Economic Integration – Items for the Academic Agenda

From The Board

It is far too soon to assign the Seattle WTO millennium failure of December last year its place in the history of globalization. Still, with the wisdom of hindsight and the wit of dialectical reasoning, the event may already be understood in one of two ways: either as a mere growing pain of the international trade system or as an upcoming *coup de théatre* involving some of the situation's fundamentals. While the world of practical diplomacy will tend to favour the first view and endorse it by forcing the 'process' back into its groove of business as usual in Geneva, Academia naturally is more enticed by the second. And right it is, knowing that a change by way of crisis has the force to expose the essentials of a situation, around which it revolves, and to push the accessory elements to the background. It simply helps academics do their job of separating substance from incidence. Paragraph 12 of the draft ministerial text, which has not overcome its brackets (to indicate non-agreement), deserves to go on record for concisely trying to grasp the trilemma between trade, development and environment:

> 'We recall the complementarities between trade liberalization, economic development and environmental protection. We reaffirm the need to ensure that trade and environmental policies are mutually supportive and to enhance policy coordination in furtherance of sustainable development. In this respect, the negotiations shall seek to maximize the synergies between trade liberalization, economic development and environmental protection, (and to avoid potential conflicts arising between continued trade liberalization and sustainable development objectives, such as the sustainable utilization of resources and the protection of the environment through proper resource management,) taking into account the objectives of seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with the respective needs and concerns of our different levels of development. We recognize the rights of Members to achieve as high levels of environmental protections as they deem appropriate, provided that measures taken are not applied for protectionist purposes.'[1]

1. Quotations are from the Draft Ministerial Text of December 3, 1999, to be precise: from the 05.45 (a.m.) version.

As for the Geneva people: once the hangover is past, they may come to realize that the crisis, with all the attention it has drawn to the trade talks from non-trade groups and concerns, has moved the WTO into a good position to become the central institution of global governance. The institution may not have anything like the resources of IMF or other institutions but, as IMF's Camdessus rightly remarked in Seattle: debt relief for poor countries would be 'almost irrelevant' without parallel opportunities for them to export more to the industrialized world.

One of the salutary effects of the crisis, important for a journal such as the present one, is to strike a fresh wedge between the realms of practice and of theory. In the sphere of the WTO, as in others, the distinction between practical problems and analytical observation has tended sometimes to suffer from the intimacy between the worlds of theory and of practice. This may explain, what is amazing in retrospect, how little of the crisis in its breeding stage (from the beginning of last summer) transpired in scholarly debate before the outburst.

Academia does not, of course, have the power of action nor consequently that of imposing new solutions or approaches. It is absent from the field of key substantive deals or concessions on which every major diplomatic breakthrough hinges. Its contribution is limited to questioning, to analysis and to unveiling structure. Work toward mending a complex situation should be left to the diplomats and the secretariats. Academia welcomes the events for signalling the need of some rethinking.

The new focus the present journal is adopting as of this issue leads me to raise, as a beginning, two broad *legal* issues proffered by the present crisis, both issues of law in global economic integration and governance. These are: 1. the role of law in structuring a liberalized world economy; 2. limits of negotiation and dispute settlement as an exclusive joint mechanism for the creation of public Law.

1. Rules: from safeguards to conditions and structure

In the context of the world's trading system the GATT-law's first but limited contribution has traditionally gone to dismantling trade barriers and providing access to markets. This has been mostly the business of diplomacy and its 'power based' style of work. The department of 'rule-making', in which the Law's role is naturally more prominent, has received a sharper profile from the Uruguay round negotiations, in what Jackson has called the shift from power-oriented to rule-oriented governance. Part of this shift is the creation of the WTO's dispute settlement system. Despite this shift the law's role is still dominantly towards liberalization and the rules concerning safeguards and subsidies are meant to gradually abolish or at least domesticate state controls.

Globalization, however, cannot be a matter of gradually levelling existing

controls and mechanisms, however unjustified these may often be from the global point of view and however undesirable generally from the point of view of trade. Economic liberty, apart from its obvious benefits, is no end in itself. Its test in anything close to legal terms is not in the last instance whether it creates greater wealth and opportunity but whether it contributes to better new structures and conditions in the liberalized area. This is something for Law scholarship and legal doctrine to contemplate. It is about the Law not helping towards abolishing but to building.

In the context of European Union the challenge is being understood and met. Rules originating from the need to protect essential public values against market forces, originally having the status of temporary exceptions or safeguards in the interests of Member-States, are now becoming understood as structural elements of the new situation and acquire the status of rule-given reason or of harmonized public interest between the Members. When rules are undone, new structure is wanted. The advantage of the operation cannot be to get rid of rules but to cut the old ones back to their essentials and to devise new forms of common understanding.

European Union has a solid record in this field, accomplished through its power of legislation and especially through its advanced judicial capacity. The latter, in the caselaw evolving around its 'rule of reason', has demonstrated how to redeem the Market through paying respect to public concerns. It may help to make the point that this is not a 'balancing' operation as it is sometimes conceived to be. Market values are mostly of a different order from public ones and the two kinds thus cannot be simply balanced. Besides, balancing will create no new structure or understanding. It is precisely by taking to heart the public concerns invoked by Member governements that the ECJ manages its role as the ultimate tester of individual legal measures against the benefits of the Market.

In view of this experience and of what is apparently needed to redeem liberalization in terms of institutions and powers, outside of a state situation that is, it is hard to see how the WTO will ever meet a similar challenge at the global level. In fact, it is probably only the limited character of the original undertaking in comparison with the Union's which accounts for the limited expectations of its members also in terms of public concerns. Yet this is precisely what not unjustly provokes anxieties and protests in the public, in only whatever amorphous state this public, this 'civil society', can manifest itself presently at the global level (for which it cannot be blamed). Surely the protesters needed the discord between the main parties to push their grievances in edgewise. But is this not a regular feature of any form of democracy?

Recognition of the situation will force the WTO either to accommodate itself more expressly into a limited ambition or, if it feels fit to expand this as the members in conjunction with the *Zeitgeist* and the spirit of technology push it, more aggressively to seek a public profile. In the absence of a legislative capacity to speak of, the task will fall even more heavily on the

Dispute Settlement Mechanism and to the development of a Rule of Reason style caselaw. And in this, legal scholarship will be asked to do what it did for the Union.

2. The constitutional dimension: limits of negotiation and adjudication

One (admittedly somewhat offensive) interpretation of the breakdown is to read its origin into the Uruguay Round success and see it as a possible result of the latter's overstretch. Essentially Marrakesh was a multiple and ambitious compounding operation, involving at once a dramatic enlargement of membership, a heavy compacted linkage arrangement, singularity of undertaking and involvement of non-trade concerns. How could this not have involved risks such as the one materializing now?

Under this light it comes as no surprise to see the idea of 'flexibility' pop up, as a safety-valve for overcompounding, especially for the benefit of developing countries. See (agreed) paragraph 4 of the draft ministerial text:

> 'We acknowledge that trade liberalization has yet to benefit many poor people, particularly those in developing countries. We recognize that more needs to be done so that all can benefit fully and equitably from the system and from the expansion of world trade. We therefore commit ourselves to ensure that the benefits of the multilateral trading system continue to grow and are shared more broadly and in a fairer manner among our Members and our peoples. Trade must make its full contribution to the elimination of poverty. *We therefore underscore the importance of the development dimension of international trade, including the need for adequate flexibility to enable developing countries to achieve the objectives of their market-oriented development policies.*' (emphasis added).

No agreement was, however, reached on the specifics, involving review of Article XVIII GATT 1994. The bracketed text of para. 49 reads:

> 'We request the Comittee on Trade and Development to examine the provisions of Article VIII, sections A and C, of GATT 1994, with a view to determining that developing countries including the least-developed countries, may increase tariffs beyond bound levels for a specified period in pursuance of these provisions to facilitate the establishment of particular industries or sectors, without being required to make additional concessions or offer substantially equivalent compensation in such situations. The CDT shall complete its review and report to the General Council by […].'

More generally speaking it may be that a venture such as this one, having become highly political, is simply no longer liable to be managed by a diplomatic establishment of specialist trade authorities, including their agreements, nor even, for that matter, by a Dispute Settlement Mechanism however sophisticated; that it requires a form of recognizeable public authority. This brings the matter under the heading of constitutionalism.

Ernst-Ulrich Petersmann, formerly a GATT legal adviser and presently professor at the Geneva Graduate Institute of International Studies, is an acknowledged authority in the field of international constitutionalism. Not long ago, in a highly commendable article, he held up the Marrakesh WTO agreement as a model for UN reform. Like GATT 1947, the old UN Charter should be given a new lease of life, he suggested, more ambitious and comprehensive than the old one, and excluding free riding.

> 'As in the Uruguay Round, the Western democracies could invite all UN member states to negotiate a legally stronger and more democratic, new UN Charter. Following such negotiations and a transitional period … they could threaten to withdraw from the old UN Charter *vis-à-vis* countries that are unwilling to undertake the 'new' UN obligations.'[2]

The fact that and the way in which this model-institution WTO should now have itself have run into difficulty does not weaken but reinforce Petersmann's case for a constitutionalist approach. Probably it should be thought to a further conclusion. Comprehensiveness of an institution will not by itself enhance its constitutional quality but only its constitutional potential and deficit. And this is precisely what seems to be the case with WTO.

In the European Union, acknowledgement of a similar deficiency led to the creation of the European Council of political leaders in 1974. With hindsight, it was not entirely a matter of chance for this to coincide with the entry into the Union of the third key party to the present system: the UK. Before, there was the two-headed authority of Germany and France combined, which was at the origin of all the founding deals in the EC. Accession of the UK brought in wholly different concerns to be accommodated, and replaced a bilateral by a triangular orientation. This first led to what is now called a period of 'Eurosclerosis' and only when the shift had been digested, by 1984, it lead to the present Union Constitutional Structure, with the European Council as the indispensible collegiate protopresidential body. The shift from twin to triplet leadership brought, simply geometrically speaking, a change of dimension, a breathing space which the Union

2. E.-U. Petersmann 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations', *Leiden Journal of International Law* 10: 421–474, 1997, at p. 452.

(then EC) so far lacked, and the germ of a public element in the Union's structure.

It was no surprise (with hindsight) that the agreement to create the European Council involved (as a trade-off) direct election for the European Parliament; both elements of the deal taken together brought the creation of a public, overarching and political, structure of authority and supervision which will ultimately redeem or even overcome the Union's technocratic predicament.

One lesson to be drawn from the Seattle experience concerns the limits of negotiation and dispute settlement for the creation of (international) *public* law. At some point, some form of public authority seems to be in order. This is more evidently so in a market-driven institution such as the WTO, lacking the inherently public vocation of an authority such as the UN's Security Council.

The Union parallel suggests that anything like a public authority to grow out of the WTO is a matter of the long term. That should come as no surprise. On the other hand, politics is there to make leaps and bounds. And one should not forget that the public equation has two sides. One is authority, the other is the public, taking form in civil society or in a representative structure. There is no knowing in what ways the latter will ultimately work out in a global economy. What is certain, however, is that something of the sort is indispensible: both as the berth of new social structure in and against the socially amorphous force and logic of trade, and as the civil or representative counterpart of the public authority mentioned above. It is thus to be seen as a sign of hope for the WTO that the beginnings of a global civil society should have dawned[3] on it even sooner than its European counterpart did on the Union.

WTE

This journal's focus has shifted from European to Economic integration generally, as the change in title indicates. The new format notably introduces case-note and book reviews and an opinion piece from one of the editors.

3. This is not to share in the triumphalism of *Le Monde Diplomatique*, rallying paper of the leftist critique of globalization, which opened its January issue with a piece by its editor in chief Ramonet entitled 'L'aurore'. It further carried lively reports of 'Comment l'OMC fut vaincue', considering the merits of this victory to be entirely those of 'les militants'.