Reciprocity and international Trade
How to restore fair competition conditions?
Report by Jean-Michel DELISLE
8 March 2012
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Presented on behalf of the Economic and Financial Committee and approved at the General Meeting on 8 March 2012

THIS REPORT IS BASED ON FEEDBACK RECEIVED FROM FRENCH PROFESSIONAL UNIONS AND ASSOCIATIONS (FFB, UIT, Ficime, UIC, FIM, SIEPS, Gitep-TICS, CCFA and Syntec Ingénierie)
The proposals contained herein do not represent the official position of these associations.
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SUMMARY OF PROPOSALS

THE ACTORS OF A RECIPROCITY POLICY

AT THE LEVEL OF THE EUROPEAN INSTITUTIONS
- Adopt a trade policy favouring bilateralism and plurilateralism over multilateralism
- Favour a "value chain" approach rather than one based on "offensive/defensive sectors"
- Define economically strategic industries
- Support work on statistics which incorporate a "value-added trade" measure

AT THE LEVEL OF EU MEMBER STATES AND MORE SPECIFICALLY, FRANCE
- Use economic diplomacy
- Create national level Market Access databases
- Contribute to an efficient border control

AT THE LEVEL OF THE ECONOMIC PLAYERS
- Favour solidarity in production circuits
- Encourage European and French companies to negotiate offsets

THE LEVERS OF A RECIPROCITY POLICY

RECIPROCITY IN TRADE AGREEMENTS
- Carry out better monitoring of the implementation of existing bilateral agreements
- Limit bilateral agreements to strategic partners open to reciprocity
- Adapt methods used in bilateral negotiations
- Negotiate, where appropriate, non-commercial reciprocities
- Introduce review clauses into free trade agreements
- Nurture sectoral reciprocity with plurilateral agreements

RECIPROCITY VIA JURISDICTIONAL TOOLS
- Give a positive image of trade defence instruments (TDIs)
- Improve statistical information on subsidies in emerging countries
- Make the use of the WTO's Dispute Settlement Body (DSB) more systematic
- Make the WTO a regulatory tool, stressing the modernisation of the rules

RECIPROCITY IN PUBLIC PROCUREMENT
- Exclude non-reciprocal partners from European public procurement
- Systematically impose a "public procurement" section to free-trade agreements.
- Work to make it easier for BRICs to sign up to AGP
- Gear transatlantic dialogue more towards the issue of procurement contracts

RECIPROCITY IN MUTUAL RECOGNITION STANDARDS AND PROCEDURES
- Clearly define a foreign regulatory strategy
- Encourage the signing of new mutual recognition agreements

RECIPROCITY IN OTHER COMPETITION RULES
- Associate BRICs with the OECD's arrangements on export credits
- Support OECD membership for BRICs so they will be bound by transparency and good governance rules
Admittedly, reciprocity has acquired a good level of recognition. It stands as a cornerstone of the international trade system, firmly inscribed in WTO agreements, without however being a principle of international law, and has now become an essential aspect of debates on European trade policy. Its presentation in its various forms reflects a wish for less naivety in international economic relations.

Since the financial crisis started in October 2008, protectionism has risen considerably. Taxes, customs restrictions and other discriminatory measures have also increased, generating concern from the World Bank, the World Trade Organisation (WTO), the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Cooperation and Development (OECD), which all have noted the emergence of protectionist practices particularly in G20 countries. The crisis has given food for thought on how to combat the pernicious effects of liberalisation.

We should not take for granted the idea that Europe's status as a prime trade power is sustainable and that this status won't be damaged in the years to come. Europe's entire trade policy cannot be based on this assumption. The European Union's relative share in global GDP is down whilst the performance of the emerging countries in terms of growth has been unprecedented over the last few years. Although the European Union generated 25% of global GDP in 2000 (adjusted for parity of purchasing power - PPP), when the Lisbon Strategy was launched, it will account for no more than 18% of global GDP in 2020 according to current estimates. Even though it is difficult for the EU to adopt more protectionist measures, it should equip itself with the resources needed for a "carefully chosen liberalisation". The EU has never made the concept of reciprocity a real leitmotiv as part of the opening-up of its markets since the Single Market is more open than the markets of the EU trade partners.

With the upcoming French presidential elections, the notion of reciprocity in trade is a relevant topic of debate. France and the EU are worried about Europe losing entire industries which are competitive or which constitute a niche on the European or global market or Chinese companies being preferred over European ones in public procurements. The companies themselves are starting to alert their respective governments.

<table>
<thead>
<tr>
<th>Reciprocity in parties' manifestos for the French presidential elections</th>
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<tr>
<td><strong>UMP</strong></td>
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<tr>
<td>- radically reform international trade on the principle of reciprocity and support a strong and protective Europe, capable of encouraging innovative industrial policies;</td>
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<tr>
<td>- refuse a rule-free version of globalisation; nurture an equitable globalisation model which respects people and the planet.</td>
</tr>
<tr>
<td><strong>PS</strong></td>
</tr>
<tr>
<td>- protect the interests of Europe, its know-how and employees in globalisation, improve regulation of trade and increase customs duties on products which come from countries which do not comply with international social, health or environmental standards.</td>
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<tr>
<td><strong>Modern</strong></td>
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<tr>
<td>- Incorporate environmental and social objectives into international trade through reform of the WTO.</td>
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<tr>
<td><strong>EELV</strong></td>
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<tr>
<td>- Reassert the principle of reciprocity in trade so that companies and countries which would like to sell their products in Europe are in compliance with health, social and environmental standards in effect in the European Union (PS- EELV manifesto agreement, 15 November 2011).</td>
</tr>
<tr>
<td><strong>PC</strong></td>
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<tr>
<td>- Create a social and ecological visa for trade.</td>
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<td><strong>FN</strong></td>
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<tr>
<td>- Introduce differentiated customs duties to favour national production.</td>
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<tr>
<td><strong>Nouvelle France</strong></td>
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<tr>
<td>- Introduce protective measures to prevent social and environmental dumping, relocations and cuts in salaries.</td>
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</tbody>
</table>

Source: Websites of French political parties

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1 The approach adopted by Alstom (Cf. Infra) particularly contributed to the European Commission's awareness of these notions. Also see the report by Jean-Claude Karpeles, "What European Trade Policy After the Crisis?", CCIP, 29 April 2010, http://www.etudes.ccip.fr/rapport219-ville-politique-commerciale-pour-l-europe-apres-la-crise-kar1004

1. Basis in international law

The reciprocity principle is not included in the basic principles of international trade per se. The WTO recognises two basic principles: the most favoured nation clause (the "MFN clause") and the national treatment clause. In the WTO agreements, the MFN clause specifies that any commercial advantage granted by a country to another must be immediately granted to all WTO members. The national treatment clause for its part enables a foreign company to benefit from the same conditions applied to national companies. So, the concept of reciprocity is included in a way in international agreements. Article XXVIII 2 of the GATT stipulates that member States should endeavour to "maintain a general level of reciprocal and mutually advantageous concessions" and the 1994 World Trade Organisation (WTO) agreement includes the same notion. Only the WTO's plurilateral Government Procurement Agreement (GPA) is fully based on this notion of reciprocity.

It should be noted however that in the 1970s, GATT agreements authorised an exception to the rules of reciprocity with regard to trade relations with developing countries; the "special and differentiated treatment" introduced by the GATT means that developing countries cannot be required to open up their markets to the same extent as developed countries in multilateral and bilateral commitments.

In international law, there are also two categories of bilateral agreements which are characterised by an equivalence of respective commitments, namely bilateral investment conventions, and fiscal conventions which confirm the parallel obligations and rights of the two parties. They are often called "reciprocal investment guarantee and protection conventions" or "reciprocal conventions on preventing double taxation" for a certain number of levies and taxes. International trade law could probably get some inspiration from such examples but cannot drift apart from the reality of the power balance between the EU and its trade partners.

2. Anti-competitive practices which have become unacceptable

The EU took a long time to realise the imbalanced nature of trade relationships with its external partners, this is why the Commission has been compared to the "Sleeping Beauty". More recently the EU has tried to establish more reciprocal relationships, especially with developing countries. The emergence of the BRICs, particularly China, had a negative effect on the EU's trade balance but did not create a real awareness of the anti-competitive trade practices and the absence of trade reciprocity on the part of some of the EU's partners. The notion of reciprocity was understood by the EU as a reciprocal opening-up of markets, but this did not include an effort to make sure that there was balance in the liberalisation processes.

Not only has the EU recently realised that its market is extremely open and that its trade partners have no great incentive to negotiate new free trade agreements with it, but it’s also realising that some of its main partners are not abiding by the rules of fair competition and are not honouring their international commitments. This realisation has been strengthened by the crisis and the difficulties in finding growth levers, especially on foreign markets.

Two cases in particular, which have come to symbolise the issue of reciprocity in trade, have aroused the interest of the French government:

- In 2006, Bombardier - a Canadian operator - won a €4 billion contract for the modernisation of the Transilien (Île-de-France) network, to the detriment of Alstom. The latter took offence at losing such a public procurement on its own territory, whilst Canada did not allow it to submit a bid for the modernisation of the Canadian metro system. On closer inspection it turned out that Canada had inserted exemptions in the general notes to the WTO Agreement on public procurements, excluding certain sectors, such as urban transport, from the Agreement's scope of application. While Canada had transposed these provisions, the EU had not incorporated this reciprocity rule into urban transport, and even continued to open up its public procurements to companies from third countries which have not signed the Government Procurement Agreement (GPA).

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Alstom then raised awareness of this situation amongst French and European governments, encouraging them to adapt the existing texts. 14 companies joined Alstom and a letter was sent to the Fillon government to this effect. Michel Barnier, the European Commissioner responsible for the interior market and services, took up the theme in Brussels, supported by the emergence of other cases related to public procurement.

- Two large construction companies from Ireland and Poland were outbid by a Chinese competitor, Covec, to build a new motorway between Warsaw and Lodz for the 2012 European football Championships. The price offered by the Chinese company was half that of the budgeted price. Without local support however, Covec experienced great difficulty in finding suppliers, renting equipment and buying construction materials.

The EU then noted that the value of public procurements awarded to companies from third countries was much higher in Europe than abroad: €312 billion, according to the European Commission, while it would not exceed €34 billion in the US and €22 billion in Japan. Since these various affairs, the French (and also European) political world has gradually embraced the idea of generalising reciprocity in the EU's external trade relations.

To tackle the crisis, over the last few years several of the EU's partners have put in place measures which restrict trade and which do not reciprocate the commitments made by the EU in bilateral agreements or GATT/WTO agreements; a slight number of these measures (only 17%) have been dismantled since the end of the crisis.

- Covered by the emerging countries strategies and the adoption of the new economic strategies of major emerging countries, there is a major increase in the number of restrictive measures which do not reciprocate the commitments by the EU in bilateral trade agreements and applying the principle of reciprocity in certain areas, especially those linked to international trade, access to market subject conditions, restrictions on foreign property, unequal application of legislation on intellectual property rights, very limited access to Chinese public procurements.

- French and European parliamentarians are not being outdone on this notion of reciprocity. Within the framework of the leading initiative approved on 28 October 2010, "An Industrial Policy in the Era of Globalisation", European parliamentarians speak in favour of reciprocity in trade between the EU and third countries and also call on Europe to examine the economic practices of third countries before drawing up its own policies.

- Likewise, the French Parliament approves, in the autumn of 2011, a report on the failings of foreign trade which calls for "the EU to adopt a tougher stance in the face of the aggressive trade strategies of the large emerging countries by examining the possibility of concluding bilateral trade agreements and applying the principle of reciprocity in certain areas, especially those linked to international trade, access to public procurement and the protection of intellectual property".

To tackle the crisis, over the last few years several of the EU's partners have put in place measures which restrict trade and which do not reciprocate the commitments made by the EU in bilateral agreements or GATT/WTO agreements; a slight number of these measures (only 17%) have been dismantled since the end of the crisis. Worse still, the protectionist practices have spread over the last few months amongst G20 countries as noted by the European Commission in its report for the G20 Summit (Cannes, 3-4 November 2011).

6 Recent increase of 30 points following the growth in the share of automotive imports from 16% to 23% between 2009 and 2011.
The other BRICs - Russia and India - have taken a similar stance. A large part of their aids combine industrial support and protectionist measures, the European Commission pointed out. In fact the majority of the economic plans is now less focused on dealing with the crisis and is geared more towards emerging as an industrial power at a global level. This is why several of these measures concern local partnerships/local content obligations, or obligations related to the transfer of technologies and know-how. In June 2011 for instance the Russian authorities, aiming at strengthening the local content of national production, introduced new rules on automotive assembly with quotas for foreign producers, the latter being obliged to manufacture 300,000 vehicles per year, with at least 60% of the parts produced locally. Another illustration of this intention to boost domestic production is the assembly, by Argentina, of BlackBerry parts in the southern part of the hemisphere, in Tierra del Fuego, instead of having them imported. This made the smartphones 15 times more expensive than those assembled in Asia 7.

Finally, the transatlantic relationship also suffers from non-reciprocity and protectionism. The Bombardier/Transilien affair (Cf. Supra) in Canada give evidence of this. We have also seen it with the US, where only 15% of public procurement is subject to WTO rules, compared with 85% in the EU. In addition, 13 Federal States in the US completely disregard the WTO Agreement in public procurement and 37 others apply but ignore it in certain sensitive sectors. Pennsylvania excludes construction steel. Finally, another US law on public procurement demands that 23% of contracts be concluded with SMEs 8. Other asymmetrical practices in US-Europe bilateral relationships have been noted. Nine measures which potentially restrict trade have been approved by the US since October 2008. This is nowhere near the 104 measures taken by Argentina but the US restrictions, such as the Buy American Act which now includes other areas such as public transport, have a significant scope 9. The textile sector has been heavily affected by all the recent extensions of this act, according to the UIC (see appendix – Trade associations talk about reciprocity).

3. Economic players increasingly sensitive to this issue

A small but growing number of French trade associations are becoming increasingly vocal in their support of reciprocity (see appendix). The FIEEC (Electronic, electrical and communication industries association) 10 believes that "the reciprocity of trade on the international stage (...) remains [one] of the essential elements for European competitiveness". The GFI (group of industrial associations) is calling for "trade reciprocity to be made effective" 11. The construction associations seem to be more sensitive to the need to impose reciprocity in public procurement following the Covec affair (Cf. Supra). The automotive industry is also following bilateral negotiations very closely. In the past South Korea was the partner, now it is India. It is closely monitoring the balance of commitments, given the "sensitivity" of the sector and India's ambition to become an industry leader. In the textiles sector, the French textile association (UIT) has voiced its support for the conclusion of free-trade agreements based on the reciprocity of commitments (EU-India, EU-Canada etc.).

The associations representing services seem to be more vague about this question of reciprocity, particularly within the framework of the current free-trade agreement negotiations. Some of them fear that reciprocity will be applied sector by sector causing a loss of levers for trade-offs in favour of services. However, in the EU-India draft agreement, the interests linked to services are particularly important, whether in financial services, retail, the mobility of service providers (audit, consultancy etc.) and finally, European law firms whose presence is very restricted in India.

In fact, the importer/exporter interests are currently largely transcended by the fragmentation of global value chains (GVCs). A company is no longer only an importer or exporter for an end product; it is often dependent on –

8 Source: Europolitique, 8 September 2011.
9 Alstom, for example, has met with real difficulties in certain US states in the area of urban transport (tramways).
the import of certain intermediary products in Europe or emerging countries in order to make the finished product. This is not only true for a product with high added value such as the iPod; it is true for a larger range of products.

The volume of trade in intermediary products continues to increase, illustrating globalisation of production processes worldwide.

In this context, both national and European associations may find it difficult to define the interests of their members, who are both importers and exporters, and to reconcile these interests, especially since trade levels vary from one country to the next, or to find consensus among members who are not subject to the same level of unfair practices on the European market.

Furthermore, certain economic players are more supportive of an offensive strategy to strengthen European industrial policy: "even if there is a certain amount of truth in protectionist arguments, industrialised countries’ multinational companies cannot count on political counter measures. (…) The only solution for multinationals is to refocus their business towards developing countries and focus on services in which they have a competitive edge" 12.

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INTRODUCTORY CHAPTER

A concept which must be realistic
The concept of reciprocity could restore fair competition conditions between the EU and its trade partners but only if instituted within an internationally recognised legal framework. This notion of reciprocity cannot be a completely separate policy; nor can it be implemented in a systematic or blind-folded fashion. The stance on reciprocity must therefore be tinged with reason and pragmatism, favouring the legal path. It is important to oppose an anarchic practice of an “eye for an eye, tooth for a tooth”. By and large, this reciprocity must be implemented with the idea of firmness, respect and less naivety. This issue, which has intrinsic limits, requires a faultless political will on the part of the EU and its members.

1. Do not breach international rules

Although the concept of reciprocity comes natural in multilateral negotiations at the WTO and in international agreements which it is a fundamental part of, it deserves to be handled with more care in bilateral relations. It should be pointed out - however obvious as it may be - that any proposal aiming to use reciprocity in international trade could have a boomerang effect, backfiring on its initiator, or more exactly, on European companies; so adopting a hard-line is greatly discouraged.

The EU cannot increase its customs duties on the simple pretext that a third country does not honour its tariff commitments on a given product. This would lead to a chain of reprisals and a tariff war which would end with everyone losing out. For example, if China closed its import market for a given product, it would be difficult to retaliate by closing the same market to the Chinese since it is unlikely that the EU and China import and export the same products between themselves. There is a significant risk of taking reprisal measures against another product and causing a conflict with finished products manufacturers or European distributors. In addition, by getting sidetracked from the legal framework, Europe runs the risk of retaliation but more importantly it also runs the risk of being taken to the international courts and the WTO Dispute Settlement Body.

Finally, European and international legislation does not allow the introduction of reciprocal measures without safeguards. The EU could not for example close the door on foreign investments or take retaliatory measures unilaterally if these do not concern strategic assets. What remains to be seen is "where to strike the balance between the necessary liberalisation and the defence of strategic interests" 13.

2. Making reciprocity "the antithesis of protectionism"

Reciprocity differs from protectionism insofar as it is used solely to enforce trade partners’ international commitments either through diplomatic channels, or through the settlement of disputes, or by incorporating, in European laws, the provisions for reciprocity which exist in the agreements signed (as is the case for the WTO Agreement on public procurement). Reciprocity also differs from protectionism when new trade agreements are negotiated in a balanced manner. "The principle of reciprocity is the real foundation of the commercial system. It is about liberalising markets and eliminating hurdles to trade. It is the antithesis to protectionism which holds sway in a good number of so-called developing or emerging countries", says Pascal Perrochon, head of international affairs at UIC (see appendix).

Reciprocity does however amount to protectionism when it involves closing off the European markets in reaction to other countries’ unfair practices, outside any legal framework. It is then a question of unilaterally renouncing one’s international commitments as a means of retaliation.

The philosophy of the European Union leans towards staying within the legal framework it has set itself and respecting international commitments. The EU has always been an open economy in favour of free trade. Commissioner Karel de Gucht thus favours “open reciprocity and not reciprocal closure” 14.

The EU and its member States cannot unilaterally waive its international commitments outside any legal framework that would allow these adjustments. For Europe, it is not a question of closing itself off, but of standing firm. Europe must use all the levers available to guarantee, preferably, positive reciprocity (liberalisation of markets) and failing this, negative reciprocity (non-access to the European market when European companies do not have access to foreign markets), on the condition that there are legal texts that would enable such action.

3. Making China a trade partner like the others

In the face of China's "exceptionalism" 15 and its tendency to reject international law, we should ask ourselves about our own complacency. China probably needs Europe more than Europe needs China. The phase, lasting many years, characterised by an ignorance of China, has been replaced by a phase of overestimation according to Jean-Luc Domenach 16.

Maintaining dialogue with countries such as China seems preferable in the eyes of several players, including some people in the European Commission. Believers in this approach think that the interests of China continue to be served by an open commercial regime; in fact we see that the rise in direct foreign investment (DFI) in China benefits from this liberalisation. We can also see that the DFI by BRICs in Europe is still relatively modest 17. Incidentally, the EU often tends to use business and regulatory dialogue to improve bilateral relations; it idealises this Chinese-European dialogue, when in fact the returns are low. The prospects for an improvement in bilateral relations by this method are low. China only understands a firm voice; it is the only way for Europe to be respected 18. It is not a question of stigmatising China; it is European complacency which is being called into question 19. The fact that China represents a considerable and unprecedented trade challenge does not justify everything.

It is also evident that the interests of an emerging power such as China have sometimes been served by an increasing intergovernmentalism within the EU as well as by privileged bilateral relations between certain member States and the Chinese authorities. The report published in 2011, by the European Council on Foreign Relations (ECFR), "Scramble for Europe" 20, denounced the resulting detrimental effect for Europe. That shows, in this context, how much firmness and unity can serve better the EU’s commercial policy. Trade reciprocity is in the interest of every country.

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15 The Economist, 18 July 2011.
17 Chinese inward investment in the EU currently only represents 2% of inward DFI in the EU.
18 J. L. Domenach, op. cit.
19 Corinne Vadcar, "Complacency is a Dead-end Street" in: Putting an End to Complete Satisfaction with China, Sociétal, no. 73, 3rd quarter 2011.
20 http://www.ecfr.eu/content/entry/advisory_the_scramble_for_europe
The law cannot do everything, for at least 3 essential reasons: by already having its trade liberalised, Europe does not have optimal flexibility; there is no joint vision on this issue between member States; finally, several players have relatively opaque practices and tend to make the application of a reciprocal policy difficult. The policy needs resources, and we need to combine this approach with more firmness in order to compensate for a lack of power.

1. The EU's limited degree of flexibility

Some see reciprocity as a tool for "protecting" against globalisation, while others see it as a way of restoring fair trade and competition. What is reciprocity then? At what level should it be applied? Can the EU force its partners to comply with reciprocity? Isn’t this just another proof of naivety for the EU to believe that it can impose this direction?

It is not easy to negotiate the removal of trade barriers when you are already so open. Certain countries have a "need for Europe" in order to diversify the geographical structure of their foreign trade (South Korea, Japan, Mexico, etc.) or to support their economic growth. But other countries have already adopted trade strategies in which they have opted for the development of their South-South relations.

There is also a significant risk of igniting trade wars and suffering the boomerang effects of a protectionist policy. China’s decision at the end of 2011 to restrict market access to US large engine cars manufacturers shows such risks of retaliation. As underscored by Pascal Perrochon, head of international affairs at UIC, "I do not think that imposing customs or tax sanctions on products imported from countries which do not respect social or environmental regulations should be a priority. It will only cause retaliatory trade measures from these countries (...)") (see appendix).

With the euro zone crisis as the backdrop, the EU does not really have the resources to implement, in a clear-sighted and balanced manner, "negative reciprocity" when its interests are threatened. Such reciprocity would make the balance of power an issue, and at the moment the balance of power (whether political or economic) between the EU and its partners is not in favour of Europe. As a result of the crisis, the EU risks becoming financially alienated from China. Finally, since the euro zone crisis, Europe has lost its credibility with its foreign partners, including the emerging countries.

2. Lack of a common vision

In European law, the Lisbon Treaty, article 207, has streamlined the EU's trade policy by confirming that all of the main aspects of foreign trade, including all services, trade related intellectual property rights and international investments now fall exclusively within EU's jurisdiction. Going forward, the Council must also share its powers with the European Parliament when measures defining the implementation framework for joint trade policy are approved.

The "doctrine" in the area of trade policy is set at the European level. Any deviation in relation to the current doctrine requires the agreement of most member States. It is, in effect the EU which negotiates, ratifies and implements trade agreements, whether bilateral or multilateral. Only the EU "has overall decision-making power at a Union's reciprocity level with its trade partners" 21. An EU member State cannot unilaterally take reprisals against countries which are said to have unfair practices. Customs duties are applied uniformly across European borders and the EU commits all member states through the international trade agreements signed.

Consequently, Europe's degree of flexibility is restricted since the member States are not unanimously in favour of a change of policy. There is nothing new in the dichotomy between the largely pro-free trade northern European States and the more protectionist southern States, which could become more exacerbated with a debate on trade reciprocity. Northern countries have always baulked at taking cases to the Dispute Settlement Body (DSB) of the WTO and fighting the unfair practices of trade partners. For example, the anti-dumping procedures are struggling to introduce compensatory measures. For the same reasons, the draft Directive on public procurements initiated by the European Interior Market Commissioner, Michel Barnier, risks encountering significant difficulties. "The existence of a majority within the Council in favour of such a mechanism it is not certain" 22.

The concept of reciprocity is strongly opposed by certain European States. Because it is strongly supported by France 23, this concept is perceived by certain European partners as a form of protectionism. In fact, the French industry minister, during the competitiveness council of 10 March 2011, said that he would sooner use the English phrase "level playing field" during this debate, a word already established in several of the Council's conclusions, adding however that the French word "réciprocité" was not a dirty word 24.

**Level playing field**

An expression for a market or industry in which all participants compete under the same conditions from regulatory and fiscal points of view.

"Ensuring a level playing field" is now a common expression in all international agreements, reports, policy statements, proposals and so on.

We suppose that the "level playing field" concept was born somewhere in the offices of the OECD or the World Bank thirty or forty years ago and it has become a seemingly indispensable and unavoidable multilateral motto.

Its use at the beginning of a text means that the author pays their respects to the global free market and free trade philosophy and that all that will be said later fits into the right line. Nevertheless, this concept is one of the most ambiguous of all and may lead to exactly opposite policies.

On the one hand, trying to maintain or improve a level playing field can inspire more free market measures, exacerbating competition, deregulating more sectors and so on. On the other hand, it could lead to taking reciprocity measures aiming at protecting free entry on the market and imposing conditions on competitors who did not respect this very principle on their own market.

Though the long term goals are the same, what is interesting is that the same words can have dramatically different consequences in the short term. "Level playing field" as an expression is therefore to be used and received carefully.

Source: Claude Revel, Skema, Financial Times Lexicon

Germany seems to have a relatively unclear position; the question of reciprocity is not debated at the national level; but Germany tends to play the neutrality card when it comes to defending the domestic market against unfair practices. This attitude is quite clear in anti-dumping procedures where on several occasions it has refused to officially give its support, fearing that it would lose market share in China.

**Example of how developing countries are treated in relation to trade**

Disagreement amongst member States is also felt within the framework of the reform of the system of preferences (GSP) started by the EU in 2011 in order to take account of developments in the economic environment. The GSP is largely based on adjustments to the principle of reciprocity mentioned in part IV of the general WTO agreement: "the contracting parties do not expect reciprocity for commitments accepted by them in trade negotiations to reduce or eliminate customs duties and other obstacles to trade with developing contracting parties". The EU has been the developed partner which has offered, autonomously, the most generous trade preferences to all developing countries. The current system grants preferences to 176 developing countries on 66% of tariff lines. Henceforth, France would like to obtain the exclusion of large emerging countries, such as India, from this GSP and introduce new criteria to be able to limit the awarding of the preferences (such as GDP per capita or a 1% threshold of international trade). It is not supported by northern EU countries which do not want to go down this path. Several economic players such as the UIC support this reform (see appendix).

In light of these diverging viewpoints, France has a key role to play in the effective implementation of this reciprocity concept in Europe. It must convince the various Member States and the European Commission to move further along this path, as it should be implemented at a European level. But the national Parliaments also have an important role to play in this area, all the more that the Lisbon Treaty gives them more leeway.

22 Senate Meeting of the European Affairs Commission, 7 June 2011.
23 "Protectionism, the Gallic village fantasy", Le Point, n° 2 051, 5 January 2012, p. 65.
24 "France defends the concept of reciprocity", Europolidé, 14 March 2011.
3. Beyond legal orthodoxy

The legal approach may be complemented by initiatives at the national level or at the level of economic players who might strengthen the spirit of firmness which must be established in trade.

However, certain practices are not in tune with the legal orthodoxy advocated up until now by the European Union.

German insurance companies for instance refuse to insure construction contracts whose materials do not meet German criteria and regulations.

Ficime has also asked itself the question: "Is it acceptable that access to the discussions of the Customs Code Committee in Brussels should be kept secret and that we cannot access these documents because French Customs are bound by secrecy and they abide by this, while at the same time, other member States are slightly less rigorous with these rules and release very strategic information to their operators at a very early stage?" (See appendix).

Similarly, Polish companies have shown solidarity, in the face of the Chinese company which won, at completely "dumped" prices, the public procurement against Polish company Covec (Cf. Supra).
CHAPTER I

Practice which applies to everyone
Because the law cannot do everything and has its limits, it is important that the majority of players sign up to and implement this practice, revising a certain number of approaches. Reciprocity is not only a matter for Europe; its implementation is also a matter for the Member States and economic players. If the European authorities as well as the EU member States and the players can implement a reciprocity policy within the framework of the legal instruments (Chapter II), they can also amend certain practices and apply various tools in relation to other policies (industrial policy, contractual negotiation, economic diplomacy, support for international expansion of companies etc.) (Chapter I).

→ Adopt a trade policy favouring bilateralism and plurilateralism over multilateralism

As noted by European Trade Commissioner Karel de Gucht, reciprocity was the main reason for the stalemate at the Doha negotiations. China, India or Brazil refuse to make more significant commitments and would still like to be treated like developing countries. Consequently, this raises the question of whether the European Union should continue along the path of multilateralism. It is possible to obtain reciprocal trade commitments at the international level; but, is the EU prepared for further concessions in order to "only" obtain regulatory advances?

As highlighted by Emmanuel Butaud-Stubbs, General Delegate of the UIT, "when you talk, simultaneously, about reciprocity and multilateralism, you have a real problem because developing countries are treated differently At the WTO, there is a majority of developing countries and multilateral law legitimises non reciprocity of trade commitments between industrialised countries and developing countries". Philippe Guibert, General Delegate of the SIEPS, also thinks that "the best way to achieve reciprocity is to negotiate free trade bilateral agreements". According to Pascal Perrochon (UIC), "at a time when multilateral negotiations are making no headway, it is by this method [bilateral] that we can put issues on the table such as those concerning tariff barriers, absence of tariffs, opening up to investments, intellectual property or access to public procurements" (see appendix).

In a WTO where the interests of developing countries or those in transition are more significant numerically, the European Commission must be prepared to break away politically from the primacy of multilateralism over other paths to liberalisation, if it wants to implement a policy of reciprocity. Consequently, European trade policy must openly favour bilateralism and plurilateralism over multilateralism.

→ Favour a "value chain" approach rather than one based on "offensive/defensive sectors"

"The "sector" debate is increasingly outdated as it focuses more on the "value chain". It is very possible to have value chains with key links - including in the traditional industries - which are set to stay in Europe and continue to export. Large textile groups are not affected at the moment, nor are luxury groups. On the other hand, in sectors such as ITC, many of the links have disappeared. So in the current debate on reciprocity, it is more a question of thinking about the value chains", says Emmanuel Butaud-Stubbs, General Delegate of the UIT (see appendix).

It is therefore important that the "Trade" Directorate-General of the European Commission which is leading the trade talks at the WTO and with third countries should incorporate this new vision of international trade.

→ Define economically strategic industries

Looking for generally balanced free trade agreement leads to sectoral bargaining and trade-offs. Reciprocity should be applied sector by sector and the European Union can no longer decline to identify industries in which it is able to maintain a competitive advantage over the long term, rather than agreement by agreement, but from a general point of view as shown in the table below.

The EU is duly bound to define economically strategic and untouchable sectors. It is regrettable that neither the EU 2020 Strategy (formerly The Lisbon Strategy), nor the Global Europe Strategy (which determines the EU's
strategy in terms of commercial policy) felt compelled to do this. The two aforementioned strategies are only strategic by name. Certain segments - which have to face intense competition from emerging countries, as is the case for the telecommunications industry - would like to be protected through reciprocal practices.  

Support work on statistics which incorporate a "value-added trade" measure

Furthermore, trade statistics do not take account of the increasing international dimension of production processes. During a conference in the Senate in 2010, French parliamentarian Jean Arthuis made an impassioned plea for an exhaustive and robust statistical framework in order to establish a measure of trade in added value. "For exported goods, it is a question of counting all the added value they contain and subtracting all the added value of imported inputs, in order to avoid double accounting in the production chain". Current negotiations of trade agreements are not based on sufficiently satisfactory statistics to be able to hope to achieve real balances. The WTO has started significant work to this end with the initiative "Manufactured in the world". The European Commission and its statistics organisation, Eurostat, should follow this trend. This is a prerequisite to clearly define the regional and bilateral interests of the European Union.

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EU member States cannot expect everything from the EU when it comes to the application of a reciprocity policy. Often, these States - including France - have added their own naivety to that of the EU in the implementation of the trade policy. While they cannot go against the principles of the trade policy in a concerted manner, they can strengthen implementation. European firmness must be backed by the member States and national voices must be in line with that of Europe. As part of a process of monitoring the discriminatory and non-reciprocal practices of third countries, it is very much in the interests of EU Member States to strengthen the representation of their companies, including SMEs, in business and regulatory dialogue with third countries in order to help bring down obstacles to trade.

France cannot expect everything from the European Union concerning trade policy. We should act up and deploy national actions in order to amplify European initiatives. The two ways of proceeding are not contradictory, but complement each other. Proposals such as the "Made in" initiative help to put the trade policy debate, to a limited extent, back on the national level and to look for possible solutions.

**Use economic diplomacy**

In general terms, amid the crisis and quest for a more balanced liberalism, France must also return to a policy of economic diplomacy and more assertive trade influence. Germany is actively developing influential strategies in the East, whilst France seems to be losing the influential upper hand it had, such as North Africa. It is by no means certain that the European Commission's external departments headed by Catherine Ashton, the EU's High Representative for foreign affairs and security policy, are serving and facilitating the strategies of national influence. France's foreign economic missions therefore have a more significant role to play than in the past. They must play a full role in the provision of France's economic data.

**Create national level Market Access databases**

Given the complexity of the restrictive measures recently taken by certain third States which are not honouring their obligations, we are still a long way from the detailed mechanisms for monitoring commitments which would require the development of unfair and non-reciprocal practices. The economic missions must have their roles strengthened in this area. Improved cooperation between French customs and economic players would also be useful. In addition to the "Market Access" database, information on access to markets for French products and services could be developed at the national level (see appendix). It would involve developing one's own database, in which the national level is the preferred point of entry for companies.

**Contribute to an efficient border control**

Imposing environmental or security standards involves being able to monitor the European Union's borders for the quality of incoming products and services. Border security is currently nowhere near good enough to guarantee the safety of imported products. Any new initiative to strengthen regulatory reciprocity needs this to resolve this issue from the outset.

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28 "The regulatory approach carried out by Europe, harmonising environmental regulations in the common market to very demanding standards and attempting to globalise these standards must naturally be actively continued so long as there is effective control! The capacity of the European Union to block access to the European market of all the products which do not meet its standards is missing, since control of products coming into the domestic market is based almost exclusively on national customs authorities which are overall not large enough for the potential size of the task, and the changing geography of the product flows", Report by Jean-Claude Karpeles, Vision of the CCIP of a new sustainable growth: an economic, social and environmental triptych, CCIP, 15 April 2010, http://www.etudes.ccip.fr/les-etudes-ccip/19-entreprises-et-croissance-durable
Since the leeway at the European or national level is relatively limited, it is also important that the economic players themselves tackle the issue and show more innovation.

→ **Favour solidarity in production circuits**

Encouraging companies to review their relations with producers and subcontractors may make it possible to re-introduce more solidarity into the production circuits.

According to Gerco Rietveld 29, the I.T. sector should serve as an example, "where mutual dependence is significant, in order to develop healthy procurement management". Pharmaceutical companies also see the need to incorporate purchases into the business and play, he says, a pioneering role in the area: "we need to bring the procurement departments out of their isolation and involve them in a frank and open dialogue with the business management". The German model could serve as an example since the large national groups in that country are much better at implementing international vertical integration whilst preserving their subcontractors based on the national territory.

More solidarity between suppliers and subcontractors should be part of companies' long-term strategy to promote innovation and implement, at the level of the economic players, reciprocity in trade practices. This solidarity should be an element of corporate social responsibility (CSR) and must be incorporated into companies' annual reports. This solidarity is important so that producers support their suppliers when the latter are confronted with foreign trade partners' unfair practices. It is also important when it comes to preferring quality over low costs or when a production circuit is to be made permanent.

→ **Encourage European and French companies to negotiate offsets**

Offsets play a major role in the large international contracts. European and French companies could introduce an offsets policy in order to exploit their own areas of expertise and apply practices used widely by trade partners. This would result in a certain rule harmonisation between emerging and industrialised countries.

### Examples of offset measures

Imposing regulatory constraints to force foreign companies to associate with national players within the framework of joint ventures, in order to end dependency and be able to ultimately capitalise the know-how acquired from these forced partnerships is a negotiating tool. These are tools authorised by the GATT/WTO agreements. "Offsets force the foreign company which has won the call-to-tender to create national added value in the country of their client, as a condition for the signing of the main contract, this in order to encourage local industrial development or to contribute to the rebalancing of the balance of payments", says Christian Sylvain, Areva Offset Director. Encouraging French operators to extend these practices in their sectors of activity when France is the client may enable the reintroduction of reciprocity into contractual exchanges with the companies of large emerging countries for example.


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29 Strategic consultant in the Netherlands, author of "Inkoop, een niew paradigm" ("Procurement, a New Paradigm").
CHAPTER II

Implementation: the legal instruments
Europe has the tools to implement such a reciprocity policy. But it must adapt the legal tools in its possession. It must start by correctly incorporating into its own law the international agreements (which have not been transposed and which enable it to close its markets when its partners do not honour their commitments). That is what the EU intends to do with public procurements.

1. Reciprocity in bilateral agreements

Reciprocity is to be applied not only in the existing free trade agreements (FTAs) but also in the free trade agreements under negotiation.

a. In the existing agreements

→ Carry out better monitoring of the implementation of existing bilateral agreements

For a long time bilateral free trade agreements had concerned the removal of tariffs. For several decades, the new generation of FTAs has included wider-ranging provisions, concerning standards, technical aspects or regulations. This makes the respective commitments’ follow-up more difficult and, consequently, more urgent.

Most of these agreements include a mechanism for following up these commitments, if only because liberalisation within the framework of bilateral relations is carried out progressively, in several stages. Consequently it is not easy to ensure the continuity of liberalisation of a party to a bilateral agreement. Whilst certain sectors may be liberalised via bilateral dismantling, the trade partner to an agreement may be tempted to subsequently reintroduce barriers of another type. What about the balance of commitments? This balance can be observed in fact and in law, i.e. in the agreement. But in the concrete reality of liberalisation, it will have disappeared via the replacement of tariff obstacles with non-tariff barriers. Barriers to market entry may also be introduced through provisions on inward investment or services whilst the trade relationship between the two parties remains theoretically open.

In this regard, the companies present on the third country market may help observe, over the long term, the concrete commitments of a State which is a EU partner. The European or national associations representing these companies, the European Chambers of Commerce abroad, to mention a few, play this role of identifying the breach of commitments, alongside the European Commission. This is particularly the case of the European Chamber of Commerce in China (Cf. Infra). The "Market Access" database also enables companies to reference tariff and non-tariff hurdles that they may encounter on third country markets.

b. In agreements under negotiation

In October 2006, the European Commission published a statement entitled "A competitive Europe in a globalised economy" defining the EU's foreign trade policy. This new framework is based on a new generation of so-called "WTO+" free trade agreements which aims to incorporate areas which are not currently covered by the WTO rules.

→ Limit bilateral agreements to strategic partners open to reciprocity

It is true that while negotiating such a WTO+ agreement with South Korea, the EU obtained tariff concessions equivalent to European ones (FTA came into force in July 2011), but the levels of concessions in other regions of the world do not always guarantee such reciprocity. The FTA negotiated by the EU with South Korea facilitates access for the EU’s economic players to the South Korean public procurements. In addition, the South Korean government has made a commitment to extend contract possibilities to public works concessions and Build-
Operate-Transfer (BOT) contracts. It is clear that the economic maturity of the trade partner involved in the bargaining is a factor in the reciprocal liberalisation of markets.

The EU is currently involved in about 16 FTA bilateral negotiations, not including economic partnership agreements. These negotiations involve countries such as Canada, India or Singapore. It is not easy for Europe, which is so open to trade, to conclude balanced agreements with partners whose levels of economic development are so different and whose economic structures are so varied. The EU is involved in a significant number of bilateral negotiations; if it wants to control the results, it must reduce this number.

Finally, along with China, Europe still seems to be suffering from a new kind of naivety by wanting to negotiate a draft EU-China agreement on investment. The ambition of this project seems to be out of touch with the reality of China’s liberalisation at the moment.

Example of the draft EU-China agreement on investment

The European Commission seems to be looking to open up the Chinese market via a bilateral investment agreement. To do this it launched a public invitation for comments prior to the summer of 2011, on the project and the expectations of economic players. However, the main question raised by this draft agreement is what concrete progress the EU can obtain given China’s defensive stance on foreign investment. The European Chamber of Commerce in China (EUCCC) has recently underlined the new obstacles to the entry of foreign investors into China: "(...) Foreign businesses are still not treated equally in China in 2011 both in terms of written laws and regulations, and in terms of implementation. There remains a prevalence of long-standing market access barriers, laws and regulations that unambiguously discriminate against foreign companies, as well as the biased and subjective implementation of laws and regulations" 30.

The report from the European Commission on the measures restricting trade and investment taken by G20 countries also lists no less than 24 measures adopted by China from October 2008 to September 2011 (with none being removed), several of which concern investment 31. Finally, the last update to the list of authorised, restricted or prohibited investments for foreign companies, adopted by the Chinese government at the end of December 2011 (and which came into force on 30 January 2012) has put up new investment barriers in the automotive and refineries sectors.

At a time when China is reforming its investment economy abroad, how can we establish open and reciprocal rules in a bilateral EU-China agreement on investment? If we managed to do this, it would probably involve spending more time observing the policies introduced by the Chinese authorities at the central State and provincial level and activating an eventual dispute settlement system. The negotiation of an agreement on investment between China and the EU therefore deserves the greatest of vigilance on the part of the Commission so that the respective commitments of the two parties are truly balanced. It is also important that such an agreement makes provisions for more transparency on governance rules of Chinese companies which invest in the EU (Cf. Infra).

→ Adapt methods used in bilateral negotiations

Getting more balance in bilateral agreements involves adapting the methods of these negotiations. Whilst the EU should focus on countries likely to grant enough concessions, it should think about extending the practice of negative lists, used within the framework of negotiations with Canada, to other negotiations. This method should allow a better assessment of how balanced the concessions are.

- With the US, there are grounds for making trade relations more balanced. The US is liberalising the banking sector under the pretext of reciprocity for the foreign investor. Whilst European and American companies are insisting on the negotiation of an EU-US free trade agreement, it is possible to call for a balanced agreement by imposing, for example, conditions related to reciprocity in the reservations expressed by each of the partners.

- Within the framework of negotiations with India, several trade associations are also highlighting the risk of the asymmetry of proposed commitments, all the more that India is very competitive in certain sectors. Business Europe has underlined the importance of finalising these negotiations but would like a restoration of the balance between the partners: the European employers’ organisation believes that the current draft favours India too much because it excludes several sectors from its scope of application. It is certainly important to pay

attention to a certain number of openings which, although not huge, reflect the start of an evolution in India’s trade policy. But in India, the reforms may lead to the status quo 32.

**Negotiate, where appropriate, non-commercial reciprocities**

In negotiations where the partners are not inclined to offer liberalisation equivalent to that offered by the EU, there may be other openings which would lead to this concession reciprocity. Likewise, it may be prudent for the EU to provide, in certain cases, other type of responses when agreements are negotiated.

So, within the framework of the free trade agreements which the European Commission intends to negotiate with south Mediterranean countries (members of the Agadir Agreement (Morocco, Tunisia, Egypt and Jordan), Europe has offensive interests in the services sector; the European balancing item to the opening of these south Mediterranean markets does not necessarily exist, with Europe, for the moment, not being in favour of the idea of liberalising access to agricultural products. Consequently, wouldn’t it be worthwhile for Europe to offer a socio-political concession, supporting and consolidating political and economic transitions of the Arab spring countries (awarding of visas as part of the free circulation of people, for example)?

**Introduce review clauses into free trade agreements**

The EU must not only introduce conditions of reciprocity in caveats appended to agreements, it must also explicitly make provisions for review clauses to these agreements. Reciprocity is not fixed in time; it is an evolving concept. It is therefore important for the EU to be aware that an agreement which is balanced at a certain moment in time will not necessarily still be balanced several years after it has been concluded.

### 2. Reciprocity in plurilateral agreements

**Nurture sectoral reciprocity with plurilateral agreements**

The US no longer believes in the WTO and has openly orientated itself towards regional agreements. It is certainly in the interests of the European Union to follow this lead and let go of multilateralism. The energy expended in the Doha Round should be refocused on bilateralism and also on plurilateralism. The US has recently spoken in favour of plurilateralism in the services sector.

It appears to be easier to obtain balanced agreements at the plurilateral level. Furthermore, if the European Union wants to play the sectoral reciprocity card to its full potential, it should really focus on plurilateral agreements which in principle only cover a given sector 33.

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32 Patrick de Jacquelot, "In India, the reforms have led to the status quo", *Les Échos*, 20-21 January 2012.

33 In chemicals, a plurilateral agreement aimed at dismantling tariffs, called CTHA ("Chemical Tariff Harmonization Agreement") has been signed, in order to remove tariffs in a certain sector (see appendix).
PART II

RECIPROCITY VIA JURISDICTIONAL TOOLS

Arbitration and regulation serving reciprocity

1. Resorting to trade defence instruments (TDIs)

→ **Give a positive image of trade defence instruments (TDIs)**

Trade defence instruments are often presented as forms of protection and not as tools aimed at restoring fair competition conditions. That is how some countries - particularly northern European ones - view them. It is therefore important to present these instruments as tools aimed at restoring fair competition conditions and not as forms of protection. In addition, the EU must preserve its trade defence instruments and not start reforms which would deny ways of retaliating against unfair practices.

In this regard the European Commission has announced that it would examine the way in which TDIs help European companies cope with worldwide competition. This will involve consulting all interested parties and the EU is expected to present a concrete proposal in the autumn of 2012. We must hope that this new invitation for comments will not be as ambiguous about these defence instruments relevance as may have been the case with the previous consultation.

→ **Improve statistical information on subsidies to emerging countries**

It is often easy to attack the European Union on its subsidies because its policies are more transparent than those of its partners. And yet, it is difficult to get transparency in this regard.

During the Option Affair during which the European Commission opened, in September 2010, an investigation into Chinese dumping and illegal subsidies (which was unprecedented), the Official Journal of the European Communities (OJEC) indicated that Chinese companies benefited from considerable credits and subsidies, higher than their turnover, a beneficial fiscal regime, and that they were provided favourable regulatory provisions by the authorities.

Belgian Company Option withdrew its lawsuit but the European Commission, aware of the need to better identify Chinese State aid, decided to extend its knowledge of the mechanisms by which the Chinese authorities provided illegal subsidies to their companies. It has launched a significant inquiry into the State aid and exceptional credits which Chinese exporters get from Chinese authorities.

Improving the knowledge of subsidies in BRIC countries would also probably involve more information exchange between the EU and the US; in its complaint raised at the WTO against the Chinese dumping practices in the wind farm sector, Washington has identified over 200 aid mechanisms from the Chinese State.

The cooperation between the US and European administrations during the first anti-subsidy action against China in the summer of 2011 made their actions through the DSB more efficient and created a solidarity between European and US producers. The US and the European Union should continue, insofar as possible, this cooperation. When an anti-subsidy procedure is filed against China, the European Union should systematically position itself as a third party, so as to better understand how the Chinese subsidies work. Knowledge of the Chinese methods is now starting to improve, even if they remain effective. Eventually, the unfair pressure on western markets and particularly European ones could decline with the euro zone crisis but also as the emerging countries strengthen their presence on the southern markets.

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34 "The EU starts to re-examine the trade defence instruments with a view to their modernisation", Press Release IP/11/1298, European Commission, 28 October 2011.

35 "How the Crisis Changes the Chinese Policy of European Countries", Lettre confidentielle Asie21-Futuribles, no. 44, October 2011.
2. More extensive use of the WTO's Dispute Settlement Body

- Make the use of the Dispute Settlement Body (DSB) more systematic

The EU must not be afraid of using the WTO's Dispute Settlement Body more systematically to enforce the international commitments made by its trade partners. If it considers itself virtuous, it must, at the very least, act in a more zealous manner.

At the end of 2010 the US filed a settlement request with the WTO for the subsidies granted by China in the wind power sector and the resulting dumping practices suffered by US companies, and the EU took the same stance. However, anti-subsidy cases with the EU are, all in all, quite low compared with the use made by the US of the WTO under its rules on State aid.

Until late 2008, out of 378 requests for review at the DSB, half concerned the US, compared with one third from the European Union. The EU currently has 85 disputes underway as a plaintiff compared with 98 for the US. Whilst China only has eight cases as a plaintiff, it has positioned itself as a third party in 87 cases. In fact, China has used the opportunity to act as a third party in various cases in order to familiarise itself with the DSB. After this learning phase, China is starting to become an active member of the DSB.

Being able to trigger procedures at the DSB more systematically initially involves strengthening information held on subsidies in particular (Cf. Supra).

3. The modernisation of rules at the WTO: the challenge of regulation

- Making the WTO first and foremost a regulatory tool to restore reciprocal liberalisation

Over the last few years the WTO has lost its credibility, following the stalemate at the Doha Round multilateral trade negotiations. But it has also lost part of its legitimacy in the eyes of several States which believe that trade liberalisation has had several damaging effects on industrialised economies over the last few years.

The US no longer believes in the WTO, and would prefer regional agreements (art. 24 of the GATT and art. 25 of the GATS) or, at best, plurilateral in the case of services. Stressing regulation may be a way of renewing Washington's interest in this body, especially since the current authorities are highlighting the export market as a new growth engine. Anti-globalisation rhetoric has a particular resonance there due to the sharp rate at which industrial activity in the country is being reduced and China's unfair practices, which are affecting several competitive sectors of the American economy, such as wind power.

While several countries - including Russia, which has just joined - still believe in the benefits of the WTO, an increasing number of countries see an asset only in its dispute-settling system. There are probably grounds for "saving" the WTO, and for highlighting the role it can play in regulating globalisation and restoring fair competition conditions. The Danish presidency of the EU has said that it is determined to support the function which the WTO has assumed of acting as a bulwark against protectionism.

On a series of aspects (public procurement, State subsidies and aid, safeguards, etc.), WTO rules probably need a major modernisation in order to help the companies of member countries to deal with unfair global competition. This is where the WTO's legitimacy could be strengthened.

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36 Anthropologists at the WTO, under the direction of Marc Abélès, CNRS, 2011.
PART III

RECIPROCITY IN PUBLIC PROCUREMENT

A specific reciprocity approach: “negative reciprocity”

Following the Alstom affair (Cf. Supra), the EU became aware of the fact that its European companies were competing with companies outside the EU which approach the European market with a low price policy whilst the European companies are unable to operate on the foreign markets.

### Implementation of EU rules for signing of government defence procurement contracts

In January 2012 the European Commission intervened to make sure that two member States (Germany and the Netherlands) respect their obligations to implement the EU rules on the signing of public procurements in the area of defence. The Commission was deeply concerned that these two member States were not respecting their commitments under the Directive covering public procurement of arms, munitions and combat equipment (as well as related work and services) for defence purposes, as well as the signing of public procurements for supplies, works and services which are sensitive to security needs. If the Directive is not entirely implemented in all member States, companies and taxpayers can no longer benefit from easy access to a transparent and open (and therefore more competitive) market in the defence sector.

1. Draft European Directive

On 20 December 2011, the European Commission proposed a revision of its directives on public procurements with a view to an in-depth modernisation of public procurement orders in the EU. The EU is however taking a long time to take initiatives internationally. This is quite indicative of a Europe that tends more towards liberalising foreign markets than specifying the conditions for entry into its own market. It is true that drafting such a text is not easy because it is difficult to define what a national or European company is. Several economic players and trade associations responded to the 2011 European invitation for comments on this project.

The aim of the European Directive would be to exclude from the public procurements the trade partners who do not guarantee reciprocity within the framework of their own public procurement.

➔ Exclude non-reciprocal partners from European public procurements

2. The WTO agreement on public procurements

The Government Procurement Agreement (GPA) - signed in 1979 and revised in 1994 - is the only binding agreement of the WTO dedicated to public procurements. It is a plurilateral agreement which does not concern all WTO member States, but only 12 or so countries and about 20 observers; China is in the process of negotiating its membership while India has the status of an observer. In addition the GPA is not applied to all public procurement. Each party to the Agreement specifies the scope of application in the appendices. Coverage is not uniform and the degree to which public procurements are opened up to foreign competition in the area of public utilities varies from one country to the next. The coverage is also subject to several specific or general exceptions.

Public procurement has always been a politically sensitive area because it is always easier to give preference to national suppliers than to foreign competitors. The implementation of the GPA is made more difficult during a recession when there is an increase in the tendency to fall back on national suppliers. Several countries impose technology transfer demands, technical barriers or offset measures. The US, Japan and South Korea for their part do not apply the GPA to public procurements reserved for national SMEs.
The European Union has been guilty of excessive liberalism in this regard:

- by making the fullest commitments under the GPA in comparison with its partners;
- by not applying, to its partners, the “reciprocity clause” in the GPA, having not clarified the conditions under which the awarding entities can apply it;
- by not having incorporated, immediately after signing the GPA, a “public procurement” section to its bilateral trade arrangements.

### Terms of GPA revision

- greater coverage of contracting entities at the sub-central level;
- the removal of significant discriminatory measures such as those which exclude groups from public procurement reserved, for example, for SMEs;
- the removal of specific exceptions which in practice make markets inaccessible whilst commitments exist.

→ **Systematically impose a “public procurement” section to free-trade agreements.**

In parallel, the European Commission must systematically incorporate a “public procurement” section into its bilateral trade talks. The partnership agreement in Mexico, which came into force in 2000, incorporates this dimension. The CCIP believes that new bilateral free trade agreements cannot be negotiated with emerging or industrialised countries without the latter making significant guarantees in terms of public procurement.

→ **Work to make it easier for BRICs to sign up to GPA**

During the discussions preceding the agreement on the modernisation of the GPA signed on 15 December in Geneva, the US expressed opposition to the inclusion of China in this agreement, on the grounds that the Chinese offer in public procurements was too weak. Ron Kirk, American trade representative, invited China to “include public companies, and the sub-central services and entities, reduce thresholds for the size of contracts covered and abolish other exclusions” 40. It is important that the EU work to facilitate the inclusion of China in this agreement, insisting on greater offers of liberalisation on the part of China, working, where appropriate, in a concerted fashion with the US.

→ **Gear transatlantic dialogue more towards the issue of procurement contracts**

Given the low level of openness of the US market to foreign government tenders (with the exception of the completely liberalised information technologies sector), it is important to pay extra attention to this within the framework of transatlantic cooperation and dialogue. The US cannot ask third countries, especially the large emerging countries such as China, to open up their public procurement without making progress on their side. The question would deserve to reappear on the agenda of the Transatlantic Economic Council (TEC) even if “the real problem […] is at the level of the (American) State where the political leaders are not very aware” so that the State can raise awareness amongst the governors of the Federal States who do not see the benefit.

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38 In fact, article XXIV of the GPA states that the signatory countries should commit to improving the efficiency of the agreement and continue negotiations to this end. Negotiations under the GPA are not part of the Doha Round talks led by the WTO. On the basis of a revision of the text carried out in 2006 in order to improve the Agreement’s usability, the signatory states have started negotiations concerning access to markets. All parties have submitted initial offers. The European Commission has been obliged by the EU Council to revise its offer to guarantee a better balance of commitments.


40 According to Christopher Yukins, law professor, George Washington University, quoted in: Europolitique, 8 September 2011.
At a time when a number of obstacles to trade are in non-tariff barriers, reciprocity in the wider sense and not solely in terms of tariffs is also relevant. Today, the question is how we can make sure that the technical or environmental regulations in force in a country or region are not another factor distorting competition.

1. Regulations

Define a more efficient European regulatory strategy

France opposes the signing of an agreement with Mercosur on the grounds that such an agreement would lead to importing into France agricultural products non-compliant with the food safety conditions and the regulations imposed on French producers. Russia for its part closes its market to German pork production, invoking, again, health regulations. Several French politicians and European deputies clearly want to take this angle on the reciprocity debate. The question of environmental standards and food safety is an important one for international trade. The WTO itself has been invited to give thought to these issues.

Asking about regulations means making strategic choices about tomorrow's trade policy and choosing the type of liberalisation desired. The EU no longer has the luxury of philanthropy, it must think strategically. Thinking strategically and long term means showing the same spirit as China, even if the practice and implementation must differ.

Imposing taxes or "reciprocity visas" would be contrary to WTO rules. The EU tries to practice what some people call a certain "regulatory imperialism", especially with countries such as Ukraine with a view to taking back part of the community benefits. It exercises this at the international level with directives such as REACH which constitute legal windows; while the REACH directive is controversial outside Europe, the EU's trade partners have not yet managed to attack it through the WTO. Likewise if we look at the Directive on the aviation emissions trading system (ETS), we can see that a situation in which Europe decides on a policy and its objectives for the rest of the world might generate problems. US airlines have reacted violently and the US is envisaging unilateral reprisals.

The European Union's regulatory agencies should consult with the European Commission and the member States to make regulatory choices which are integrated into a veritable competition policy and see precisely what leeway is possible to guarantee regulatory reciprocity.

2. Mutual recognition agreements (MRAs)

Encourage the signing of new mutual recognition agreements

Finally, the mutual recognition agreements (MRAs) participate –better than ever in reciprocity. Many of them tackle compliance assessment. The MRAs are conventions between governments through which the importing country agrees for the certification of compliance with their own legislative or regulatory demands to be carried out in the exporting country. There is the possibility of continuing the process started with several third countries. Numerous MRAs have a sectoral scope with dedicated appendices. In the chemicals industry, UIC is calling for the mutual recognition of laboratories in order to raise the technical obstacles to trade in a certain number of niche chemical products (see appendix).
PART V

RECIPROCITY IN OTHER COMPETITION RULES

Transparency and good governance as conditions for fair competition

1. Export guarantee and finance rules

Associate BRICs with the OECD's arrangements on export credits

The unfair practices of emerging countries and particularly China, which benefits from an extraordinary amount of currency reserves ($3,200 billion in the 3rd quarter of 2011), are served by strengthened finance policies and Chinese export guarantees. Industrialists admit that, in certain areas, "Chinese production is not really more competitive than ours, but the finance associated with the Chinese bids cannot be beaten" 42.

When the new OECD agreement was signed on export credits in the area of civil aeroplanes in 2011, China and Russia were invited to participate in the framing of the agreement 43. This prospect is authorised by the fact that certain large emerging countries have a special status in the OECD.

In May 2007, the OECD countries had, on the one hand, decided to invite Russia, particularly to open talks on membership of the Organisation and, on the other, offered a strengthened commitment to South Africa, Brazil, China, India and Indonesia. Although the strengthened commitment is distinct from the OECD membership process, it may lead, in the longer term, to a status of member. As special observers, the BRICs have participated in the discussions on the civil aeroplanes. Brazil has been member of the agreement on civil aeroplanes since 2007. It is foreseeable that an extension to the participation of the emerging countries to other OECD arrangements may be envisaged soon.

In addition, the European Council adopted, in November 2011, a Settlement on export credits which specifies that the EU, as a party to the OECD arrangement on export credits benefiting from public support, has a leading role to play in the efforts made by the OECD to introduce equal competition conditions at the international level by regulating the financial conditions and methods which the export credit bodies may offer.

2. Transparency and good governance rules

Support OECD membership for BRICs so they can be bound with transparency requirements in terms of corporate governance

The BRICs are investing more and more abroad. China is now one of the top ten countries investing abroad (according to the latest CNUCED figures). Investors in many of the emerging countries (China, Russia, etc.) have relatively opaque governance and finance structures which, in addition to worrying industrialised countries, also puts the latter in an uncomfortable situation in relation to the identification of the companies who want to operate in Europe. We have seen it in the battle for the consolidation of the European cable sector where the European leader Draka was made an offer by a Chinese group, Tianjin Xinmao, which was not very transparent about the financial sources of their offer.

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42 Gabriel Grésillon, "the "under-valuation" of the yuan, an outmoded fight", Les Échos, 3-4 February 2012.

43 For more information: http://www.oecd.org/document/18/0,3746,en_21571361_44315115_47211602_1_1_1_1,00.html
If this question of governance is not strictly speaking a question of trade reciprocity, for the emerging players it is however a form of "legal" competitive advantage, while the western companies for their part are completely transparent in their structures in accordance with the good governance rules which the OECD countries apply today.

Today many political and economic players denounce the lack of transparency on the part of the investors of certain emerging countries. "When Indian groups make acquisitions in Europe (…), it is clear that their strategy does not depend on the political designs of New Delhi, or on national concerns. The large Chinese companies are not perceived in the same way: because of the opacity of their governance, rightly or wrongly they are suspected of being under the influence of Beijing or, more vaguely, of being the instruments of a collective project for global, political and economic domination. The countries where they are envisaging acquisitions can therefore legitimately ask them: why, and in whose name? 44".

Other countries such as South Korea are not exempt from transparency obligations in the area of corporate governance, especially when they would like to participate in public procurements or take stakes in European companies.

*Business Europe* has also relayed this idea, calling for a clarification of the situation of certain investments: "Two points are to be watched: the rules of reciprocity and the investments made by companies owned or supported by States" 45. That is why it is in the interests of member countries to open the door of the OECD to the BRICs whose corporate governance rules are not very transparent, hence the contribution of work on a better understanding of the Chinese or Russian models for example 46.

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Appendix
- Ensuring compliance with EU regulations by all businesses operating inside the EU market

In order to prevent unfair trade practices both by third country businesses and Member States that work with those businesses, it is necessary to defend fair trade conditions inside the EU market and foster enforcement of EU regulations by both EU and third country businesses. Without going as far as being protectionist, the construction sector wishes essentially to uphold the rules applicable inside the EU market such as fair competition, transparency, non-discrimination, and national treatment.

To this end, EU institutions and Member State authorities must implement the procedures and checks necessary to ensure compliance with competition law, worker secondment, and services.

- Systematically defining, approving, and enforcing an objective method of detecting unusually low bids

Competition is unfair when a business that bids for a public procurement contract submits an unusually low bid. In order to avoid such a bid, an end-client must have an objective method of detecting unusually low bids in order to reject them when they are clearly identified.

- Checking that State-owned businesses or third country businesses that bid for an EU public procurement contracts comply with bidding conditions

In order to uphold fair competition conditions inside the EU market with respect to competition law, the end-client must first run a check on businesses from third countries that bid for an EU public procurement contract using pre-defined criteria.

Given the difficulty of conducting an investigation outside the EU, the burden of proof should fall on the business, which must be able to prove that:

- it is not receiving grants and subsidies that are not compatible with EU regulations on grants and subsidies;
- it keeps its accounting records in accordance with international accounting standards 47;

If it turns out that the terms and conditions of the business’ bid constitute unfair competition, the end-client must exclude the business.

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47 See Council Regulation (EC) No 1225/2009 of 30 November 2009, Article. 2-7-c: "Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes".
- **Demanding reciprocity in access to the public procurement of trading partners**

At the same time, as emerging-country businesses expand into world markets, EU businesses face protectionism in certain countries. In its report on barriers to trade and investment \(^{48}\), the European Commission lists the main trade barriers with which EU businesses are confronted in third country markets. The reports concludes that in most of the listed countries (Japan, China, Brazil, Russia, and the United States), foreign businesses face access restrictions in public procurements. As part of the WTO’s Public procurement Agreement, the accession negotiations of certain countries should be stepped up and existing agreements strengthened to improve access conditions by foreign businesses to the public procurement of the signatory countries at least in order to provide access conditions equivalent to those of EU public procurements.

- **Fostering fair trade conditions on international markets**

In the event of distortion of competition in the trading of goods, the European Commission has the possibility of implementing defensive measures to protect the interests of industries endangered by dumping by third country member States. Anti-dumping duties are enforced following a thorough investigation conducted by the Commission in order to determine the existence of dumping and to assess the damage registered by EU businesses.

Anti-dumping duties apply only to goods, not services.

However, the provision of services by third country businesses under distortive competitive conditions can have a significant impact on EU businesses, especially in terms of jobs, since the added value from services comes mainly from the labour involved. Nonetheless, it would be difficult to accurately measure the consequences of distortion on the sector involved in the same way as in a dumping investigation involving goods.

Against this backdrop, a first step would be to foster, as part of global negotiations, fair trade conditions for service companies, based on clear principles. For that, one can refer to the provisions of the European Council Regulation on, "measures against dumped imports (…)," which defines market economy conditions.

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\(^{48}\) Engaging our strategic economic partners on improved market access: Priorities for action on breaking down barriers to trade. SEC (2011) 298 Final.
1) How does the word "reciprocity" sound to your members? What connotations does it have?

Reciprocity is an idea which seems to be in fashion. It is a topic which has become very popular with certain European Commissioners and French politicians since the autumn of 2008. It is at the core of a global economic crisis. It is a topic which is used to cast a spell on the public and it is very seldom defined, but is used to build some sort of superficial consensus.

It is a positive debate because reciprocity is an idea, which in and of itself, should be good for EU industry. As a result, one has the impression that we have made a theoretical and ideological stride with respect to the recognition of reciprocity. At the same time, it is a rather frustrating debate because in reality, it is not defined. It is important, for example, to look at how this idea is defined by the WTO, bilateral agreements, and in certain provisions on the Internal Market; it is also important to see why it could or could not be implemented as a result of a certain number of barriers.

If we were to define the term reciprocity, it would mean concessions, commitments of comparable value, etc., but the issue of trading parties which commit to a reciprocal effort also arises. What happens if the trading parties are on a very unequal footing? The trading concessions that they will have to make may not be strictly equal. It becomes clear that the idea of reciprocity, which is a bit arithmetical, poses a philosophical question in reality: can one ask for arithmetically equal commitments from parties which are on a very uneven footing? Can one, from a practical standpoint, apply this idea to trade talks between a developed and developing country? Technically, reciprocity is more readily measured on the tariffs basis. During the GATT and subsequently the WTO talks on NAMA (non-agricultural market access) issues, we witnessed the degree of asymmetry increasing at each round of talks between least-developed, developing countries and industrial countries. Reciprocity is therefore more than equal commitments.

2) What conclusions can be drawn from the trade talks on this idea of reciprocity?

From a multilateral standpoint, the theory of special and differential treatment (SDT) has been developed since the 1970s and became the standard under the GATT. As developing countries acceded to the GATT, they sought to legitimate their rights and differences in terms of development. As a result, today there is a large body of law regarding SDT.

Frankly speaking, when we talk about both reciprocity and multilateralism, there is a real issue as a result of this differential treatment of developing countries. At the WTO, developing countries represent the majority and multilateral law legitimates the non-reciprocity of trade commitments between industrial countries and developing countries. This does away with part of the reasoning on reciprocity.

From a bilateral standpoint, the more the countries are at similar levels of development, the more reciprocity can be implemented. What the EU managed to negotiate with South Korea is certainly not the same thing that it is going to negotiate with India. It is easier to implement reciprocity bilaterally. We can expect more tangible results.
Within the Internal Market, a certain number of issues in which we should seek reciprocity with respect to access to third country markets can probably also be identified. This is the case of public procurement. The French Textile Association and its European association, Euratext, hard lobbied for reciprocity during the open consultation last July on the draft European bill on this topic. The bill still has not been finalized at this date.

3) In the sector that you represent, which cases of non-reciprocity by third country trade partners are observed?

There is a return of non-reciprocal trade practices, especially in the United States. The textile sector is very affected by the Buy American Act and its recent extensions. An EU fabric manufacturer can no longer sell fabric to the United States to make a customs officer uniform even though customs officers have less to do with national security concerns than GIs.

4) What practices do you recommend to bring back reciprocity and fair trade conditions in global trade?

I don’t really see the sectoral scope in this matter, excepting those which come out from the difference between exporting industries and non-exporting industries. I see the difference on the issue of targeting third countries, especially with respect to bilateral free trade agreements on exports and investment.

It is sometimes difficult to see the difference between a statutory or regulatory barrier which may violate a multilateral obligation and practices in the field (speed of customs formalities, for example). This is a crucial aspect because speed is absolutely essential in the fashion sector. If your collection clears customs too late, after the season, you lose your market. Therefore, it is difficult to measure all that.

The French Textile Association is going to closely monitor the EU-India agreement. Textiles and garments are one of India’s main exports to the EU. India’s access to the EU market is therefore strategic. From an EU viewpoint, considering the breakdown by sector of EU exports to India, we can see that textiles and garments do not account for a significant share of all EU exports because it is a closed market with high customs duties; furthermore, the country produces raw materials (cotton, petroleum-based fibres) and textiles and garments. In this context, the French Textile Association is not expecting equal commitments, but aims to have the same tariffs among countries. Reciprocity is therefore going to be very difficult to achieve.

Even though, the textile sector must not be sacrificed to other industries, we now know which industries have comparative advantage. Increasingly, the “sector” debate is outdated. It is more and more a debate on the value chain. It is very possible to have value chains with key links – including in traditional industries – that can stay in Europe and will continue to export. Big textile groups don’t have problems today, nor do luxury goods groups. Conversely, in the information technology and communications sector, most sub-sectors have disappeared. It is therefore more crucial today to think about value chains in the reciprocity debate. The difficulty is that the recognition of value chains/strategic industries that can stay in Europe has made great strides in the Enterprise and Industry Directorate-General and the Research and Innovation Directorate-General of the European Commission. It has made less inroads in the Trade Directorate-General, which when negotiating a bilateral agreement, takes into consideration the overall balance of the agreement, the strategic nature of the relationships with the country involved, and the old issue of offensive industries versus defensive industries. With the matrix of customs duties, all those considerations result in a rough compromise. Hence, industries considered to be traditional are often sacrificed in agreement negotiations even if bargaining is the very nature of such talks.
1) How does the word "reciprocity" sound to your members? What connotations does it have?

The notion of “international trade reciprocity” definitively resonates next to our members, which are, for the most part, subsidiaries of global groups. They perceive this idea of reciprocity especially through free trade agreements that foster bilateral or multilateral trade and for which reciprocity is a key factor for businesses that import and export.

Another example of a sector that is important to us is the WTO Information Technologies Agreement (ITA) and the dispute with the European Commission on this topic. This agreement dates back to 1996 and covers a list of products exempt from custom duties which must be updated to take into account products derived from new technologies. The slowness of the WTO's updating procedure and the lack of predictability regarding the decisions arising from said talks act as considerable barriers for players.

2) In the sector that you represent, which cases of non-reciprocity by third country trade partners are observed?

By example, we have very closely monitored the impact on the electronics sector of the implementation of the EU-South Korea agreement and we will closely follow the dismantling of tariffs. Reciprocity is also a key factor in safety/security procedures and certification of businesses.

In another sector that we represent, construction equipment, there is difficulty to implement reciprocity as part of the association agreement with Algeria which has not stopped re-erecting barriers, especially on the import of used goods and equipment.

3) What practices do you recommend to bring back reciprocity and fair trade conditions in trade?

Steps that could be taken to bring back reciprocity and fair trade conditions are: improving the visibility of business players on talks related to the agreements in order to reach enhanced predictability. Is it normal for Custom Code Committee talks in Brussels to be held behind closed doors and that we have no access to debate summaries because French Customs is due to keep them secret? At the same time, other Member States do not comply as strictly with said rules and disclose to their businesses very strategic information in short delays.

The rules should be the same for all and if they are not followed by all Member States they should be made more flexible for all!
1) How does the word “reciprocity” sound to your members? What connotations does it have?

Absolutely! Association members are intimately acquainted with the idea of reciprocity in international trade because our sector is heavily dependent on international trade. France is the fifth biggest producer of chemical products in the world and the second biggest in Europe after Germany. We are heavy users of imported raw minerals and hydrocarbons. As a result, we are faced with a certain number of non-tariff barriers put in place by supplier States such as quotas or export taxes. Our sector is also a big exporter (63% of sector turnover and a €5 billion trade surplus in 2010).

Market access issues are recurrent even though the European Union grants preferential tariffs to many of its trading partners through its generalized system of preferences (GSP). It is not a matter of challenging the existence of this system because many developing countries need to be supported, but certain emerging countries have already emerged. We therefore lend our support to the European Commission’s aim to overhaul preferential trade systems to benefit the poorest countries.

The principle of reciprocity is the true backbone of the trading system. It means opening up markets and eliminating trade barriers. It is also the antithesis of protectionism which is the norm in a good number of so-called developing or emerging countries. However, wanting to erect a certain number of trade and/or non-trade barriers to entry is actually now being questioned even in so-called developing countries. The French debate on the idea of “made in France” is completely unrealistic in the context of the global economy. Who really controls rules of origin, whether preferential or non-preferential? A turning inward attitude would result in a collapse of our exports and in retaliatory measures from our trading partners. It is necessary in all cases to foster fair trade and implement defensive and protective measures (for example, in intellectual property) against unfair competition.

In fact, there is no clear-cut choice between one principle and another. We need a blend of ideas. Our sector favours opening up markets and facilitate trade. It also advocates competition, provided it is fair. However, when a country or business does not comply with global trade rules, some defensive measures like anti-dumping ones must be available. The chemicals sector is the heaviest user of trade defences in Europe, primarily against China and India. We are convinced that the use of anti-dumping or anti-subsidy measures will wane if our trading partners follow the rules.

2) In the sector that you represent, which cases of non-reciprocity by third country trade partners are observed?

Let’s take the environmental issue. It is clear that the chemical sector is not subject to the same regulations and constraints worldwide. The European Union has implemented a certain number of carbon dioxide emissions caps (ETS) and the REACH regulation on the registration, evaluation, authorisation, and restriction of chemical substances. The issue is not whether to challenge such regulations. It is a matter of questioning the procedures. In a global economy, it is difficult to fight fairly in third country markets with competitors that do not have the same obligations. We are therefore in favour of a global agreement on carbon dioxide emissions or even of the implementation of a global REACH program which would be based on the EU regulation since the EU is a forerunner on this issue. This way, current technical or environmental standards would no longer distort competition.
Apart from the price, global competitiveness must be based solely on the product’s know-how, quality or innovative nature. It is too bad that tariff and/or non-tariff trade barriers or a lax attitude to environmental protection or product safety are competitive factors.

3) What practices do you recommend to bring back reciprocity and fair trade conditions in trade?

Globally, the chemicals sector has already bet on a sector-wide agreement to try to even out tariff disparities. A plurilateral tariff dismantling agreement called the Chemical Tariff Harmonization Agreement (CTHA) encompasses 80% of all world trade in chemical products since 1995. This agreement caps custom duties at 6.5%, 5.5%, and 0% according to tariff lines. The aim of the agreement is to completely dismantle tariffs over the medium-term. However, countries such as Brazil and India are not parties to this agreement and access to their markets remains costly and complex for EU manufacturers.

The bilateral talks initiated by the European Union with a certain number of third countries can also resolve market access issues. Now that multilateral talks are faltering, this is the way how the EU can put tariff and non-tariff issues on the negotiating agenda as well as issues on investment liberalisation, intellectual property, and access to public procurement.

I don’t think that slapping customs and tax sanctions on imported products from countries that do not comply with labour and environmental standards is the first thing we need to do. This can only result in retaliatory trade measures from those countries. It has to be the last option that is taken only once all trade talk solutions have been exhausted.

Lastly, we need to ensure fair and unlimited global access to raw materials and put in place WTO standards to open up access to markets by lobbying for mutual recognition of testing laboratories to break down technical barriers to trade.
When will we have reciprocity in public procurement?

How can we let some countries using every possible means to restrict access by foreign countries to public procurement while the European Union is for the most part wide opened? The idea of forcing the concept of reciprocity is gaining acceptance.

“In South Korea and Japan, our construction equipment businesses have given up on bidding for public procurement. They know that they will not be selected since those countries systematically give preference to their own domestic companies. The only way to get awarded a bid in public procurement is to set up a local subsidiary”.

This statement from Renaud Buronfosse, the executive director of the French association for construction, infrastructures, steel-making, and lifting equipment [(Syndicat des équipements pour construction, infrastructures, sidérurgie et manutention (CISMA)] reflects the difficulty that EU businesses run when they want to enter some public procurement markets even though existing free trade agreements. Restricting bids to local businesses, local content requirements, license-granting procedures, obligation of technologies transfer, standards, and regulations are but a few of the barriers. Certain countries will protect by all possible means their domestic market.

Unacceptable competitive distortions

This situation is in stark contrast with the ease with which third countries can enter the EU market. For Evelyne Cholet, international business director of the French Mechanical Industries Association, “the divide which exists between the relative openness of public procurement in the European Union and the lack of access to the public procurement of our trading partners creates significant competitive distortions which are unacceptable for EU businesses. The European Union must no longer let third country businesses think that its market, the biggest in the world, is a one-way street.”

Hence the idea, which is beginning to gain currency, to put in place the principle of reciprocity such as set in the 1996 plurilateral Agreement on Government Procurement (GPA) of the WTO (World Trade Organization) in order “not to close up the EU market, but to set forth the same competitive conditions for access to public procurement,” underlines E. Cholet. Under this agreement, the signatory States agree to set the same conditions for foreign trade partners as for their domestic ones.

FIM is lobbying for the harshest option

“In August 2011, the French Association for Mechanical Industries replied to the consultation opened by the European Commission on issues faced by our member businesses and on the barriers erected by some countries, relates Yves Blouin, head of the association’s business law department. “A draft European Regulation is reportedly in the works which would allow government buyers to exclude bids from businesses from countries that do not comply with the principle of reciprocity. For now, it is all but wishful thinking”.

Clearly, government buyers could choose to exclude such businesses or allow them to bid. This would make everyone happy. “Whereas France is very enthusiastic on this issue, Germany and the United Kingdom are much more reticent,” underlines Y. Blouin. “Some States are lax. Still others fear retaliation.” The French Mechanical Industries Association as well as the French Rail Industries Association (Fédération des industries ferroviaires) are lobbying for the harshest option, i.e., to exclude business from countries that do not comply with reciprocity.”
The United States, Japan, and India are notorious for trade restrictions and non-reciprocal practices such as in public procurement which is mostly closed off to member businesses.

Another barrier is national preference practices common in Latin American countries, which also represent many barriers to international trade.

Our member businesses want a real opening up of the markets of our major trading partners whereas our markets are already completely open to our competitors. We are asking for reciprocity in all current talks on bilateral agreements. We have finally decided to catch up with our competitors on this issue.

The best way to secure reciprocity is to negotiate bilateral free trade agreements since it is obvious that the talks on public procurement (GPA) as part of the WTO did not achieve our stated aims as a result of reservations, restrictions, etc. not to mention that China is still not member of the GPA.

More than reciprocity, what really matters is the real opening up of our competitors’ markets. Reciprocity works both ways. The European Union has already opened up its markets to third country trading partners.

Our member businesses see all their competitors enter all markets without limitation, which is the case of the Japanese and the Chinese. As a result, this issue resonates very strongly next to our member businesses which are lobbying for the opening up of markets through negotiations.

When businesses want to invest in third countries, entering these markets is also restricted by public procurement legislation.

Similarly, when our member businesses want to invest outside of the EU, they face many restrictions which also constitute a number of non-tariff barriers that must be dismantled.

Businesses must also secure from such countries like Japan and the United States the recognition of EU and international standards, because the lack of mutual recognition acts as a very effective technical barrier to protect their domestic market.

Lastly, we must speak out against the long-arm application of certain statutes or regulations by the United States, especially those on the control of dual-use products which require EU exporters to apply for export authorizations from Washington even though the makeup of their products includes US components, technologies, and software. This violates international law and is a barrier to trade which must also be broken down.

There are several ways to bring back reciprocity. In the talks underway, it is necessary to get a firm stance even if we have to go back on concessions made previously. We must seize every opportunity during current talks to put across the message of firmness. Legally, the instruments exist and it is not necessary to reinvent the wheel. The issue is that Member States have no real determination, within this context, to bring back fair competition conditions in trade. This policy of firmness and reciprocity also works in favour of a more well-balanced approach between producers and consumers, the latter looking for low prices.
Viewpoint

Stéphane ELKON, Executive Director

1) How does the word "reciprocity" sound to your members? What connotations does it have?

Access to third country markets poses many difficulties for association members in terms of competition, fair trade, and consequently, competitiveness. Ensuring that international trade is fair and that all businesses operate using the same rules is therefore a legitimate concern.

We have observed with satisfaction that the European Union has begun to fight back and is contemplating measures to bring back fair trade conditions and remove protectionist measures implemented by certain countries.

2) In the sector that you represent, which cases of non-reciprocity by third country trade partners are observed?

Our members have observed that many third countries are slow to open up their markets to international competition and have implemented protectionist measures that hamper our businesses among others, clearly limiting the outlets on those markets. Several have noticed a return to creeping protectionism in several countries, including the BRICS, in particular. Such protectionism is illustrated by increasing requirements to manufacture and conduct R&D in the country involved as a pre-condition to access these markets, which goes against the WTO rules.

Other examples:

- clauses in procurement, requiring that purchases be made by local suppliers and that R&D be conducted locally (China, India, Brazil, Argentina, etc.);
- requirements to use local 3G and 4G mobile telephone standards, requirements to transfer intellectual property (for example, China and India);
- blocking of mergers and acquisitions from competitors of domestic champions (e.g. China).

3) What practices do you recommend to bring back reciprocity and fair trade conditions in trade?

All businesses must compete according to the same rules in order to benefit consumers and businesses. We recommend to:

- enforce effectively international commitments;
- for public procurement in Europe, exclude goods, services, and businesses from third countries that do not follow the principles of reciprocity;
- keep the R&D aid awarded in Europe only for those businesses that comply with the principles of reciprocity;
- prohibit unusually low bids, especially for public procurement in the EU; in fact, such bids can be based on State aids that do not comply with international commitments;
- foster, as a performance factor, Corporate Responsibility best practices so that they are increasingly taken into account in the supplier selection process in both public procurement and business procurement.
The issue of reciprocity in international trade is very important in the automobile industry, especially because it is one of the industries which encounters the highest barriers to entry in many third countries and in particular in emerging countries. It is revealing that during recent and current talks, the automobile industry was one of the most arduous aspects of the talks.

There are two main aspects of reciprocity:

- First, tariff barriers (custom duties) which can be as high as 80% to 100% in certain countries such as Thailand and India. This is why we are closely monitoring bilateral and multilateral trade talks being conducted by the European Union. We believe that bilateral free trade agreements must lead to the complete dismantling of custom duties between parties, as is the case in those concluded by the EU with its trading partners (with exception of South Africa). We understand the sensitivity of certain industries. This is often the case with the automobile industry. The status of developing countries requires special and differential treatment. However, we believe that such treatment must result in low tariffs granted to those countries in terms of duration of the goal-setting period, and not in terms of goal content. In other words, the sole asymmetry that we can accept is a slower dismantling of duties in trade partner countries compared to that of the EU.

- Second, hurdles regarding technical regulations and the vehicle certification. This is an aspect that is specific to the automobile sector and arises from the need to prove to the authorities that a vehicle complies with domestic regulations (traffic rules) and obtain its certification before it is put on the market. A UN working group (specifically, the Economic Commission for Europe which is also open to non-EU countries) is working on harmonising such regulations. As part of said working group, an international agreement was concluded in 1958 setting forth international regulations on vehicle safety and emissions. This agreement also provides for mutual recognition of the certifications issued in accordance with harmonised certification procedures between signatory countries. This constitutes a considerable streamlining of certification procedures in the country of export. Since the EU has already signed a great number of harmonised regulations, increased participation by emerging countries in this working group and the codification of said regulations into their own certification system would greatly reduce such technical barriers to trade in the automobile industry.
1) How does the word "reciprocity" sound to your members? What connotations does it have?

This is really a principle for which we lobby heavily, especially at the level of our European association, the European Association of Consulting Associations (EFCA), since the European Union allows third country businesses to bid for the public procurement contracts published whereas the US, China, and other countries often only allow their domestic companies to bid. This principle is closely related to the de-linking of aid recommended by the OECD and which requires inviting third country bidders to bid even when Member States are providing the financing (bilateral financing).

2) In the sector that you represent, which cases of non-reciprocity by third country trade partners are observed?

Yes, as I already mentioned earlier. For example, when the Chinese work in Africa they almost never comply with the ethics clauses since they get their funding from grants from their government at high prices and are thus able to outbid us more easily.

But we can also mention countries from the North which also manage to de-link their bids, but let's say in a “smarter” way, thus supporting their business. The outcome is that French businesses succeed with almost zero financing whereas other Europeans regularly outbid us. Generally, some countries “cleverly” support their businesses while complying with international rules while others are held back by their principles.

3) What practices do you recommend to bring back reciprocity and fair trade conditions in trade?

Our bilateral development agencies, for example, the French development agency (AFD), need to be more realistic. They need to understand that development aid is not necessarily incompatible with supporting our businesses. We also need to have no qualms about keeping our linked aid programs such as the French reserve for emerging countries (RPE) and the French aid fund for the private sector (Fasep). The European Union needs to take concerted action against the BRICS which are uniting with increasingly closed bids. We are beginning to get the message across, but faintly.