Legal Issues of Economic Integration 30(2): 95–102, 2003.

Globalization through WTO Integration: Neither Friend nor Foe[1]

From The Board

I. Introduction

1.1. Concept, terminology, historical antecedent

1.1.1. Concept

'Globalization', perhaps the most pervasive concept of the 1990s, appears to have found instant appeal across a range of intellectual interests. Whether fervently embraced, or vilified, globalization is living reality. We are part of it as much as it is part of our daily professional and personal experience, language and mode or even habit of thinking.

1.1.2. Terminology

While 'interdependence' was the dominant concept used to characterize international relations in a decentralized system between economically disparate sovereign territorial states (particularly industrialized and developing countries), 'globalization' is the concept of choice used to denote *integration* as well as an end of *fragmentation*. To the extent that *globalization* reflects a certain trend towards increasingly common, harmonized standards, it may also appear as a manifestation of *centralization* on a global scale, which in turn necessitates global institutional management.

1.1.3. Historical antecedent

Suffice it to recall that the phenomenon of globalization is neither new nor unique.

As the prominent economist Paul Krugman recently asked rhetorically: 'why do we imagine that the global market is something new?' His answer was 'because politics killed that first global market' since 'between 1914 and 1945 wars and protectionism tore up the dense web of trade and investment . . .'[2]

However, there are also cautionary tales concerning the asymmetrical distribution of gains from globalization, a matter of pressing contemporary concern.

1. This article is a somewhat adapted version of a conference paper presented at the Fourth Vienna Globalisation Symposium, 15–16 May 2003.
2. P. Krugman, *Pop Internationalism* (The MIT Press, Cambridge, Massachusetts, London, 1997), pp. 208, 212.

LEIE ART. NO. 008 P.I.P.S. 2003008
DISK, CP

1.2. The contours of globalization today

1.2.1. The socio-economic dimension

Worldwide trends toward the opening of national markets, combined with innovation and transfer of communications and information technology, have significantly altered modes of production, distribution and exchange of goods and services. Production and trade flows are 'global', and capital moves with unsettling speed and, mostly uncontrollably, across permeable state structures in the 'borderless' world economy. National economies of the major trading nations are increasingly integrated into one global market.

On the other hand, benefits from increased trade and investment flows in recent years manifestly by-passed the majority of developing countries, while their external debts still grow. It has also been observed that while further liberalization particularly in such areas as information technology and telecommunications favours developed countries, liberalization in areas of particular interest to developing countries, such as textiles, agriculture and the movement of natural persons, proceeds at a much slower pace.

1.2.2. The legal-institutional dimension

Whatever else globalization represents or might be, to the international lawyer it is clearly a process of peaceful normative, regulatory and adjudicative integration through which certain socio-economic values have come to be enshrined in and accepted as global standards governing the conduct of international and transnational actors, that is of states and companies.

From a legal perspective globalization appears to be a process through which 'global market forces' have wrested the initiative if not the power for contextual agenda-setting from states. Most, if not all of international economic, and trade law is market driven.[3] 'Regulation' is a resource, a public good, demanded and acquired by economic operators, designed primarily for their benefit, but supplied by the political process.[4] In that sense globalization is localization in disguise: domestic socio-economic issues, transformed into and 'repatriated' as issues of global concern requiring 'regulatory attention' in form of 'dezentraler Kontextsteuerung'.[5] Global markets, as was mentioned, existed already before the First World War. However, it was in response to the massive destruction of economic life in both World Wars that multilateral institutions were created – the League of Nations, the ILO, the Bretton Woods

3. IBRD/The World Bank, 'Fostering Markets: Liberalization, Regulation and Industrial Policy', chap. 4 in *World Development Report: The State in a Changing World* (1997), p. 61.
4. Stigler, 'The Process of Economic Regulation', 17 *The Anti-Trust Bulletin* (1972) p. 207 *et seq*.
5. G. Teubner/Willke, 'Kontext und Autonomie', *Zeitschrift für Rechtssoziologie* (1984); similarly, G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in *id.* (ed.), *Global Law without a State* (Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1997), pp. 3–28.

Institutions, the ITO Havana Charter – to re-establish, re-kindle, organize and manage certain aspects of global markets. Contemporary intergovernmental arrangements such as the OECD and G-8 have not yet shown sufficient resolve and vision to provide such balanced macro-economic management of multilateral trade and monetary affairs.[6] Therefore, most of the debates concerning global socio-economic management are being conducted in the WTO.

2. WTO integration

2.1. General remarks

In view of these considerations, it is scarcely surprising that pressure is mounting to use the services of the WTO for the governance of globalization. This would involve the negotiation of regulatory standards,[7] as well as their coordination, administration, and enforcement in short, the construction of some kind of 'global public policy' in such areas as the management of trade-related environmental standards, social justice in a globalized economy, investment and competition policy and electronic commerce.

2.2. Aspects of WTO integration

2.2.1. Universal deference to the practice of market economies

Originally, and during the 1970s and 1980s, the GATT was criticized or even denounced as 'a rich man's club'. However, after the demise of much of state controlled – or planned economic practice, market economic principles – private property, free trade, competition – are, in principle, universally accepted, including by developing countries, which constitute the majority of WTO membership. Consequently, and in the absence, apparently, of any serious rival economic theory threatening to debunk David Ricardo's venerable paradigm, it can be argued that the WTO has already achieved global *economic integration*.

2.2.2. Integration of law, practice and policy on trade-related issues

One commentator on post-Second World War economies, writing in the late 1940s, praised the Universal Declaration of Human Rights as a milestone in man's fight for liberty and human dignity and suggested action by states to firstly outlaw exchange controls, secondly, to safeguard free compe-

6. The Asian financial and economic crisis has apparently galvanized governments and the Bretton Woods institutions to discuss certain systemic reforms.
7. Harter, 'Negotiating Regulations: A Cure for Malaise', 17 *Georgetown Law Journal* (1982) p. 1 *et seq.*

tition and prohibit monopoly practices by business or labour and thirdly, to devise laws to encourage savings, investments and enterprise.[8]

Whatever the merits of this set of prescriptions, it is clear that they reflect an integrated view of post-war socio-economic life. Peace, prosperity and democratic government depend on simultaneous actions in the interrelated areas of human rights, labour standards, liberal trade, free competition, and investment policy. All trade-related issues together enshrine socio-economic and political values and conditions forming the context of trade.[9] The origin of the linkage between labour rights and standards and multilateral trade rules coincided with the establishment of the International Labour Organization (ILO), while the cognate link between employment, human rights and trade was made during the negotiations of the Havana Charter. Central to these issues, as indeed to the link between environmental protection and trade, is the question of the legality of trade measures as a means of enforcing trade-related standards.[10] While demands for a 'social clause' in the WTO in the sense of binding minimum social standards[11] have subsided for now,[12] this highly complex and controversial issue is unlikely to be resolved anytime soon.

– Management of social issues: labour and environmental standards

Some have referred to the trade connection of both environmental and labour standards as 'social issues'. As far as labour standards are concerned, this reflects a perception of a new global struggle between capital and labour and the resulting downward pressure on wages and labour standards. Given the centrality of low labour costs to the workings of comparative advantage, one could argue that labour standards are more relevant to trade than intellectual property rights which the United States had successfully brought into the world trade regime through the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). For instance, developing countries might in the future campaign for an accommodation of their comparative advantage in labour services.[13]

Regarding environmental protection and, to a lesser extent, consumer protection, governments are expected to assume some kind of scientific-

8. P. Cortney, *The Economic Munich, The I.T.O. Charter, Inflation or Liberty, The 1929 Lesson* (Philosophical Library, New York, 1949), p. 132.
9. *See*, F. Weiss, 'The GATT 1994: Environmental Sustainability of Trade or Environmental Protection Sustainable by Trade?', in Ginther *et al.* (eds.), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers, Dordrecht, 1995), pp. 382–401.
10. *See*, F. Weiss, *op. cit.*, fn. 2 *supra*.
11. *See*, e.g. Friedl Weiss, 'Internationally Recognised Labour Standards and Trade', Chap. 5 in Friedl Weiss, Erik Denters and Paul de Waart (eds.), *International Economic Law with a Human Face* (Kluwer Law International, 1998), pp. 79 *et seq*.
12. The Final Declaration of the First WTO Ministerial Conference held in Singapore in December 1996 deemed the ILO to be the competent body to set and deal with these standards.
13. N. Harris, 'Free International Movement of Labour', *Economic and Political Weekly* (1991) pp. 163–164.

managerial role pursuant to an ostensibly ideologically neutral scientific logic of intervention to protect an emerging new balance between ecological interdependence and political independence, between market and communitarian or collective views, and between environmental concerns and economic development and trade objectives. However, debates in the GATT on the complex interface between trade and environmental policies exposed profound differences of opinion.[14] These, however, were to some extent reconciled by the new evocative concept of 'sustainable development' which was inaugurated at the 1992 United Nations Conference on Environment and Development (UNCED) and inserted into the preamble to the Agreement Establishing the World Trade Organization. That principle requires the rule of trade to be applied in a manner that respects the principle of sustainable development and protects and preserves the environment, allowing members to pursue valid conservation goals.[15] Since, as is evident from the WTO panel practice, the case-by-case approach to the reconciliation of the conflicting goals of environmental concerns and trade liberalization has failed, a more systematic approach to their integration is called for. While some litigant parties have invoked principles or rules of international law to justify their trade restrictions for environmental purposes, panels have consistently advocated that WTO Members conclude bilateral, regional, multilateral or global agreements on environmental protection. This points towards an exceedingly arduous process of linking existing and future multilateral environmental agreements (MEAs) to the WTO system as a whole. Alternatively, the WTO itself could become instrumental in appropriate trade-related environmental global standard setting. However, considering the diversity of views and policies of WTO Members on this matter, such positive, harmonising integration of trade and environmental concerns may prove elusive. In this respect the Doha Ministerial Declaration merely envisages negotiations on the applicability of WTO rules as among parties to the MEA without prejudice to the WTO rights of any Member that is not a party to the MEA.

– Creation and management of multilateral investment and competition rules

The Doha Ministerial Declaration of 21 November 2001 stated that, on the basis of explicit consensus, negotiations will take place after the fifth session of the Ministerial Conference on modalities of negotiations toward a 'multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment' as well as 'to enhance the contribution of competition policy to interna-

14. J. Whalley, 'The Interface between Environmental and Trade Policies', 101 *The Economic Journal* (1991), p. 180 *et seq.*; R.G. Tarasofsky and F. Weiss, *Yearbook of International Environmental Law* (1997), pp. 582–603.
15. *See* the Appellate Body Report in the *Shrimp-Turtle* Case, paras. 3.152; 3.168.

tional trade and development'. Indeed, industrialized countries have for some time discussed international restrictive business practices and, more recently, have begun to exert pressure for the adoption of global rules on competition.[16]

While competition policy focuses primarily on the goals of efficiency and consumer welfare, trade policy often seeks to protect the interests of a country's individual producers. But there is also agreement on an important confluence between them: the common goal of market access. While the removal of external governmental trade barriers facilitates market entry, the control of anti-competitive conduct of market operators opens access to competitive markets. In combination, potential welfare gains derived from comparative advantage are made safe against anti-competitive erosion. The common goal coincides with the central function of the GATT/WTO which is to ensure equality of competitive opportunities for members in the world trading system. Indeed, panel practice confirms the complementarity character of trade and competition policy.[17] The WTO Annual Report of 1997 stated that 'the issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent will the framework be within which this will be done.'

2.2.3. Refining the WTO Constitution

The WTO is close to becoming a truly universal organization, comparable to the United Nations. Yet, unlike the UN, it attracts a great deal of hostile comment by different groups of 'civil society'. While some popular disaffection with the workings of the WTO is patently misdirected, the WTO being a member driven organization, certain criticism is clearly justified.

One such criticism concerns the legitimacy and decision making of its institutions. It has rightly been observed that the shift of standard setting and regulatory activity from national jurisdictions to intergovernmental bodies such as the WTO, entails a certain loss of transparency, and democratic accountability. Put simply, the question is whether the WTO, as currently structured and administered, is capable of sustainable passage for the onward march of globalising trade and trade-related relations?

Three features of the WTO as an international organization need to be underlined; first and most obvious is its centrality to global economic governance; second, it is surprisingly democratic, at least in its formal decision-making procedure (in contrast to the IMF); third, there are tensions and contradictions between formal and informal realities, especially in terms

16. A GATT Group of Experts appointed in 1958 (BISD 7S/29) reported on harmful restrictive business practices in international trade and considered 'that it would be unrealistic to recommend at present a multilateral agreement for the control of international restrictive business practices', BISD 9/170, 171; *see also* Leon Brittan's speech on the EC's future competition policy, Press Release, IP(92) 1009 of the EC Commission of 8 December 1992.
17. *See* the 'Oilseeds Panel', adopted on 25 January 1990, BISD 37S/86.

of its decision-making procedures. Two areas of reform merit particular attention. One is 'institutional', concerning the WTO's decision-making process; the other related area is 'procedural', involving the WTO's system for the settlement of disputes.

– WTO decision-making

Formally each WTO Member has an equal vote. Since there is no equivalent to the Security Council, this makes the WTO in theory even more democratic than the United Nations. Turning from theory to practice, *oligarchy* comes closer than democracy to describing decision-making at the WTO. Nonetheless, *informal oligarchy* remains in tension with *formal democracy* which creates interesting potential for change. It is the traditional, hegemonial or parochial 'Green Room' process which needs to be modernized. That process of decision-making involves a relatively small number of self-selected developed and some large developing countries deciding on divisive issues. Decisions so taken are then conveyed to the larger membership for final decision.

– Reforming the WTO dispute settlement system

The WTO dispute settlement system, arguably, is the most important element in the WTO's constitutionalization as the principle organization of global economic governance.

While this is not the place for a detailed discussion of the thorny and protracted issue of the reform of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), suffice it to point out that in order to balance and thereby integrate trade-related values, it would be imperative for the system to be freed from its traditional and self-imposed adjudicative isolation from relevant practice in international law.[18]

3. Concluding remarks

In the light of the above considerations, one must conclude that globalization, welcome or feared, is not some irresistible cosmic force threatening the survival of humanity, nor the harbinger of doom for the socio-cultural identities of entire societies, nor even, the job-crunching monster it is sometimes made out to be. In fact, globalization, like an incoming tide, is neither beneficial nor damaging *per se*. It is simply a by-product of increased market integration and economic interdependence worldwide, of the weaving together of national economies through trade, investment and technology. Globalization

18. *See* the *Bananas* and *Hormones* Cases; Friedl Weiss (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May, 2000).

has engulfed many a 'village', but villagers and their governments have yet to devise a suitable response, politically and in law, to manage the process of globalization, to harness its attendant benefits while preventing large scale economic depletion and social deprivation. In all these endeavours the WTO will undoubtedly feature prominently in the years to come.

F.W., June, 2003.

It is with great sadness that the Editorial Board of Legal Issues of Economic Integration (LIEI) have learnt of the recent death of Bob Hudec, who served as a distinguished member of LIEI's Editorial Advisory Board. To all of us who have had the privilege of being amongst his closest professional colleagues and friends, Bob's passing away has come as a shock and is acutely felt as a great loss. Bob was greatly admired, especially his indomitable spirit and his stimulating intellectual leadership and academic radiancy. Sadly, the truly global community of scholars and friends have lost their 'doyen'.