Legal Issues of Economic Integration 34(1): 1–4, 2007.

Coalitions of the Unwilling

From the Board

Autumn leaves are falling; contemplative end-of-year reviews are approaching. Despondent introspection has come into season; anxiety about globalisation seems pervasive in Europe and elsewhere. People enjoy the benefits of globalisation, mostly cheaper goods in greater variety; yet seem strangely unaware that their own jobs might be at risk as a result. While goods are usually welcome, moving more or less freely, people, migrants habitually are neither welcome nor moving freely.

Undeniably, things are not going well in the field of integration, at home, regionally, and worldwide.

It has become a habit of thinking that integration works better at the lower echelons of organised communities. Thus, the regional, more cohesive EU, supposedly, is more advanced and efficient than the multilateral WTO. Likewise, the system of European human rights protection is more advanced than its UN-based equivalent. Yet such home-spun truth appears brittle for two reasons: more cohesive communities require a lesser degree of integration and, secondly, certain regressive tendencies may manifest themselves from time to time at all levels of integration, as is evident at present. What is the evidence?

At home, debates about methods of integration have given way to more combustible discourses on whether more and better integration towards a multicultural society is desirable at all.

At the European level, constitutional ambitions have suffered a serious setback and the much vaunted European cultural identity of a 'Citizens' Europe' – while respecting national, regional and local cultural diversity – fails to rouse much interest, let alone passion. The Commission, the undisputed motor of integration, had to accept a much diluted Services Directive for the internal market. Furthermore, the freedom of movement for economically active EU citizens has clearly been achieved at the expense of the increasing discrimination against non-EU nationals, for whom European citizenship has become a most effective marker of exclusion. Thus, it is scarcely surprising that, during the latest enlargement process, the Member States of the EU of 15, fearing a mass influx of workers from the prospective new Member states, insisted on transitional arrangements for an initial two-year period beginning on 1 May 2004, permitting them to restrict the freedom of movement of workers for a maximum period of seven years.

Bulgaria and Romania, though due to accede to EU membership on 1 January 2007, have been placed under rigorous so-called accompanying measures, subject to implementing modalities of a monitoring mechanism. Failure by either new Member State to implement internal market legislation with a cross border

effect causing risks of a serious breach in the functioning of the internal market, may trigger safeguard measures until three years after accession, but may be applicable beyond that date until the situation is remedied.

As for Turkey, the drawbridges appear to have been pulled up ever higher after formal accession negotiations were opened on 3 October 2005. According to the Commission's 'screening' report of November 2005, no progress has been made regarding the chapter on freedom of movement of workers. The 2006 Report is expected to be even more critical of Turkey's reforming zeal. Although Turkey's 9th harmonization package is due to be adopted on 8 November 2006, it is considered weak and insufficient.

At the level of multilateral trade negotiations, the Doha Round of the WTO has quietly been aborted, at least, pending major electoral contests in some of the key players.

Have we lost the courage of our convictions that rational social engineering based on best economic and social science available in open societies trumps protectionism and nationalism of every ilk, any time?

The end of the Cold War marked a fundamental change in world politics. It also presented certain social sciences, in particular, international law, international relations and economics, with the challenge of their respective re-conceptualisations. Thus, post-Westphalian international law witnessed simultaneously a new impetus towards universalism and the waning of state sovereignty, the emergence of new non-state actors and a further proliferation of international organisations and of standard setting and rule making through them. Consequently, we are witnessing a growing measure of fragmentation, aggravated by a preposterously fashionable trend in legal scholarship to infuse, mostly uncritically, terminology drawn from international relations theory – e.g. partial, self-contained regimes of international law – and concepts drawn from municipal and other law analogies – e.g. the 'constitutionalisation', 'Europeanisation' of international law – into the discourse and analysis of international law. Jörg Friedrichs puts forward the novel concept of international community as, a 'system of overlapping authority and multiple loyalty, held together by a duality of competing universalistic claims.'[1] In his view, the fragmentation of the international order is simply an element of this 'new medievalism'. Is this not perhaps a more accurate portrayal of the current state of affairs? The constant desire of many to trumpet the 'supposed' common values of this or that regional or of the international community is not at all reflective of contemporary realities. The fact of fragmentation, which is becoming ever more prevalent, perhaps should not be limited in such strict terms. Andreas Fischer-Lescano and Günther Teubner argue that, 'the fragmentation of global

1. J. Friedrichs, 'The Meaning of New Medievalism', *European Journal of International Relations*, vol. 7 issue, 4 (2001), pp. 475–501, at 475.

law is more radical than any single reductionist perspective – legal, political, economic or cultural – can comprehend.' In their opinion, 'legal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself'.[2] There is a necessity to look at the occurrence of fragmentation from many perspectives; not only as to what is being created but also to the impact on existing institutions.

In trade terms, the establishment of preferential regional trade agreements (RTAs or PTAs, or regional integration arrangements, RIAs, as they are sometimes called), and the resultant process of fragmentation, is one with which we have been living with, and quietly acquiescing to for quite some time. Their aim, short-term trade creation, has been successfully accomplished. Yet, it is the long-term by-products of these successes on which the international community and legal scholars should be focusing. PTAs, whilst achieving the short-term aims of actors, undermine the cohesion, precedence and legitimacy of the international multi-lateral legal order. It is this effect which has been so sorely under-estimated. It must be noted that a reliance on a multilateral trading system is in accordance with orthodox economic theory. It is not disputed that trade relations governed by multilateral trade rules result in the maximisation of economic welfare. Economically, PTAs are simply a 'second best' expedient. It is, however, the tendency towards more frequent use of these PTAs which should be examined most carefully. The argument can be framed of course in terms of the creation of new customary norms: custom can come into being through derogation from an established norm; eventually these derogations turn into state practice. However, could it not be said that in this particular situation, the international legal order might be regressing to an almost Hobbesian state of nature? Were the international community to allow the slow erosion of the credibility of the multi-lateral trading system, which is resulting from the current process of fragmentation to continue unchecked, it would be extremely short-sighted. Whilst PTAs of all stripes do achieve the short-term aims of their participants, they convey a message that the multilateral system is one which can be opted out of whenever some members should so choose. The objection of the United States to derogations from the multi-lateral MFN principle in the *travaux préparatoires* of GATT 1947 was couched in strong terms. Given the political climate of the post-war world, the perception was strong that PTAs were sub-optimal and that bilateral, possibly even secret, agreements led inevitably to conflict. The United States' more recent use of PTAs, expected to fulfil the aims they perceived they were unable to achieve under the WTO system, arguably will bear out their historical disquiet.

Is it not obvious that for systems of integration to prosper and for resultant

2. A. Fischer-*Lescano* & G. Teubner, *Regime-Collisions: The vain search for legal unity in the fragmentation of global law, 25 Michigan Journal of International Law (2004), pp. 999–1046, at 1004.*

benefits to be reaped, whether for purposes of trade and/or other objectives, it is desirable that there should be a strong commitment to a rule based, stable and predictable system?

FW, November 2006