas dimensões (-opção):

- a adesão da Turquia desencadearia necessariamente pressões e dinâmicas no sentido do alargamento da União à Europa de Leste e do Sudeste. Uma tal dinâmica de alargamento determinaria um processo de dissolução da "construção europeia", acabando por transformar a UE numa simples zona de comércio livre, assente numa estabilidade económica, social e política, servindo de alicerce à NATO alargada. Daí que Giscard d'Estaing afirme que os que defendem a adesão da Turquia "visam fragilizar o sistema de modo a que a integração europeia se torne numa zona de livre-câmbio comum à Europa e ao Médio Oriente. Ora isto é o fim do projecto da integração europeia". Mas será que uma União a 27, ou a 32, sem a Turquia, é ainda capaz de manter o "projecto da integração europeia", isto é, a UE enquanto projecto político?
- a outra dimensão (-opção) nega a tendência para o abismo, sublinhando, em primeiro plano, a especificidade das relações da integração europeia com a Turquia e, paralelamente, a dimensão geopolítica e estratégica de uma tal adesão, em especial, numa conjuntura de crise e instabilidades e de indefinições de geo-estratégias energéticas, quer no Médio Oriente, quer no Cáucaso e Ásia Central. E quanto às pressões no sentido de novos alargamentos, seriam contidas através da nova Política de Vizinhança[39].

De qualquer modo, será que a União quererá ou poderá decidir, no decurso dos próximos anos, isto é, antes do fim das negociações de adesão com a Turquia, que serão longas, se quer realmente afirmar-se

[39] Cf., entre outros, NATHANIEL COPSEY e ALAN MAYHEW (eds.), *European Neighbourhood Policy and Ukraine*, Brighton: ed. Sussex European Institute, 2005; LIEKIS SARUNAS e outros (eds.), *European Union and its new neighbourhood: different countries, common interests*. Vilnius: ed. Mykolas Romeris University, 2005.

como entidade geopolítica ou antes como simples espaço de paz e estabilidade aberto a muitos Estados, configurando-se, assim, numa organização internacional *sui generis* de vocação quase hemisférica?

Se decidir afirmar-se como entidade geopolítica, integrando a médio prazo a Turquia no seu seio, terá, antes de tudo, de adoptar uma política externa e de segurança credível e efectiva em relação ao Leste europeu, ao Cáucaso, ao Médio Oriente e à Ásia Central. Investindo, pois, e desde já, na sua nova Política de Vizinhança de modo a organizar a sua periferia que vai da Ucrânia ao Mediterrâneo, criando um espaço regional de estabilidade e desenvolvimento que teria necessariamente um impacto mundial[40].

E, sobretudo, num mundo que tende cada vez mais para uma configuração multipolar, a afirmação da União Europeia como entidade geopolítica (uma potência *sui generis*) permitiria, de acordo com a sua própria "natureza", reforçar a geometria multilateral dessa multipolaridade, que será necessariamente instável por que assente no princípio segundo o qual: "as mesmas regras para todos, embora nem todos os Estados possam ser iguais"[41].

Somos, assim, obrigados a constatar que actualmente, com as negociações para a adesão da Turquia, com a ajuda e intervenção nos Balcãs e os futuros alargamentos a esses países e com a Política de Vizinhança, mas também com os conflitos no Afeganistão e no Médio Oriente, mas não só, a UE é confrontada com desafios e problemas estratégicos e geopolíticos que só poderá enfrentar de maneira coerente e eficaz se se assumir e afirmar como "potência", de natureza *sui generis* certamente, mas sempre como actor internacional coerente e significante[42].

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[40] Fabricio Tassinari, op. cit., p.22 "Turkey's influence in Central Asia...there are two main regional constellations where Turkey's role is of great strategic importance for Europe. One is the Black Sea area. The Black Sea is becoming a major crossroads of threats and challenges for the enlarged EU. Turkey's role in the region is of central importance not only because the above-mentioned geo-economic interests deriving from transit of oil and gas, but also because of classical geopolitical reasons...The second regional constellation where Turkey's role can be of major strategic importance is of course in the broader Middle East. Turkey plays a major role in the diverse area spanning from the Eastern Mediterranean to Iraq and Iran".

[41] Ph. Moreau Defarges, em entrevista ao diário *Público*, de 13 de Dezembro de 2004.

[42] "The ambiguities surrounding the EU neighbourhood strategy are ultimately due to the fact that wider Europe concerns the conceptual, strategic and spatial limits of Europe", Fabricio Tassinari, op. cit., p. 31.

Se atentarmos bem, questões como o relacionamento com a Rússia, quer ao nível da energia, quer ao nível da segurança, como os conflitos, uns latentes, outros em ebulição, nos países da Vizinhança de Leste, cuja chave de solução continua a pertencer à Rússia, como a grave questão das redes e vias de transporte de energia que obriga a União a pensar politicamente nos países do Mar Negro e da Ásia Central e a adoptar, pelo menos retoricamente, uma "política externa da energia", como a estabilização económica e política dos países da bacia do Mediterrâneo, etc., "suscitam renovadas e pertinentes dúvidas sobre o papel da União Europeia na cena internacional"[43].

Conclusões

A adesão da Turquia é, pois, simultaneamente, um *atout* e um desafio estratégico (e diplomático) para a União Europeia.

Uma vantagem geoestratégica, entre outras razões, porque permitiria à UE quebrar o monopólio estratégico dos EUA no Cáucaso do sul, na Ásia Central e no Médio Oriente; de configurar, por isso, a sua relação com a Rússia de modo mais autónomo e coerente; de poder controlar as rotas da energia provenientes do mar Cáspio e do Golfo, assegurando os aprovisionamentos energéticos de muitos Estados-membros[44].

E desde logo, porque com a adesão da Roménia e da Bulgária a União Europeia estendeu as suas fronteiras até ao Mar Negro, espaço estratégico onde se concentram interesses e desafios muito importantes que subjazem, aliás, à relação entre a União e a Rússia[45]. Trata-se,

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[43] JORGE SAMPAIO, *A integração europeia de Portugal vinte anos depois*, Instituto de Defesa Nacional, 2006, p.9.

[44] Os Primeiros-ministros grego e turco, Karamanlis e Erdogan, inauguraram, em 18 de Novembro de 2007, o primeiro gasoduto ligando os dois países que transporta gás do Azerbeijão a partir do Mar Cáspio. Faz parte de um projecto designado *Southern European Gas Ring*, apoiado política e financeiramente pela União, que deverá prosseguir com a sua conexão à Itália através do Mar Adriático. A Turquia, além de ser um dos parceiros chave do projectado gasoduto Nabucco, também fortemente apoiado pela União, disporá, dentro de cinco anos, de uma das mais importantes redes de abastecimento de gás à UE.

[45] Cf. MARIA RAQUEL FREIRE "Parceria estratégica? Os desafios à Presidência da EU no reequacionamento das relações com a Rússia", *Relações Internacionais*, n.º 14, Junho de 2007, p. 109 e s.

com efeito, de uma zona que suscita questões e ameaças de grande relevância: expansão das normas democráticas; gestão de conflitos etno-territoriais[46]; estabilidade do sudeste europeu e do Cáucaso; configuração e gestão das futuras rotas do gás e do petróleo; migrações clandestinas; redes terroristas; tráfego de armas e de drogas, etc.

Ora, a União, até hoje, quer no âmbito da sua Política de Vizinhança, quer através do esboço duma política geoestratégica da energia, quer no quadro da sua relação de "parceria estratégica" com a Rússia, só tem projectado, fundamentalmente, fragilidades, incoerências, divisões internas e poucos meios operacionais. Não será, pois, só com a Roménia e a Bulgária como peões da frente, e sem a Turquia, que a União conseguirá adoptar uma política presidida por uma visão estratégica coerente e efectiva para esta zona de grandes tensões geopolíticas.

Mas a adesão da Turquia é também um desafio estratégico e diplomático para a União, que passaria a ter fronteiras com países como o Iraque, a Síria e o Irão. Sem contar com a eventual obrigação de ter de gerir a "questão curda", uma vez que a Turquia alberga uma importante comunidade do povo curdo disseminado ainda no Iraque e no Irão.

Independentemente, mas também em razão, das divergências existentes entre os Estados desta Europa cada vez mais alargada, acerca do que é e/ou deverá ser a União Europeia, sobretudo, como actor internacional, não podemos deixar de constatar que a União é, fundamentalmente, um espaço de paz, de desenvolvimento e de valores.

Assim, rejeitar a adesão da Turquia se esse Estado não respeitar ou não conseguir fazer respeitar os valores fundamentais (democracia; Estado de direito; direitos humanos; direito das minorias; liberdade de expressão; liberdade sindical...) é um dever da União e dos seus Estados-membros. Contudo, recusar a adesão por outras razões seria ilegítimo e politicamente com consequências graves, quer a nível interno, quer internacionalmente.

A adesão de uma Turquia democrática e respeitadora dos direitos fundamentais seria, sem dúvida alguma, no contexto internacional em que vivemos de "guerra e de confrontos entre civilizações", um dos maiores sucessos da política externa da União Europeia.

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[46] Os casos da Abacásia, Ossécia do Sul e Nagorno-Karabakh onde o papel da UE é fortemente marginal!

É evidente que a Turquia tem ainda um longo percurso de reformas a realizar, cujo trajecto interno está cheio de embustes, mas, por outro lado, tem também demonstrado estar na boa direcção, desde logo porque as recentes eleições e o referendo atestaram que a democracia funciona e que o poder político legítimo foi capaz de resolver graves crises político-instituicionais internas através dos procedimentos da democracia política.

Por outro lado, o novo governo de Erdogan, apesar das exigências de equilíbrio e de pragmatismo que a conjuntura interna lhe impõem, terá de imprimir um novo dinamismo ao processo de adesão. Mas esse dinamismo depende não só do apoio e da coesão da população turca, mas também do apoio da União Europeia, sobretudo no momento em que a Turquia tenta levar a cabo uma reforma constitucional crucial para a adesão e para a europeização do regime kemalista.

A União Europeia não pode continuar com a sua política de ambiguidades em relação à adesão da Turquia que é, não só um factor de erosão do alargamento como instrumento fundamental da sua política externa, mas também um factor de erosão da coesão interna da União.

CURRENT ISSUES IN EU-CHINA RELATIONS

por *José Luís de Sales Marques**

1. Introduction

Just days before China and EU leaders met for their 10th China-EU Summit, which took place in Beijing, on November 28th 2007, under the Portuguese rotating presidency, some articles appeared on the international media to underline the current difficulties over their bilateral relations, with enticing headlines such as Europe's "China honeymoon is over"[1]. This moody feeling, which was replicated in the West by many other headlines of pre-summit news and related comments, found its roots in remarks by the Commission that Europe was selling less to China than to Switzerland; claims that the EU deficit with China was rising 17 million euros by the hour; calls for China to revaluate its currency; the public rows over the quality of some Chinese exports to Europe; all adding up, to the impression that pre-summit irritations were build-up of something important, maybe some concession Europe wanted to get from China.

The Chinese media, though somewhat optimistic, hinting leaders from both sides would be seeking ways to make progress in the negotiations of the new partnership and cooperation agreement (PCA), targeted for replacing the outdated 1985 Trade and Economic Cooperation Agreement, also voiced concerns about EU's lack of firmness in condemning the former president of Taiwan over his plans of launching a referendum on his claim for a seat in the United Nations, for which is an integral part of China.

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* President of the Institute of European Studies of Macau, Economist.

[1] DAVID SHAMBAUGH, *The "China Honeymoon" is over*, International Herald Tribune, electronic media, Monday, November 26, 2007, accessed on 30/11/2007.

The actual discussions at the Summit, which according to immediate post-summit declarations just covered few topics, meant leaders only had time to agree upon some pressing political issues, leaving the polishing of the remaining points featured in the usually long "joint communiqué" to their staff and advisers. Nothing really worth mentioning, except for the setting up of a new dialogue mechanism, seemingly proposed by the Chinese side, named High Level Mechanism for the management of economic and trade relations. At the end of the Summit, Barroso went back to Europe with this new arrangement, similar to the one China runs with the United States of America, and China listened to Socrates condemning Taiwan's referendum and reaffirming the one China principle. Maybe it was just too little for a Summit, considering there were very important issues pending further clarification, namely the content of the Comprehensive Strategic Partnership, Europe and China decided to proclaim in 2003. Alternatively, perhaps not, since Mr. Barroso and eight other Commissioners went back to Beijing last April for talks with their Chinese counterparts, under the abovementioned framework where "useful progress" [2] was made.

In the meantime, unfortunate events happened in China, raising the political divergences between China and, at least, some European counterparts, to worrying levels. I am referring to the serious unrest in Tibet, the criticism of some European leaders and institutions, such as the European Parliament, to the Chinese handling of those events and the subsequent demonstrations in several European capitals during the Olympic torch relay. As a consequence, some European leaders called for the boycott of the opening of the Olympic Games in Beijing, the Dalai Lama enjoyed wide spread publicity and the attention of some high level officials, Mr. Gordon Brown, for instance, and the anti-China groups in Europe more room than ever.

The shocking news of the earthquake in Sichuan, claiming tens of thousands of lives and leaving others trapped or disappeared, not to mention the material losses; and, the dignified and efficient handling of the post-disaster traumas by the Chinese leadership silenced the bashing for some time.

The purpose of this article is to evaluate the impact of recent events in overall China-EU relations, taking the long view and not

[2] Remarks by President Barroso during joint press interview with premier Wen Jia Bao, Beijing 25/4/2008.

responding in a rush to changing perceptions. We will try also to incorporate in our analysis other viewpoints, namely from European, Chinese and American commentators.

2. Building meaningful relations[3]

EU and China established diplomatic relations in 1975, in the context of bipolarity and with mix concerns and expectations. Europe was worried about Japan making inroads towards the Chinese market, the home of more than one billion potential consumers. Every year passed was a year lost in the access to such a huge market. On the other hand, China still living, at least formally, under the Cultural Revolution, and in the last years of Mao and Zhou En Lai, wanted European technology to develop its four modernization program. It also wished for a stronger Europe, more independent from US and resistant to the URSS, as part of the "second world".

For many years Europe's attitude was to make the most out of the economic opportunities offered by the Chinese process of reform and opening up, initiated by Deng Xiao Ping in 1978. Beside trade, European FDI started to call on China. However, by the end of the 80's Europe was losing position in the Chinese market in every front, incapable to compete against established Japanese interest and growing American presence. The structural trade deficit EU is now facing with China, approximately Euro 170 billion in 2007, started around 1988 and never recovered. The market-driven relation was abruptly interrupted by the June 4th Tiananmen incident, which took the world by surprise. In the Madrid declaration, issued a few weeks later, in June 27th 1989, the European leaders called for sanctions against China, including the suspension in the sales of arms, or the so-called "arms embargo".

In the course of the two following years all sanctions where lifted with the exception of the arms embargo. Bilateral political contacts at the highest level, between Brussels and Beijing, were fully resumed by September 1992.

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[3] For a comprehensive account of EU-China relations see José Luis de Sales Marques, *EU-China Relations and the eastward challenge*, Temas de Integração, 2nd semester 2005, n. 20, Almeidina, Coimbra, 2005.

World politics went through unexpected as well as radical changes with the fall of the Berlin Wall, the end of the Soviet Empire and the invasion of Kuwait by Iraq. China's no voting position at the United Nations Security Council allowing Operation Desert Storm to go ahead with legitimacy and full international support, was well appreciated by western powers, including those from Europe. On the other hand the 14th Congress of the Chinese Communist Party approved, in October 1992, the formula "socialist market economy", as the way ahead for China's further development. The world was reassured that market reform and opening-up would continue its course fro many years to come.

In the mean time, Europe was adopting the Maastricht Treaty, in force since January 1993, building up political union, institutionalizing the three pillars architecture and defining the conditions and timing for monetary union. EC was now EU. As a result of those changes, the second pillar, dedicated to foreign and securities policies, a pure intergovernmental turf, had room for new initiatives. A new set of policy papers submitted by the Commission to the Council regarding aspects of external relations/ foreign policy were produced. They addressed, beside economic considerations, regional security concerns and called for political dialogue. The document on the "New Asia Strategy", draw guidelines for EU to improve relations with the region and advocated inter-regional dialogue. The Asia-Europe Meeting process, first meeting in Bangkok in 1996 is partly a result of this strategy, notwithstanding the importance that must be recognized to ASEAN.

China was the subject of the Commission Communication "A long term policy for Europe-China relations", released in 1995, based on the principle of "constructive engagement and cooperation". The new strategy called for stronger political ties between EU and China, encouraged her to become fully integrated in the international community and promised to contribute to reforms in the country. Significant developments happened in the scope of cooperation projects, their dimension and the upgrading of political dialogue with the annual EU-China Summit, the first one taking place in London in 1998. Over the following years new communications were issued: "Building a comprehensive partnership with China" – 1998 which established the basic five points around which to build up the relations[4], followed by "EU's

[4] (1) Engaging China further, trough and upgraded political dialogue, in the international community; (2) Supporting China's transition to an open society based upon the rule of law and the respect fro human rights; (3) Integrating China further

strategy towards China: Implementation of the 1998 Communication and Future steps for a more effective EU Policy" – 2001; "A maturing partnership: shared interest and challenges in EU-China relations" – 2003.

In the meantime, China released its first policy paper on EU in October 13th 2003, the same day the Commission' "A maturing partnership" was adopted by the European Council. It was a response underlining both sides commitment to multilateralism, United Nations reform and shared concern towards a wide range of international issues, from fighting terrorism to global warming. The Iraq invasion, which China opposed and overall American unilateralism called for closer relations with EU. If there was a honeymoon, as quoted, then the wedding took place in late 2003. China-EU relations were beginning a new era of "Comprehensive Strategic Partnership". Chris Patten, EU Commissioner for External Relations from 1999 to 2004, recognizes in his book[5] Not quite the Diplomat,

> *I was lucky to be dealing with China at a time when Europe's relationship with her was developing strongly. This partly reflected the fact that continuing European integration – the launch of the single currency, the broadening of the single market, enlargement – fitted into China's world view, in which there are several poles of influence not simply one hegemon....*

But, the European household soon enlarged to the new eastern members, bringing in political perceptions of China which are rather more critical of its human rights record and attentive to transatlantic arguments. Moreover, a substantial part of Europe was having poor economic performances, astonished by the effects of globalization and market liberalization, namely with WTO's ending the quota system in 2005. Those performances translated into unemployment, social unrest and political tension. The manufacturing economies of Europe, namely the ones in the Southern flank, as well as those attracting the bulk of migrant workers saw, all in a sudden, the upsurge of migrant workers from the troubled Mediterranean, newcomers from the east and the cheap imports from China taking away their jobs and menacing their

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in the world economy by bringing it more fully into the world trading system and by supporting the process of economic and social reform underway in the country, including in the context of sustainable development; (4) Making better use of existing European resources; (5) Raising the EU's profile in China.

[5] Chris Patten, *Not quite the diplomat*, Penguin Books, London 2006, p. 278.

economic survival. The failure of approval of the EU Constitutional Treaty in France and the Netherlands, street demonstration in several European cities, the rise of populist discourse and political changes in France and Germany, all happened during this period. The so-called "bras-war" in 2005, when big influx of Chinese clothing order from European retailers for Christmas triggered a trade crisis, was typical of the European problems and the temptation of protectionism.

In such political and emotional surroundings, China blaming in Europe became more frequent, extending beyond the political circles to trade unions and the public opinion.

From the other side, Chinese leaders cannot forget the promises of Schroeder and Chirac in 2004[6], of lifting the embargo on arms sale, imposed on China since 1989, as a result of the Tiananmen incidents. The political window of opportunity for such a move, if there was any, soon vanished. American opposition, internal reactions of some member countries and China's approval of the Anti Secession Law, approved by the National People's Congress to discouraged Taiwan's moves towards declaration of independence, soon make it too difficult to handle. Hope turned into frustration.

This climate was also unfavorable for the granting to China of the Market Economy Status, something the Chinese has been pursuing for some years. Australia, New Zealand, Brazil and a host of over 50 countries, has already recognized this status for China's economy, but neither EU nor the US has done so. China argues that its current status of a "non-trading economy" is obsolete placing her in a disadvantaged position when arguing against anti-dumping cases. Moreover, China can hardly accept that Market Economy Status was given to Russia, which is a notable non-WTO member has not went through the market reforms China did, and where economy is controlled by an oligarchy.

The EU 2006 communication "Closer partners, growing responsibilities" was quite different from all previous ones. Whereas, policy proposals of the previous communications were based on the need to help China's reform and integration into the international community, carrying a underlined assumption of China as a developing country,

[6] Responding to Chinese calls for the lifting of the embargo, the 12-13/12/2003 European Council, under the Italian presidency, " invites the General Affairs Council to re-examine the question of the embargo..." and the European Council of 13/12/2004 confirms the political will to work towards the lifting of the arms embargo". Subsequent declarations by the Council and Commission followed similar directions.

the current one focusing on economic issues, particularly those related with trade and investment, "demands" reciprocity from China open--markets, because the "benefits of engagement must be fully realized". China and Europe are assumed to be equal partners, with symmetrical responsibilities. This approach is fully explained in an "attachment" to the original communication, dedicated only to trade and investment. Within certain circles, namely academic gatherings, and political commentators, there was a feeling that the latest EU communication sounded less European and more American in style and content.

Up to this point, it is fair to ask if China's assessment of Europe that "there is no fundamental conflict of interest between China and EU and neither poses a threat to the other" (China's EU Policy Paper, 2003) is reciprocated by European political leaders, academics, media, businessmen and public opinion. Albeit EU's Commission has a clear position that China's rise poses challenges and opportunities[7], not threats, from the recollection of various sources, we can only say that the European public opinion have not yet come to a definite conclusion! Mr. Barroso's following remarks[8], last November, at the Chinese Communist Party Central School, are self explanatory,

> *For my part, I want to make things in a way that European citizens view China positively and in no way as a threat...We need to keep public opinion on both sides favourable to the further deepening of our cooperation. But the considerable and growing trade deficit is adding EU citizens' anxiety about globalization, and in growing political importance. Indeed there is a risk that the economic emergence of China is seen by Europeans as a threat.*

What is the meaning of such worries? Which EU's interest could be threatened by China in East Asia and other parts of the world? Leaving the traditional security threat aside, which is groundless, it would leave European economic interest as the other only possibility. But which interest are those that worries the European public? The European's African policy? Energy security? Other non-traditional security aspects? In those and other areas, China and Europe approaches favors cooperation over competition in finding solutions to overreaching world problems.

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[7] The 2006 Communication.

[8] José Manuel Barroso, *The EU and China: shaping the future together*, SPEECH/07/759.

3. Sino-European convergences and divergences

1. Economic and trade relations – Notwithstanding all current differences, China-EU relations are bonded together by economic interdependence and mutual sensitivity to changes in each other's economic environment. EU is China's first trading partner and China is EU's second international trade partner, totaling 254 billion Euros in 2006[9]. Breaking the relation in impossible in today's context, damaging it beyond repair is irrational. China is a success story of globalization, Europe also benefited from it, but was not so astute in managing it. The problems European economies are facing such as lack of competitiveness, outsourcing, low productivity, are interlocked and have been diagnosed by EU itself and are supposed to be tackled by the implementation of the Lisbon Strategy. They are the result of globalization and would surge, with or without China in her current role of factory of the world.

Europe is China's main provider of advanced technologies, one of the major foreign investors and European companies established in China accounts for a great deal of Chinese exports into Europe. Europeans are crying for more access to the Chinese market, namely financial markets. With the High Level Economic and Trade Mechanism, there is one more stage where the two parties will be able to communicate openly and explain their own weaknesses and constrains to the other. Europe needs to create jobs for its unemployed; China needs to keep them and to create even more because of the million of newcomers to the urban economy. Both sides need to solve their internal problems pertaining to sustainable development, fostering economic growth without further polluting and damaging their frail environments. The way forward require Europe's and China to continue structural adjustments to their economy and economic governance. For reasons that are evident, Chinese scholars are closely monitoring how EU's is implementing the Lisbon strategy and developing its social model. China's interest in the European experience is genuine, because notwithstanding major differences, both realities covers large territories, with disparities in regional incomes, cultural diversity within the populations and the need to further integrate their internal market.

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[9] EU delegation in Beijing, http://www.delchn.ec.europa.eu/euch_Trad_rala1.htm, access 29/5/2008.

There are lessons to learn from both sides and bearing in mind the underlying asymmetry in the development levels of the European and Chinese economies, China and Europe should develop very fruitful dialogues, with results, on issues regarding sustainable development. Trade issues are also economic and development issues, which is why I think they should be frame in a different perspective, from the current trade centered approach in EU's economic diplomacy.

2. Political relations – What is actually determinant in the future EU-China relations is the fundamental assumption that neither EU nor China poses a threat to each other, except in the minds of ill informed. They are not strategic competitors. They share long term views about world governance in favor of effective multilateralism, the reform of the United Nations system, rejecting unilateral approaches and the illegal use of force. It might be argued that China's idea of the international system is rather different from that of Europe, with more emphasis on realism rather than the current institutional-liberal approach of the EU. However, the two discourses are actually becoming closer.

EU had the wisdom to understand that none of the major world problems will be solved without China. Partly, because China is home to almost 20% of the world population with its 1.3 billion inhabitants, which by itself would confirm that assessment. But, there is more, in the sense that China is not a passive actor in the international arena but is becoming increasingly a positive contributor to world stability, in the traditional and non-traditional security issues. China is contributing, for instance, to ameliorate the livelihood of many non-Chinese in Asia and Africa.

Therefore, ongoing EU-China dialogues and new initiatives covering pressing world issues such as development of Africa, energy prices, food prices, raw materials, financial turmoil, exchange rate fluctuations, macroeconomic imbalances, sustainable development, international security, prevention of pandemic diseases, to name a few, are extending the scope of the partnership to new areas and building a multi-dimensional, multi-level relations.

China and EU are currently cooperating in 120 assistance projects and holding 48 sectoral dialogues in several areas which are of mutual significance. Cooperation in the Galileo satellite navigation programme is amongst the most significant in technological terms. The same could be said of the ITER project – for research and development of fusion

energy – in which China is also a partner in the international consortium where EU is also a member.

Those are facts proving that trade and political tensions, which called the attention of the media, commentators and the academic community, calling it the end of the "honeymoon", must be confronted with the complexity of the existing relations. It does not mean that they should not be dealt with, on the contrary. They are reality calls. Eventually there was no honeymoon, because the wedding never took place, first. There are, still, huge deficits, on both sides of the partnership in mutual knowledge and trust and very ineffective communications. As a wise commentator said recently, EU-China relations must overcome the limits of institutional/official dialogues to a wider, broader based public, because, at crucial moments, they are the ones that can provide the sustainability and good will to surpass eventual difficulties.

It also means that the proclaimed "comprehensive strategic partnership" much be filled with contents. Which are or should be the contents of such a partnership? It would only be meaningful to EU, China and the world if it manages to contribute to two crucial dimensions:

- A more just, safe and democratic international system in a better world;
- To sustainable and people's first development in EU and China as well.

In concluding this short essay on EU-China relations, I would say that the road is long, but the fruits rewarding.

JURISPRUDÊNCIA CRÍTICA

THE EU AND THE RULE OF LAW: ADVOCATE-GENERAL POIARES MADURO IN THE *YUSUF AND AL BARAKAAT INTERNATIONAL FOUNDATION V COUNCIL AND COMMISSION* CASE (C-415/05 P)»

por *Miguel Gorjão-Henriques**

«**1.** The appellant in the present proceedings has been designated by the Sanctions Committee of the United Nations Security Council as an entity suspected of supporting terrorism, of which the funds and other financial resources are to be frozen. Before the Court of First Instance, the appellant challenged the lawfulness of the regulation by which the Council has implemented the freezing order in the Community. The appellant argued – unsuccessfully – that the Community lacked competence to adopt that regulation, that the regulation was adopted in contravention of Article 249 EC, and, moreover, that the regulation breached the appellant's fundamental rights. On what are essentially the same grounds, the appellant now asks the Court of Justice to set aside the judgment of the Court of First Instance. The Council and the Commission disagree with the appellant on all three counts. Most importantly, however, they contend that the regulation is necessary for the implementation of binding Security Council resolutions, and, accordingly, that the Community Courts should not assess its conformity with fundamental rights. Essentially they argue that, when the Security Council has spoken, the Court must remain silent.

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I – Background to the appeal

2. Al Barakaat International Foundation ('the appellant') is established at Spånga (Sweden). On 12 November 2001, the appellant was included in the list in Annex I to Regulation No 467/2001 as an entity suspected of supporting terrorism.[1] As a consequence, the appellant's funds and other financial resources in the Community were to be frozen. On 27 May 2002, that regulation was repealed and replaced by Council Regulation (EC) No 881/2002 ('the contested regulation').[2] However, the appellant continued to be listed – in Annex I to the contested regulation – as an entity suspected of supporting terrorism whose funds were to be frozen.

3. The contested regulation was adopted on the basis of Articles 60 EC, 301 EC and 308 EC in order to give effect, within the Community, to Council Common Position 2002/402/CFSP.[3] That Common Position, in turn, reflected Resolutions 1267(1999),[4] 1333(2000)[5] and 1390(2002)[6] of the United Nations Security Council. Considering that the suppression of international terrorism is essential for the maintenance of international peace and security, the Security Council adopted those resolutions under Chapter VII of the UN Charter.

4. The resolutions provide, inter alia, that all States are to take measures to freeze the funds and other financial assets of individuals

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[1] Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1). The appellant's name was added by Commission Regulation (EC) No 2062/2001 of 19 October 2001, amending, for the third time, Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25).

[2] Imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9).

[3] Concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). See, in particular, Article 3 and the ninth recital in the Preamble.

[4] S/RES/1267(1999) of 15 October 1999.

[5] S/RES/1333(2000) of 19 December 2000.

[6] S/RES/1390(2002) of 16 January 2002.

and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, as designated by a committee of the Security Council composed of all its members ('the Sanctions Committee'). On 8 March 2001, the Sanctions Committee published a first consolidated list of the persons and entities that were to be subjected to the freezing of funds. That list has since been amended and supplemented several times. The name of the appellant was added to the list by the Sanctions Committee on 9 November 2001.

5. On 20 December 2002, the Security Council adopted Resolution 1452(2002), intended to facilitate the implementation of counter-terrorism measures. That resolution provides for a number of exceptions to the freezing of funds imposed by Resolutions 1267(1999), 1333(2000) and 1390(2002) that may be granted by the States on humanitarian grounds, on condition that the Sanctions Committee has been notified and has not objected or, in some cases, has given its consent. In addition, on 17 January 2003, the Security Council adopted Resolution 1455(2003), intended to improve the implementation of the measures for the freezing of funds.

6. In the light of those resolutions, the Council adopted Common Position 2003/140/CFSP[7] in order to provide for the exceptions permitted by the Security Council. In addition, on 27 March 2003, the Council amended the contested regulation as regards exceptions to the freezing of funds and economic resources.[8]

7. The contested regulation, as amended, provides in Article 2 that 'all funds and other financial resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen'. Article 2a provides for certain exceptions, for instance as regards reasonable legal fees, on condition that the Sanctions Committee has been notified and has not objected.

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[7] Concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62).

[8] Council Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1).

8. By application lodged on 10 December 2001, the appellant, together with Messrs Abdirisak Aden, Abdulaziz Ali and Ahmed Yusuf, brought an action before the Court of First Instance against the Council and the Commission, claiming inter alia that that Court should annul Regulations Nos 2062/2001 and 467/2001. The United Kingdom was given leave to intervene in support of the defendants. Following the repeal of Regulation No 467/2001, the Court of First Instance decided to treat the case as an action for annulment of the contested regulation directed against the Council alone, supported by the Commission and the United Kingdom. While the proceedings before the Court of First Instance were still pending, the Sanctions Committee decided to remove the persons known as 'Abdi Abdulaziz Ali' and 'Abdirisak Aden' from the list of persons to whom and groups and entities to which the freezing of funds and other economic resources must apply. These names were subsequently removed from Annex I to the contested regulation. Messrs Abdirisak Aden and Adbulaziz Ali informed the Court of First Instance that they wished to discontinue their action. The names of those two applicants were accordingly removed from the register.

9. Before the Court of First Instance, Al Barakaat International Foundation and Mr Yusuf put forward three grounds of annulment: the first alleged that the Council was incompetent to adopt the contested regulation, the second alleged infringement of Article 249 EC and the third alleged breach of their fundamental rights. By judgment of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* ('the judgment under appeal'),[9] the Court of First Instance upheld the contested regulation. On 21 November 2005, the appellant and Mr Yusuf brought the present appeal against the judgment of the Court of First Instance. While the appeal proceedings before this Court were still pending, the Sanctions Committee decided to remove Mr Yusuf from the list of persons to whom and groups and entities to which the freezing of funds and other economic resources must apply. His name was subsequently removed from Annex I to the contested regulation. Mr Yusuf informed this Court that he wished to discontinue his action and his name was accordingly removed from the register. Apart from Al Barakaat Inter-

[9] [2005] ECR II-3533.

national Foundation, the parties to the present appeal proceedings are the Council, the Commission and the United Kingdom, as well as Spain, France and the Netherlands, as interveners in the appeal. For the sake of brevity I shall refer, on occasion, to the Council, the Commission and the United Kingdom as 'the respondents'.

10. The appellant raises three pleas in law in support of its application to have the judgment under appeal set aside. Those pleas relate, firstly, to the legal basis of the contested regulation. The second plea is based on Article 249 EC and relates to the choice of an act in the form of a regulation, rather than a decision, as the legal instrument for the purpose of freezing the appellant's assets. The third plea concerns the fundamental rights of the appellant. I shall turn, first, to the question of the legal basis.

II – The legal basis of the contested regulation

11. The appellant's first plea relates to the legal basis of the contested regulation. The judgment under appeal devotes considerable attention to this issue. Upon consideration of various alternatives, the Court of First Instance concluded that the combined effect of Articles 60 EC, 301 EC and 308 EC gave the Community power to adopt the contested regulation.[10] The appellant argues that this finding is mistaken in law and maintains that the Community lacked competence altogether to adopt the contested regulation. Though relying on slightly different justifications, both the Council and the United Kingdom agree with the Court of First Instance that the contested regulation finds its legal basis in Articles 60 EC, 301 EC and 308 EC. The Commission, however, takes a different view and concludes that Articles 60 EC and 301 EC alone would have provided a sufficient legal basis.

12. I agree with that argument. The Court of First Instance considered that the powers to impose economic and financial sanctions provided for by Articles 60 EC and 301 EC, namely, the interruption or reduction of economic relations with one or more third countries, do not cover the interruption or reduction of economic relations with

[10] Paragraphs 107 to 171 of the judgment under appeal.

individuals within those countries, but only with their governing regimes. That view is difficult to reconcile with the wording and the purpose of those provisions. Article 301 EC authorizes the Council to '*interrupt or to reduce ... economic relations with one or more third countries*' through unspecified '*urgent measures*' that are necessary to carry out the Union's Common Foreign and Security Policy ('CFSP'). As such, Article 301 EC is fundamentally concerned with the objectives of these measures, namely the objectives of the CFSP, to be achieved by affecting the Community's economic relations with third countries. Article 60(1) EC authorizes the Council to take such measures with respect to the 'movement of capital and on payments as regards the third countries concerned'. It therefore indicates the means for carrying out the objectives stated earlier; those means involve restricting the flow of funds into and out of the Community. Beyond these two provisions, the EC Treaty does not regulate what shape the measures should take, or who should be the target or bear the burden of the measures. Rather, the only requirement is that the measures 'interrupt or reduce' economic relations, with third countries, in the area of movement of capital or payments.

13. The financial sanctions in the contested regulation meet that requirement: they are targeted predominantly at individuals and groups within third countries. By affecting economic relations with entities within a given country, the sanctions necessarily affect the overall state of economic relations between the Community and that country. Economic relations with individuals and groups from within a third country are part of economic relations with that country; targeting the former necessarily affects the latter. To exclude economic relations with individuals or groups from the ambit of '*economic relations with ... third countries*' would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders.

14. Moreover, the Court of First Instance's restrictive reading of Article 301 EC deprives this provision of much of its practical use. Within the framework of the CFSP, the Union may decide, for reasons relating to the maintenance of international peace and security, to impose economic and financial sanctions against non-State actors who

are situated in third countries. I fail to see why Article 301 EC should be interpreted more narrowly. As the Court of First Instance itself recognized, '*the Union and its Community pillar are not to be prevented from adapting to* [threats to international peace and security] *by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities developing international terrorist activity or in any other way striking a blow at international peace and security*'.[11]

15. The Court of First Instance found that Article 308 EC had to be brought into play in order to impose financial sanctions on individuals who do not exercise government control. However, the reliance on the notion of government control as a distinguishing factor highlights an underlying tension in the reasoning of the Court of First Instance. The Court of First Instance construed Article 308 EC as a 'bridge' between the CFSP and the Community pillar. However, while Article 301 EC might be seen as a cross-pillar bridge, Article 308 EC surely cannot fulfil that function. Article 308 EC, like Article 60(1) EC, is strictly an enabling provision: it provides the means, but not the objective. Even though it refers to 'objectives of the Community', these objectives are exogenous to Article 308 EC; they cannot be introduced by Article 308 EC itself. Hence, if one excludes the interruption of economic relations with non-State actors from the realm of acceptable means to achieve the objectives permitted by Article 301 EC, one cannot use Article 308 EC to bring those means back in. Either a measure directed against non-State actors fits the objectives of the CFSP which the Community can pursue by virtue of Article 301 EC, or, if it does not, then Article 308 EC is of no help.

16. My conclusion, therefore, is that the judgment of the Court of First Instance is vitiated by an error in law. If the Court were to follow my analysis concerning the legal basis it would have enough ground to set aside the judgment under appeal. It is for that reason that I shall not address the appellant's second plea in law. However, I believe that, where pleas are raised concerning alleged breaches of fundamental rights, it is preferable for the Court to make use of the possibility of reviewing those pleas as well, both for reasons of legal

[11] Paragraph 169 of the judgment under appeal.

certainty and in order to prevent a possible breach of fundamental rights from subsisting in the Community legal order, albeit by virtue of a measure that merely has a different form or legal basis. I shall accordingly proceed to assess the appellant's third plea in law.

III – The jurisdiction of the Community Courts to determine whether the contested regulation breaches fundamental rights

17. In the proceedings before the Court of First Instance, the appellant claimed that the contested regulation breached the right to a fair hearing, the right to respect for property, and the right to effective judicial review.[12] However, before assessing the substance of these claims, the Court of First Instance examined the scope of its own jurisdiction to assess the conformity of the contested regulation with fundamental rights.[13] In order to ascertain the appropriate scope of judicial review, the Court of First Instance considered the relationship between the Community legal order and the legal order established under the UN Charter. The reasoning of the Court of First Instance is extensive and sophisticated, but may be summarised as follows.

18. First, the Court of First Instance identified what essentially amounts to a rule of primacy, flowing from the EC Treaty, according to which Security Council resolutions adopted under Chapter VII of the UN Charter prevail over rules of Community law. The Court of First Instance essentially found that Community law recognises and accepts that, in keeping with Article 103 of the UN Charter, Security Council resolutions take precedence over the Treaty.[14] Secondly, the Court of First Instance held that, in consequence, it had no authority

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[12] Paragraph 190 et seq. of the judgment under appeal.

[13] In paragraphs 226 to 283 of the judgment under appeal.

[14] Article 103 of the UN Charter provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' It is generally recognised that this obligation extends to binding Security Council decisions. See the Order of 14 April 1992 of the International Court of Justice in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at paragraph 39.

to review, even indirectly, Security Council resolutions in order to assess their conformity with fundamental rights as protected by the Community legal order. It observed that the Security Council resolutions at issue left no margin of discretion and, therefore, that it could not assess the contested regulation without engaging in such indirect review. None the less, the Court of First Instance considered, thirdly, that it was empowered to review the Security Council resolutions at issue in order to assess their conformity with the protection of fundamental rights, in so far as those rights formed part of the principle of jus cogens.

19. By its third plea, the appellant argues that the Court of First Instance applied the wrong standard of review when assessing the alleged breaches of fundamental rights. The appellant maintains that the application of the appropriate standard of review would have resulted, in particular, in a finding of a breach of the right to a fair hearing and of the right to effective judicial review. The appellant points out that the Court of First Instance did not take any view as to the conformity of the contested regulation with fundamental rights as they result from the general principles of Community law. Instead, the Court of First Instance confined its analysis to the question whether the Security Council resolutions which the contested regulation seeks to implement were in conformity with principles of *jus cogens*.[15] According to the appellant, there is no basis in Community law for restricting judicial control in respect of the contested regulation in this way.

20. Essentially, the argument raised by the appellant is that the Court of First Instance embraced a mistaken view of its own judicial powers, because it mischaracterised the relationship between the international legal order and the Community legal order. This brings us to the question of how the relationship between the international legal order and the Community legal order must be described.

21. The logical starting point of our discussion should, of course, be the landmark ruling in *Van Gend en Loos*, in which the Court affirmed the autonomy of the Community legal order.[16] The Court

[15] See paragraphs 286 to 346 of the judgment under appeal.

[16] Case 26/62 *Van Gend en Loos* [1963] ECR 1, at p. 12.

held that the Treaty is not merely an agreement between States, but an agreement between the peoples of Europe. It considered that the Treaty had established a *'new legal order'*, beholden to, but distinct from the existing legal order of public international law. In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the 'basic constitutional charter'.[17]

22. This does not mean, however, that the Community's municipal legal order and the international legal order pass by each other like ships in the night. On the contrary, the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments.[18] The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.[19]

23. Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law. The case-law provides a number of examples. There are cases in which the Court has barred an international agreement from having effect within the Community legal order on the ground that the agreement was concluded on the wrong legal basis. The Court did so, recently, in *Parliament v Council and Commission*.[20] The Court's approach is easy to understand once one realises that it would have 'fundamental institutional implications for the Community and for the Member States'[21] if an agreement that was adopted without a proper legal basis – or

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[17] Case 294/83 *Les Verts* [1986] ECR 1339, paragraph 23.

[18] See, for instance, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22, and Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 to 11.

[19] See, for instance, Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos* [2007] ECR I-0000; Case C-300/98 *Dior and Others* [2000] ECR I-11307, paragraph 33; Case C-162/96 *Racke* [1998] I-3655; Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219; and *Poulsen and Diva Navigation*, cited in footnote 19.

[20] Joined Cases C-317/04 and C-318/04 [2006] ECR I-4721. See also Case C-327/91 *France* v *Commission* [1994] ECR-3641.

[21] Opinion 2/94 [1996] ECR I-1759, paragraph 35.

according to the wrong decision-making procedure – were to produce effects within the Community legal order. A similar concern underpins cases in which the Court has held that, when entering into commitments on the international stage, Member States and Community institutions are under a duty of loyal cooperation.[22] If an international agreement is concluded in breach of that duty, it can be denied effect in the Community legal order. Even more apposite, in the context of the present case, is the fact that the Court has verified, on occasion, whether acts adopted by the Community for the purpose of giving municipal effect to international commitments were in compliance with general principles of Community law. For instance, in *Germany v Council* the Court annulled the Council decision concerning the conclusion of the WTO Agreement to the extent that it approved the Framework Agreement on Bananas.[23] The Court considered that provisions of that Framework Agreement infringed a general principle of Community law: the principle of non-discrimination.

24. All these cases have in common that, although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty.[24] Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.

25. It follows that the present appeal turns fundamentally on the following question: is there any basis in the Treaty for holding that the contested regulation is exempt from the constitutional constraints normally imposed by Community law, since it implements a sanctions regime imposed by Security Council resolutions? Or, to put it

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[22] See, for instance, Ruling 1/78 of 14 November 1978 [1978] ECR 2151, paragraph 33; Opinion 2/91 [1993] ECR I-1061, paragraphs 36 to 38; and Case C-25/94 *Commission* v *Council* [1996] ECR I-1469, paragraphs 40 to 51.

[23] Case C-122/95 [1998] ECR I-973.

[24] See, for instance, Opinion 2/94, cited in footnote 22, paragraphs 30, 34 and 35.

differently: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?

26. In this regard, the ruling of this Court in *Bosphorus*[25] immediately comes to mind. In that ruling, the Court assessed whether a regulation that was adopted to implement a Security Council resolution which imposed a trade embargo on the Federal Republic of Yugoslavia infringed fundamental rights and the principle of proportionality. The Court held that the interest of 'putting an end to the state of war in the region and to the massive violations of human rights and humanitarian law in the Republic of Bosnia-Herzegovina' outweighed the interest of a wholly innocent party to be able to pursue its economic activities using assets it had leased from a company based in the Federal Republic of Yugoslavia.[26] The Court made no suggestion whatsoever that it might not have powers of review because the regulation was necessary in order to implement a sanctions regime that was drawn up by the Security Council.[27]

27. Nevertheless, the Council, the Commission and the United Kingdom claim that the judgment in *Bosphorus* is silent on the matter of the scope of the Court's jurisdiction, because, at any rate, the regulation did not infringe fundamental rights. I do not consider this argument very persuasive. True, while the Advocate General dismissed the idea in passing, the Court did not explicitly address whether the fact that the regulation implemented a Security Council resolution could preclude it from exercising judicial review. None the less, I would suppose that, instead of deliberately leaving the matter undecided, the Court accepted as self-evident what the Advocate General had felt useful to spell out, namely that '*respect for fundamental rights is ... a condition of the lawfulness of Community acts*'.[28]

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[25] Case C-84/95 [1996] ECR I-3953.

[26] *Bosphorus*, cited in footnote 26, paragraph 26.

[27] The impounding of the aircraft of Bosphorus Airways took place in accordance with Security Council Resolution 820(1993). The UN Sanctions Committee had decided that a failure on the part of the authorities to impound the aircraft would amount to a breach of the resolution.

[28] Opinion of Advocate General Jacobs in *Bosphorus*, cited in footnote 26, paragraph 53. See also paragraph 34 of Opinion 2/94, cited in footnote 22.

28. In any event, even if one were to accept the suggestion that the Court sidestepped the problem of its jurisdiction in *Bosphorus*, the fact remains that the Council, the Commission and the United Kingdom fail to identify any basis in the Treaty from which it could logically follow that measures taken for the implementation of Security Council resolutions have supra-constitutional status and are hence accorded immunity from judicial review.

29. The United Kingdom suggests that such immunity from review can be derived from Article 307 EC. The first paragraph of that article provides: '*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.*' In the view of the United Kingdom, that provision, read in conjunction with Article 10 EC, would impose on the Community an obligation not to impair Member State compliance with Security Council resolutions. In consequence, the Court should abstain from judicial review of the contested regulation. I shall state at the outset that I am not convinced by that argument, but it is nevertheless worth looking into the matter in some detail, particularly since Article 307 EC figured prominently in the reasoning of the Court of First Instance.[29]

30. At first sight, it may not be entirely clear how Member States would be prevented from fulfilling their obligations under the United Nations Charter if the Court were to annul the contested regulation. Indeed, in the absence of a Community measure, it would in principle be open to the Member States to take their own implementing measures, since they are allowed, under the Treaty, to adopt measures which, though affecting the functioning of the common market, may be necessary for the maintenance of international peace and security.[30] None the less, the powers retained by the Member States in the field of security policy must be exercised in a manner consistent with

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[29] Paragraphs 235 to 241 of the judgment under appeal.

[30] Articles 297 EC and 60 (2) EC. See also: Case C-70/94 *Werner* [1995] ECR I-3189; Case C-83/94 *Leifer and Others* [1995] ECR I-3231; and the Opinion of Advocate General Jacobs in Case C-120/94 *Commission* v *Greece* [1996] ECR I-1513.

Community law.[31] In the light of the Court's ruling in *ERT*,[32] it may be assumed that, to the extent that their actions come within the scope of Community law, Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves. On that assumption, if the Court were to annul the contested regulation on the ground that it infringed Community rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without – in so far as those measures came within the scope of Community law – acting in breach of fundamental rights as protected by the Court. Thus, the argument based on Article 307 EC is of indirect relevance only.

31. The crucial problem with the argument raised by the United Kingdom, however, is that it presents Article 307 EC as the source of a possible derogation from Article 6 (1) EU, according to which '*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*'. I see no basis for such an interpretation of Article 307 EC. Moreover, it would be irreconcilable with Article 49 EU, which renders accession to the Union conditional on respect for the principles set out in Article 6 (1) EU. Furthermore, it would potentially enable national authorities to use the Community to circumvent fundamental rights which are guaranteed in their national legal orders even in respect of acts implementing international obligations.[33] This would plainly run counter to firmly established case-law of this Court, according to which the

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[31] Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25.

[32] Case C-260/89 [1991] ECR I-2925. See also Case C-368/95 *Familiapress* [1997] ECR I-3689 and Case C-60/00 *Carpenter* [2002] ECR I-6279.

[33] In certain legal systems, it seems very unlikely that national measures for the implementation of Security Council resolutions would enjoy immunity from judicial review (which incidentally shows that a decision by this Court to exclude measures such as the contested regulation from judicial review might create difficulties for the reception of Community law in some national legal orders). See, for instance, the following sources. Germany: Bundesverfassungsgericht, Order of 14 October 2004 (Görgülü) 2 BvR 1481/04, reported in NJW 2004, p. 3407-3412. The Czech Republic: Ústavní soud, 15 April 2003 (I. ÚS 752/02); Ústavní soud, 21 February 2007 (I. ÚS 604/04). Italy: Corte Costituzionale, 19 March 2001, No 73. Hungary: 4/1997 (I. 22.) AB határozat. Poland: Orzecznictwo Trybuna³u Konstytucyjnego (zbiór urzêdowy), 27 April 2005, P 1/05, pkt 5.5, Seria A, 2005 Nr 4, poz. 42; and Orzecznictwo Trybuna³u Konstytucyjnego (zbiór urzêdowy), 2 July 2007, K 41/05, Seria A, 2007 Nr 7, poz. 72.

Community guarantees a complete system of judicial protection in which fundamental rights are safeguarded in consonance with the constitutional traditions of the Member States. As the Court stated in *Les Verts*, '*the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*'.[34] More straightforwardly, in *Schmidberger*, the Court reaffirmed that '*measures which are incompatible with the observance of human rights ... are not acceptable in the Community*'.[35] In short, the United Kingdom's reading of Article 307 EC would break away from the very principles on which the Union is founded, while there is nothing in the Treaty to suggest that Article 307 EC has a special status – let alone a special status of that magnitude – in the constitutional framework of the Community.

32. Besides, the obligations under Article 307 EC and the related duty of loyal cooperation flow in both directions: they apply to the Community as well as to the Member States.[36] The second paragraph of Article 307 EC provides that '*the Member State or States concerned shall take all appropriate steps to eliminate ... incompatibilities*' between their prior treaty obligations and their obligations under Community law. To this end, Member States shall '*assist each other ... and shall, where appropriate adopt a common attitude*'. That duty requires Member States to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law.[37] As Members of the United Nations, the Member States, and particularly – in the context of the present case – those belonging to the Security Council, have to act in such a way as to prevent, as far as possible, the adoption of decisions

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[34] *Les Verts*, cited in footnote 18, paragraph 23.

[35] Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73.

[36] For a recent example of a case concerning the obligations of Member States under Article 307 EC, see Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 59.

[37] See, in a similar vein, on the requirement of unity in the international representation of the Community, Opinion 1/94 [1994] ECR I-5267, paragraphs 106 to 109, and *Commission* v *Council*, cited in footnote 23, paragraphs 40 to 51.

by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. The Member States themselves, therefore, carry a responsibility to minimise the risk of conflicts between the Community legal order and international law.

33. If Article 307 EC cannot render the contested regulation exempt from judicial review, are there perhaps any other rules of Community law that can? The Council, the Commission and the United Kingdom argue that, as a matter of general principle, it is not for the Court to cast doubt on Community measures that implement resolutions which the Security Council has considered necessary for the maintenance of international peace and security. In this connection, the Commission evokes the notion of 'political questions'.[38] In brief, one could say that the Commission, the Council and the United Kingdom contend that the specific subject-matter at issue in the present case does not lend itself to judicial review. They claim that the European Court of Human Rights takes a similar position.

34. The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted. As Justice Murphy rightly stated in his dissenting opinion in the *Korematsu* case of the United States Supreme Court:

> '*Like other claims conflicting with the asserted constitutional rights of the individual,* [that] *claim must subject itself to the*

[38] The term 'political question' was coined by United States Supreme Court Chief Justice Taney in *Luther* v. *Borden*, 48 U.S. 1 (1849), 46-47. The precise meaning of this notion within the Community context is far from clear. The Commission did not dwell upon the argument, which it raised at the hearing, but the suggestion appears to be that the Court should abstain from exercising judicial review, since there are no judicial criteria by which the matters presently under consideration may be measured.

judicial process of having its reasonableness determined and its conflicts with other interests reconciled. What are the allowable limits of [discretion], *and whether or not they have been overstepped in a particular case, are judicial questions.*'[39]

35. Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that '*there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods*'.[40] Nor does it mean, as the United Kingdom submits, that judicial review in those cases should be only '*of the most marginal kind*'. On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary. As I shall discuss below, the Court must verify whether the claim that extraordinarily high security risks exist is substantiated and it must ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals.

36. According to the Council, the Commission and the United Kingdom, the European Court of Human Rights relinquishes its powers of review when a contested measure is necessary in order to implement a Security Council resolution. Yet, I seriously doubt that the European Court of Human Rights limits its own jurisdiction in that way.[41] Moreover, even if it were to do so, I do not think that that would be of consequence in the present case.

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[39] United States Supreme Court, *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting) (internal quotation marks omitted).

[40] MONTESQUIEU, *De l'Esprit des Lois*, Book XII ('Il y a des cas où il faut mettre, pour un moment, un voile sur la liberté, comme l'on cache les statues des dieux').

[41] The European Court of Human Rights has held that 'the Contracting States may not, in the name of the struggle against ... terrorism, adopt whatever measures

37. It is certainly correct to say that, in ensuring the observance of fundamental rights within the Community, the Court of Justice draws inspiration from the case-law of the European Court of Human Rights.[42] None the less, there remain important differences between the two courts. The task of the European Court of Human Rights is to ensure the observance of the commitments entered into by the Contracting States under the Convention. Although the purpose of the Convention is the maintenance and further realisation of human rights

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they deem appropriate' (Klass and Others, judgment of 6 September 1978, Series A no. 28, § 49). Moreover, in its judgment in *Bosphorus Airways*, the same Court discussed the issue of its jurisdiction at length, without even hinting at the possibility that it might not be able to exercise review because the impugned measures implemented a resolution of the Security Council (Bosphorus Hava Yollarý Turizm ve Ticaret Anonim Þirketi (Bosphorus Airways) v. Ireland [GC], no. 45036/98). Therefore, the judgment in *Bosphorus Airways* seems to bolster the argument in favour of judicial review. Still, according to the Council, the Commission and the United Kingdom, it would follow from the admissibility decision in *Behrami* that measures that are necessary for the implementation of Security Council resolutions automatically fall outside the ambit of the Convention (Behrami and Behrami v. France and Saramati v. France, Germany and Norway (dec.) [GC], nos. 71412/01 and 78166/01 ECtHR, 2 May 2007); see also the admissibility decisions of 5 July 2007 in Kasumaj v. Greece (dec.), no. 6974/05, and of 28 August 2007 in Gajic v. Germany (dec.), no. 31446/02). However, that seems to be an overly expansive reading of the Court's decision. The *Behrami* case concerned an alleged infringement of fundamental rights by a security force deployed in Kosovo which operated under the auspices of the United Nations. The respondent States had contributed troops to this security force. Yet, the European Court of Human Rights declined jurisdiction *ratione personae* mainly because the ultimate authority and control over the security mission remained with the Security Council and, therefore, the impugned actions and inactions were attributable to the United Nations and not to the respondent States (see §§121 and 133 to 135 of the decision). Indeed, in this respect the Court carefully distinguished the case from *Bosphorus Airways* (see, in particular, §151 of the decision). Thus, the position of the European Court of Human Rights seems to be that, where, pursuant to the rules of public international law, the impugned acts are attributable to the United Nations, the court has no jurisdiction *ratione personae*, since the United Nations are not a contracting party to the Convention. By contrast, when the authorities of a contracting State have taken procedural steps to implement a Security Council resolution in the domestic legal order, the measures thus taken are attributable to that State and therefore amenable to judicial review under the Convention (see also §§ 27 to 29 of the admissibility decision of 16 October 2007 in Beric and Others v. Bosnia and Herzegovina).

[42] See, for instance, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraph 33.

and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level.[43] This is illustrated by the Convention's intergovernmental enforcement mechanism.[44] The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community. The European Court of Human Rights and the Court of Justice are therefore unique as regards their jurisdiction *ratione personae* and as regards the relationship of their legal system with public international law. Thus, the Council, the Commission and the United Kingdom attempt to draw a parallel precisely where the analogy between the two Courts ends.

38. The Council asserted at the hearing that, by exercising its judicial task in respect of acts of Community institutions which have their source in Security Council resolutions, the Court would exceed its proper function and '*speak on behalf of the international community*'. However, that assertion clearly goes too far. Of course, if the Court were to find that the contested resolution cannot be applied in the Community legal order, this is likely to have certain repercussions on the international stage. It should be noted, however, that these repercussions need not necessarily be negative. They are the immediate consequence of the fact that, as the system governing the functioning of the United Nations now stands, the only option available to individuals who wish to have access to an independent tribunal in order to obtain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court.[45]

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[43] See the Preamble to the European Convention on Human Rights and Fundamental Freedoms, as well as Article 19 ECHR and Article 46(1) ECHR.

[44] See Article 46(2) ECHR.

[45] See paragraph 39 of the Report of 16 August 2006 of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/61/267): 'Given that the effect of inclusion [on the list] is the freezing of assets, the right to contest inclusion is a necessity. At the international level, these procedures do not at present exist. They are present, in some instances, at the national level. The Special Rapporteur is of the view that if there is no proper or adequate international review available, national review procedures – even for international lists – are necessary. These should be available in the States that apply the sanctions'.

Indeed, the possibility of a successful challenge cannot be entirely unexpected on the Security Council's part, given that it was expressly contemplated by the Analytical Support and Sanctions Monitoring Team of the Sanctions Committee.[46]

39. Moreover, the legal effects of a ruling by this Court remain confined to the municipal legal order of the Community. To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law. While it is true that the restrictions which the general principles of Community law impose on the actions of the institutions may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter. The Council's contention that, by reviewing the contested regulation, the Court would assume jurisdiction beyond the perimeters of the Community legal order is therefore misconceived.

40. I accordingly conclude that the Court of First Instance erred in law in holding that it had no jurisdiction to review the contested regulation in the light of fundamental rights that are part of the general principles of Community law. In consequence, the Court should consider the appellant's third plea well founded and set aside the judgment under appeal.

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[46] See, in particular, the Second Report of the Analytical Support and Sanctions Monitoring Team (S/2005/83), in which it is noted, in paragraph 54, that 'the way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental rights norms and conventions' and, in paragraph 58, that 'revisions to the process could help to reduce the possibility of one or more potentially negative court decisions'. In that connection, the Report specifically mentions the European Court of Justice. See also Annex I to the Sixth Report of the Analytical Support and Sanctions Monitoring Team (S/2007/132) for an overview of legal challenges to aspects of the sanctions programme.

IV – The alleged breaches of fundamental rights

41. Instead of referring the matter back to the Court of First Instance, I suggest that the Court make use of the possibility of giving final judgment in this case.[47] For reasons of expediency, I think it would be appropriate, in this regard, to concentrate on the principal aspect of the case, namely the issue whether the contested regulation infringes the appellant's fundamental rights.

42. The appellant alleges that the contested regulation infringes a number of its fundamental rights and, on those grounds, seeks the annulment of that regulation. The respondents – in particular the Commission and the United Kingdom – argue that, to the extent that the contested regulation may interfere with the appellant's fundamental rights, this is justified for reasons relating to the suppression of international terrorism. In this connection, they also argue that the Court should not apply normal standards of review, but instead should – in the light of the international security interests at stake – apply less stringent criteria for the protection of fundamental rights.

43. I disagree with the respondents. They advocate a type of judicial review that at heart is very similar to the approach taken by the Court of First Instance under the heading of *jus cogens*. In a sense, their argument is yet another expression of the belief that the present case concerns a 'political question' and that the Court, unlike the political institutions, is not in a position to deal adequately with such questions. The reason would be that the matters at issue are of international significance and any intervention of the Court might upset globally-coordinated efforts to combat terrorism. The argument is also closely connected with the view that courts are ill equipped to determine which measures are appropriate to prevent international terrorism. The Security Council, in contrast, presumably has the expertise to make that determination. For these reasons, the respondents conclude that the Court should treat assessments made by the Security Council with the utmost deference and, if it does anything at all, should exercise a minimal review in respect of Community acts based on those assessments.

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[47] In accordance with Article 61 of the Statute of the Court.

44. It is true that courts ought not to be institutionally blind. Thus, the Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.

45. The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper. In the words of Aharon Barak, the former President on the Supreme Court of Israel:

> *'It is when the cannons roar that we especially need the laws ... Every struggle of the state – against terrorism or any other*

enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes". ... The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.'[48]

46. There is no reason, therefore, for the Court to depart, in the present case, from its usual interpretation of the fundamental rights that have been invoked by the appellant. The only novel question is whether the concrete needs raised by the prevention of international terrorism justify restrictions on the fundamental rights of the appellant that would otherwise not be acceptable. This does not entail a different conception of those fundamental rights and the applicable standard of review. It simply means that the weight to be given to the different interests which are always to be balanced in the application of the fundamental rights at issue may be different as a consequence of the specific needs arising from the prevention of international terrorism. But this is to be assessed in a normal exercise of judicial review by this Court. The present circumstances may result in a different balance being struck among the values involved in the protection of fundamental rights but the standard of protection afforded by them ought not to change.

47. The problem facing the appellant is that its financial interests within the Community have been frozen for several years, without limit of time and in conditions where there appear to be no adequate means for the appellant to challenge the assertion that it is involved in supporting terrorism. The appellant has invoked the right to property, the right to be heard, and the right to effective judicial review. In the context of this case, these rights are closely connected. Clearly,

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[48] Supreme Court of Israel, HCJ 769/02 [2006] *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, paragraphs 61 and 62 (internal quotation marks omitted).

the indefinite freezing of someone's assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person or entity concerned are potentially devastating, even where arrangements are made for basic expenses. Of course, this explains why the measure has such a strong coercive effect and why 'smart sanctions' of this type might be considered a suitable or even necessary means to prevent terrorist acts. However, it also underscores the need for procedural safeguards which require the authorities to justify such measures and demonstrate their proportionality, not merely in the abstract, but in the concrete circumstances of the given case. The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right to property. However, that does not *ipso facto* relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person or entity concerned. Procedural safeguards are necessary precisely to ensure that that is indeed the case. In the absence of those safeguards, the freezing of assets for an indefinite period of time infringes the right to property.

48. The appellant contends that, regarding the sanctions at issue, no such safeguards are in place. In this context, the appellant seeks to rely on the right to be heard by the administrative authorities, as well as on the right to effective judicial review by an independent tribunal.

49. Both the right to be heard and the right to effective judicial review constitute fundamental rights that form part of the general principles of Community law. According to settled case-law, '*observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question ... That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views*'.[49] As to the right to effective judicial review, the Court has held: '*The European Community is ... a community based on the rule of law in*

[49] Case C-32/95 P *Lisrestal and Others* [1996] ECR I-5373, paragraph 21. See also Article 41(2) of the Charter on Fundamental Rights of the European Union.

which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. ... Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States'.[50] Moreover, it follows from the same case-law that both natural persons and legal persons enjoy the right to be heard and the right to effective judicial review.

50. The respondents argue, however, that in so far as there have been restrictions on the right to be heard and the right to effective judicial review, these restrictions are justified. They maintain that any effort on the part of the Community or its Member States to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed by the contested regulation would contravene the underlying Security Council resolutions and therefore jeopardise the fight against international terrorism. In consonance with that view, they have not made any submissions that would enable this Court to exercise review in respect of the specific situation of the appellant.

51. I shall not dwell too much upon the alleged breach of the right to be heard. Suffice it to say that, although certain restrictions on that right may be envisaged for public security reasons, in the present case the Community institutions have not afforded any opportunity to the appellant to make known its views on whether the sanctions against it are justified and whether they should be kept in force. The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list.[51] Yet, the processing of that request is purely a matter

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[50] Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 38 and 39. See also Article 47 of the Charter on Fundamental Rights and Articles 6 and 13 ECHR.

[51] The de-listing procedure has undergone several changes since the original adoption of the measures against the appellant. Under the initial regime, the person concerned could only submit requests for de-listing to their State of citizenship or of residence. Under the current procedure, petitioners seeking to submit a request for de-listing can do so either through a United Nations 'focal point' or through their

of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality. One of the crucial reasons for which the right to be heard must be respected is to enable the parties concerned to defend their rights effectively, particularly in legal proceedings which might be brought after the administrative control procedure has come to a close. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the appellant's right to effective judicial protection.

52. The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. As the European Court of Human Right held in *Klass and Others*, *'the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'*.[52]

53. The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant the appellant an opportunity to dispute the grounds for its continued inclusion on the list. They have, in effect, levelled extremely serious allegations against the appellant and have, on that basis, sub-

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State of residence or citizenship. However, the fundamentally intergovernmental nature of the de-listing process has not changed. See Security Council Resolution 1730(2006) of 19 December 2006 and the Sanction Committee's Guidelines for the Conduct of its Work, available at http://www.un.org/sc/committees/1267/index.shtml.

[52] ECtHR, Klass and Others, cited in footnote 42, § 55.

jected the appellant to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.

54. Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.

55. It follows that the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant.

V – Conclusion

56. I propose that the Court should:

1) Set aside the judgment of the Court of First Instance of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*;
2) Annul, in so far as it concerns the appellant, Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain

specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan».

Commentary:

1. We resume our commitment to, in *Temas de Integração*, make known some major decisions or opinions of the European Union judges and advocate-generals. Thus, we decided to comment on a landmark opinion delivered by the first advocate-general Miguel POIARES MADURO on 23 January 2008, in case C-415/05 P, *Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, not yet decided by the European Court of Justice (ECJ).

2. This case is a very interesting one and started, as the Advocate-General pointed out, after the UN considered several persons as being financially supporting terrorism, but it deals with a bulk of serious and very interesting issues, not all addressed by these conclusions, namely the boundaries of the principle of attribution, the international status of the EU, the need to ensure the protection of fundamental rights as general principles of EU law and, particularly, the right to an effective judicial protection.

3. Although it is far from clear that the ECJ will support the audacious approach assumed by the Advocate-General, this case seems to be of high relevance in the context of asserting the position of the EU in the international legal order and it certainly gives an opportunity to the ECJ to affirm a vision and a prospect for the future of the EC/EU (EU only, after the entering into force of the Treaty of Lisbon) in its own boundaries – establishment of a parameter of judicial protection and assumption (or not) of its role in ensuring the rule of law and the basic european political values.

4. However, although these questions are not at all new in the ECJ case-law, particularly the discussion about the rule of law, the

relation between primacy and *ius cogens* and the legal role of the fundamental rights in the EC/EU legal order, there is a clear need to assume an accrued control over the treaty provisions (and not only its implementation rules), because they are clearly being interpreted in a way that deprives Member States of some of their economic freedoms and even of their own judgement on whether and how some fundamental interests are upheld.

5. The interest of this opinion is also accrued by the signature of the Lisbon Treaty last December 13, 2007, already ratified by the majo-rity of the Member States, being Portugal the last to do so, until now (Presidential Decree 31/2008, of 9 May 2008).

6. The Lisbon Treaty introduces some interesting changes in the ECJ (now, generally and as a whole, referred to as Court of Justice of the European Union – articles 13 (1), § 2, and 19, of the EU Treaty)[53]. Also, the CFI becomes a General Court and the ECJ itself, when specifically considered, is usually referred to as Court of Justice (see article 19 (1) of the EU Treaty).

7. By eliminating article 46 of the actual EU/Maastricht Treaty, the ECJ reaches a more coherent standing in the EC/EU legal order, in spite of the limitations that still remain, namely in articles 269 and, especially, 275 of the Treaty on the Functioning of the European Union (TFEU).

8. The Treaty of Lisbon not only reinforces the status of the fundamental rights (see article 6 of the EU Treaty) but also introduces in its own wording the principle of effective judicial protection (article 19 (1), § 2) which, although directed to the Member States, may confer on the EU institutions the same obligations in cases where there is only EU action. It should be noticed that this is also in accordance with the European Court of Human Rights case-law, mainly since the *Aireyc. Ireland* case, where it was affirmed that «*although the object of Article 8 (art. 8) is essentially that of protecting the*

[53] «*The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*» (OJ, C 115, of 9.5.2008).

individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations (...) to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court (see paragraphs 20-28 above), she was unable to seek recognition in law (...) She has therefore been the victim of a violation of Article 8 (art. 8).»[54]

9. This provision may impose to the Member States, *e.g.* Portugal, the recognition of a right to appeal against otherwise final decisions, in cases where a preliminary ruling, in violation of article 267 TFEU (previous article 234 EC), is not carried out by the national jurisdiction, or where a difference exists (as it clearly does, considering the ECJ strict analysis of the individual legitimacy to appeal before the CFI and the Supreme Administrative Court reckless doctrine).

10. Moreover, we believe that the Lisbon Treaty[55] follows the same road to which advocate-general POIARES MADURO cautiously leads the ECJ, since it acknowledges the possibility for the ECJ to control the legality of restrictive measures applied to individuals in the context of the CFSP (articles 24 (1) and 40 TFEU; article 275 TFEU; see also article 47 of the Charter of Fundamental Rights).

11. And this conviction is strengthened by – for the first time in more than 50 years of judicial integration – its assumption of the individuals' legitimacy to seek the annulment of general provisions ("regulatory acts")[56], *i.e.* «*against a regulatory act which is of direct concern to them and does not entail implementing measures*» (article 263 (4) TFEU), answering this way to the ECJ in the *Unión de Pequeños*

[54] Decision of 9.10.1979, series A, nr. 33.

[55] Together with other interesting improvements, like the one made in article 260 (3) TFEU.

[56] For the sake of this commentary, we won't develop any considerations on the difference, in the "new" TFEU, between legislative and regulatory acts, assuming that these different typologies are immaterial for these purposes.

Agricultores case[57], when it stated that «*it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, for example, Joined Cases 67/85, 68/85 and 70/85 Van der Kooy v Commission [1988] ECR 219, paragraph 14; Extramet Industrie v Council, paragraph 13, and Codorniu v Council, paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.*»58 And the ECJ went on stating that «*while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force*».[59] Arguably, this has now been done by the Member States.

12. In conclusion, we believe that the following years – or, rather, the following cases – will allow us to live in a *Union of Law* and to make the judicial review of the "new" EU legislative or regulatory acts more effective, both at the national level (through the preliminary references procedure, if it is applicable or mandatory[60]) and the European level.

[57] Decision of 25th July 2002, *Unión de Pequeños Agricultores v. Council*, C-50/00 P, Colect., 2002, I, pp. 6677; or, more recently, CFI decision of 31 January 2008, T-95/06, par. 116 (not yet published).

[58] Paragraph 44.

[59] Paragraph 45.

[60] Also, we must reaffirm that, for us, the *Foto-frost* case-law is not imposed by EC law, although it can result from the way national constitutional law deals with EC law.

Vária

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

The European Interest: Succeeding in the age of globalisation*

Contribution of the Commission to the October Meeting of Heads of State and Government

Introduction

In recent years our response to globalisation has moved to the heart of the EU policy agenda. The relaunch of the Lisbon Strategy in Spring 2005 put Europe back on track to face up to competition as the touchstone for creating growth and jobs in the modern global economy. In their informal meeting at Hampton Court in October 2005, the Heads of State and Government set out the key challenges posed by globalisation in areas like innovation, energy, migration, education and demography[1]. At the Spring European Council in 2006, it was agreed to move up a gear in the work of the renewed Lisbon strategy for growth and jobs to spearhead the response of the European economy.

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[1] Commission contribution: "European values in a globalised world" – COM(2005) 525, 20.10.2005.

2007 has seen agreement to put Europe in the forefront of global efforts to tackle climate change and to put in place a European policy for secure, sustainable and competitive energy – to put Europe on the threshold of a third industrial revolution.

At the same time, public awareness of globalisation has intensified. Globalisation is seen to touch every walk of life - opening doors, creating opportunities, raising apprehensions. It has called in question some of the basic assumptions about the world economy and the calculation of domestic economic interest. It has generated new expectations about how public authorities should help citizens to acclimatise to change. The European Union needs to draw together the threads of this debate and offer a coordinated response to this most demanding of challenges: to show citizens how the EU is the best tool to enable Europeans to shape globalisation.

Fifty years of European integration has seen the economic prospects of Member States entwined as never before, bringing unprecedented social progress. This makes it essential for Europe to react effectively to shifting trends in the global economy. It can only do this by actively promoting the European interest as a specific objective, offering a coherence which national action alone cannot match. The European interest needs to be specifically defined, strongly articulated, stoutly defended, and vigorously promoted, if Europe is to offer the right platform for the future[2].

The purpose of this paper is to provide the basis for a strategic policy discussion between the Heads of State and Government at their informal meeting on 18/19 October. It sets out the next steps on the path mapped out two years ago, and specifically describes how the Lisbon strategy for growth and jobs can continue to provide the backbone for a European approach to globalisation.

I. Shaping up to globalisation

At Hampton Court, the European Union outlined the range of issues demanding a policy response from the European Union. In doing so, it recognised that the EU of 27 Member States offers a route

[2] Commission Communication "Global Europe: competing in the world – COM (2006) 567, 4.10.2006.

for Europe to act on a continental scale, with a critical mass and a reach which should be used to the greatest advantage. The European Union and its Member States could offer its citizens a distinctive European response to a series of complex global challenges.

This awareness of the unique potential offered by the European Union has come together with a renewed confidence of the ability of the Union to deliver the policy agenda in practice. Concerns about the EU's ability to deliver have been confounded by the boldness of the decisions taken at the Spring European Council of 2007, and by the progress towards the Reform Treaty.

At the same time, the EU economy is performing well. The Lisbon strategy for growth and jobs has moved to the centre of the process of economic reform. Enlargement has given an added dynamism to European growth. Thanks to the extension of the internal market to twelve new Member States, the EU has achieved a smarter division of labour and economies of scale. Europe enjoyed strong growth and impressive job creation in 2006, with 3.5 million new jobs. And, for the first time in a decade, job creation has gone hand in hand with productivity improvements. Growth is expected to remain around 2¾% this year on the back of a strong performance in the global economy. However, the recent financial turmoil and the likely slowdown in the US economy have substantially increased the risks for 2008. Against this background, the EU needs a consistent and assured policy response. Sound macroeconomic policies are essential to reduce uncertainty. The euro has proved an anchor of stability that has protected the EU economy as a whole, not only the euro area. Reforms carried out during the last years have made our economies more resilient and will help us weather the storm.

The European Union has to build on these strong foundations. Inside the EU, this means increasing its adaptability in order to provide for the sustainable well being of its citizens, young and old, in town or countryside, in all Member States. The freedoms which lie behind the Internal Market and the effectiveness of its dynamic competition policy have been married with an active cohesion policy now driven by the growth and jobs agenda, spreading and boosting prosperity across all Member States and all regions, in recognition of the need for European principles of solidarity to be nurtured.

Externally, the EU is prospering from its openness to the rest of the world – in economic terms, but also in terms of cultural and

knowledge exchange, and in terms of the recognition given to European values worldwide. As the world's largest exporter of goods and services and its largest importer of goods, the largest importer of energy, the second largest source and the second largest destination of foreign direct investment, the EU is a major beneficiary of an open world economic system. It is increasing its exports of high-quality, high-value agricultural products, encouraging farmers to respond to market demands, with benefits for our environment and food security. It has an obvious stake in defining the rules of global governance in a way that reflects its interests and values. At the same time, it has a particular responsibility as one of the few players with an ability to tackle global issues: security, climate change, poverty, international migration. The EU, as the world's largest donor of development assistance and main partner for a large number of third countries, takes these responsibilities seriously, supporting human rights, and promoting effective multilateralism and sustainable development worldwide. The EU must use the available tools to the full if it is to strengthen its position in a globalised world.

The EU is already working on many of the policy elements needed to equip it to take on the challenge of globalisation with confidence. As globalisation continues to accelerate the pace of change, these areas of work need to be stepped up to boost the capacity of the EU to shape the globalisation agenda. In the coming months, the Commission will be putting new ideas on the table to address these key challenges: fresh ideas built on the EU's commitment to open markets and fair competition. The EU remains committed to further breaking down barriers to trade and investment, while it will stand firm against unfair practises in trade, investment and distorted competition.

Review of internal policies is already under way, aiming to reshape Europe to face globalisation and give it the right platform to look beyond its borders:

- ***Getting the most from the Internal Market.*** The EU single market gives Europeans a solid foundation on which to adapt to globalisation and structural change. The Commission is finalising its work on the ambitious and comprehensive review welcomed by the 2007 Spring European Council[3] which must ensure that the Internal Market continues to drive European

[3] Presidency conclusions, European Council, 9 March 2007, paragraph 7.

growth and jobs in the globalised world. The single market makes Europe more attractive for investors and companies from across the world and more influential in setting rules and standards worldwide. The goal is a Europe which can rely on a strong, innovative and competitive industrial base, which realises the full potential of services, where consumers and entrepreneurs gain maximum benefits from the Internal Market, and where European standards can help build standards at the international level.

- ***Responding to Europe's new social realities.*** The ongoing stock-taking of Europe's social realities is looking at the big changes under way in employment patterns, family structures, lifestyles and in traditional support structures, reflecting increasing pressures from demography in an ageing society. This will require a new approach to the social agenda with implications for both national and European level: we will need more effective means of ensuring citizens' existing rights of access to employment, education, social services, health care and other forms of social protection across Europe. Globalisation is central to these new realities: in areas where the EU has a direct role, it must better adapt its existing instruments and policies, but also build on new policy responses such as the Globalisation Adjustment Fund and continue to respond to the legitimate concerns of people adversely affected by changes in trade patterns and by economic and social change. It must also be alive to the need to respond to new forms of poverty in our Member States.
- ***Migration in a globalising Europe*** In a Europe with no internal borders, the changing demands of an ageing society and a labour market in constant evolution have challenged established assumptions about migration from outside the EU. A new global approach is needed so that migration strikes the right balance between the risk of labour market shortages, economic impacts, negative social consequences, integration policies and external policy objectives.
- ***Sustainable energy policies for a low carbon future.*** The conclusions of the 2007 Spring European Council set out an ambitious EU approach to energy and climate change. The goal is a radical new frontier for the European economy and European society. By the end of 2007 the Commission will

have put forward the main legislative proposals to deliver on these objectives by 2020. Putting the EU on the path to a low carbon future demands a huge commitment, but brings real opportunities: already, the eco-industry[4] employs more than key sectors like car manufacturing or pharmaceuticals, and the EU's determination to act will give it a head start in developing new technologies and creating new jobs.

- ***Ensuring financial stability.*** Recent developments have brought home to us that the stability of the increasingly globalised financial markets is vital for our economies and can by no means be taken for granted. Financial market transparency, effective competition rules and appropriate regulation and supervision will continue to be crucial to both confidence and performance. The need for the euro to realise its potential as an important pole of stability and growth in the global economy points to further reflection on its representation in international financial institutions.

At the same time, the European Union needs to look directly at the external dimension, to consider how the impact of the collective European effort can be maximised and how different internal and external policies can be harnessed to best effect.

- ***Mobilising the external dimension.*** An open global trading system is in the interest of the EU. Whilst the EU needs to protect its citizens, its interests and its values, protectionism cannot be the solution. As the world's leading trader and investor, our openness allows lower cost inputs for industry, lower prices for consumers, a competitive stimulus for business, and new investment. At the same time, it is important for the EU to use its influence in international negotiations to seek openness from others: the political case for openness can only be sustained if others reciprocate in a positive manner. The EU needs to ensure that third countries offer proportionate levels of openness to EU exporters and investors and to have ground rules which do not impinge on our capacity to protect our

[4] OECD and Eurostat define as economic activities that produce goods and services to measure, prevent, limit, minimise or correct environmental damage to water, air and soil, as well as problems related to waste, noise and eco-systems.

interests and to safeguard our high product standards relating to health, safety, the environment and consumer protection. Third country companies wishing to do business in the EU will not be allowed to by-pass the rules applied in the Internal Market. The same rules must apply to all – as shown in the recent Commission proposals on the internal energy market. The confidence of consumers and market operators alike requires that third country investment respects accepted market principles. The way in which the EU applies its rules also needs to reflect the changes brought by globalisation in the patterns of ownership and interest in all sectors. We should build on the comprehensive agenda for external competitiveness proposed by the Commission in November 2006[5], looking at opening markets around the world and tackling the new barriers to trade and investment.

- ***Shaping global regulation.*** The global marketplace can work most effectively when there are common ground rules. The EU has a well developed regulatory regime based on years of experience in helping its Member States to reconcile their different approaches and find the right mix to allow trade to flourish while respecting a minimum set of standards for its goods in areas like health and safety. A new international approach focusing on regulatory cooperation, convergence of standards and equivalence of rules is emerging as a result of sectoral bilateral discussions with third countries. This approach should be further developed in the mutual interests of the EU and its partners.

Key to the realisation and implementation of all these measures is the ***Lisbon Strategy for growth and jobs***. The goal of making the EU a dynamic, competitive, knowledge based society remains essential. The Lisbon toolbox is already bringing the different strands of policy together to offer a more comprehensive vision of how the EU and Member States can work in harness to tackle the complex issues facing Europe today. The next section of this paper sets out a vision of how the Lisbon Strategy should be developed in its next cycle, to take account of the challenges and opportunities of globalisation and to offer the foundations for the European response.

[5] Global Europe: Competing in the world – COM(2006) 567, 4.10.2006.

II. Deepening the reforms in the Lisbon Strategy for growth and jobs

The Commission considers that the re-launch of the Lisbon Growth and Jobs Strategy in 2005 has been a success. Viewed as a whole, it has helped to speed up the pace of reform, helping Member States to implement difficult but necessary change. Commission assessments indicate that it has contributed to the recent improvement in the EU's economic performance.

(i) More growth and jobs through improved co-ordination

The new governance of the Lisbon Strategy for growth and jobs, with its emphasis on partnership between the European and the Member States level, has proved its worth. The integrated guidelines are fulfilling their role; they do not require major revision. However, the pace of implementation is uneven. Member States obviously have very different starting points. But, even taking this into account, some Member States have proved more willing than others to take up the challenge to "move up a gear". The "implementation gap" cannot be ignored.

Member States' economies have become highly interdependent. There are significant spill-over effects between them. Prosperity in one creates prosperity in the others; sluggishness in one holds the others back. In this context, sound fiscal policies and high-quality public finances are of crucial importance: they pave the way for higher and sustainable growth, not only because they free up resources for essential investment, but because they improve the stability of the European economy and society as a whole.

It is essential to press on with reform. The adoption of country-specific recommendations this year represents a major step forward; Member States have agreed collectively what individual Member States should be doing to reform their economies. This is a first step towards the kind of stronger economic policy co-ordination needed to reap the full benefits.

Strong policy co-ordination must fully respect the role and mandate of the Member States and the institutions, and it could be particularly beneficial to build on the Lisbon approach in the euro area, where spill-over effects are most powerful and where the need for a common agenda is strongest. Sharing a common currency and a com-

mon monetary policy offers an extra dimension to coordination which could strengthen the role of the euro area in delivering growth and jobs for the whole EU. The Commission will present a comprehensive review of the functioning of EMU to mark its tenth anniversary, with ideas on how policies, coordination and governance can help the euro area to work to best effect.

(ii) The policy orientations

The four priority areas agreed by the 2006 Spring European Council provide the right frame for the Strategy at both EU and national level: R&D and innovation, the right business environment, investment in people, and energy and climate change. But in all four areas, there is a need to deepen the reform agenda if the real potential for growth and jobs is to be met.

– *More R&D and innovation*

Globalisation has stepped up the pace of change – for technology, for ideas, for the way we work and live our lives. If Europe can unlock its potential for innovation and creativity, it can shape the direction of change with the distinctive European values and cultural diversity so central to European society[6]. The emphasis in this area has been on increasing R&D expenditure and Member States are making progress towards the 3% GDP target. All Member States have set national targets; the challenge for public and in particular the private sector is to meet them.

But investment alone will not guarantee an improved R&D performance. We need a market which cuts the lead time to transform innovation into new products and services. Europe needs the right conditions for research and innovation to flourish – such as attractive careers for researchers, a modern IPR system and interoperable standards. A knowledge economy needs free movement for ideas and researchers, adding a "fifth freedom" to the four freedoms of the Internal Market and creating a genuine European Research Area.

Work needs to be driven forward to tackle the problems of fragmented resources and insufficient scale, and to develop the "know-

[6] An innovation-friendly, modern Europe – COM(2006) 589.

ledge triangle" of research, education and innovation. This means helping Member States to pool resources in strategic research areas, modernising higher education, and creating innovative new infrastructures, to complement the European Institute of Technology. This will attract the best researchers and promote breakthrough technologies.

– A more dynamic business environment

SME and entrepreneurship has been put high on the reform agenda. The task now is to fully unlock the growth and jobs potential of SMEs and make full use of their innovative capacities. The Commission will seek the views of SMEs and their representatives to help design a "Small Business Act" for Europe with a view to making a wide range of proposals to support SMEs by the end of 2008.

The better regulation "culture" has begun to take root across the EU: the institutions need to lead the way. The Commission has made major changes in the way it develops new proposals and monitors implementation of the existing *acquis*. The European Parliament has also begun to use impact assessments but the Council has yet to begin to use it as a working tool.

But the benefits of better regulation need to be felt at all levels. All Member States have agreed to set targets to reduce administrative burdens by 25% by 2012. As well as cutting existing burdens, special consideration should be given to whether all the administrative requirements of EU legislation need to be applied in full to SMEs. The next stage is to modernise public administrations so that they provide a transparent, predictable service and an effective means of redress.

– Greater employability and investment in people

Both globalisation and technological change risk increased inequality, opening up the gap between the skilled and the unskilled. The best solution is to help each individual to adapt, by improving the quality and availability of education and training for all ages. As recent studies have underlined[7], this is not only a matter of increasing investment: the key to increased performance lies in modernising education and training policies. One in six young people leave school with no qualifications – without targeted support, they could be ex-

[7] "Education at a glance", OECD, 2007.

cluded from the knowledge economy, and vulnerable to the changes sparked by globalisation.

There is a growing interest in "flexicurity." This can help people to manage employment transitions more successfully in times of accelerating economic change. By upgrading their skills, and protecting people rather than particular jobs, it helps people to move into better paid, more satisfying jobs, or even start their own businesses.

The Commission has proposed common principles for consideration at the December European Council. These would offer Member States a basis to draw on as they work with the national social partners to adapt flexicurity to national circumstances and mainstream this approach into their National Reform Programmes.

More attention will also be given to active inclusion and equal opportunities. Adequate social protection should be promoted and the fight against poverty reinforced.

– ***Energy and climate change***

The ambitious targets set by the European Union to cut greenhouse gas emissions and drive low-carbon energy are based on two key foundations: a conviction that, with mechanisms like trading to let the market lead the process, fundamental change is within our economic reach; and confidence that there has been a real sea change in citizens' commitment to reform. The two legislative packages coming forward this autumn – on the internal energy market and on meeting the agreed targets – seek to provide an ambitious and effective framework to achieve secure, sustainable and competitive energy and to usher in a new generation of EU measures to cut emissions in areas from power generation to transport. At the same time, this ambitious approach provides the best possible platform for international negotiations to tackle climate change worldwide.

The Lisbon strategy offers a framework to develop national measures to stimulate the low-carbon economy, such as fiscal measures and incentives, and to see how effective measures in one Member State could be taken up by others. At the same time, the Strategy can promote a new ecological approach to industrial and innovation policy – to stimulate and mainstream sustainable and environmentally-friendly technologies.

III. Setting the pace for global Europe

The EU must be in a position to present to citizens with a compelling vision of how a global Europe is adapting to new needs while protecting their interests, reforming its economic and social governance to ensure continuing prosperity, solidarity and security for the next generation as well as today's citizens. Meeting challenges of this scale can only be done effectively by making the most of the partnership between Member States and the EU level. Active involvement and a sense of stronger ownership by all actors are prerequisites for a successful Lisbon strategy. It will require a concerted commitment to engage in a capable and responsive communication strategy with EU citizens.

The EU is in the process of deciding many different EU policy initiatives, each of which has its own logic and supporters. The particular challenge for the European Council, both in October 2007 and in Spring 2008, is to bring these different initiatives together to respond coherently to the internal and external challenges faced by the EU in this era of globalisation. It is clearer than ever that the EU can only achieve its objectives at home by being active and united on the global stage: and that its internal policies must be harnessed and sometimes adjusted to achieve external goals. EU and national measures need to work together to gear up European action.

This puts the onus on each Member State to take up the challenge of economic and social reform and to help Europe – at both the EU and the national level – to prepare to benefit from globalisation. At the same time, the Commission will bring forward detailed initiatives as set out in this paper, bringing out how the European dimension can offer a long term vision and a reach beyond the capacity of individual Member States.

The Informal European Council provides an opportunity to bring a comprehensive perspective, and to confirm that the areas of work described in this paper represent the right range of measures. European leaders need to have a clear vision of the key building blocks for European action:

- On the key messages to communicate to citizens about Europe's response to globalisation
- On how the different elements of internal and external EU action should be drawn together

- On how national and EU efforts can be coordinated to offer the greatest benefits to citizens and consumers

This should be the platform for the 2008 Spring European Council as the key annual rendezvous for the Lisbon strategy for growth and jobs, to draw the threads together: to show how our new policy agenda, matched by a renewed political impetus, will make Europe a confident and successful player in the age of globalisation.

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