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*by Hans Smit**

I. INTRODUCTION

The most successful and comprehensive attempts at voluntary economic integration[1] in recent times have all occurred in Western Europe. Encouraged by the early success of the BENELUX Customs Union,[2] the countries of Western Europe, ever since they emerged from the Second World War, have sought to integrate, both politically and economically, in a variety of ways. At the root of these attempts have been two principal motivations. First, the economic and political might, displayed by the United States in the war, persuaded the Europeans that they could continue to play a leading role in the post-war world only if they managed to combine into an economic and political union of the approximate size of the United States. Second, it was increasingly recognized that trade could not develop properly unless national barriers were removed.

While the advantages of integration were broadly recognized, the attempts at effectuating it ran into political obstacles. Various forms of integration and cooperation were devised, but few came into existence. The French-Italian Customs Union agreement was never ratified. The European Defense Community was voted down by the French Parliament. The OEEC and the Council of Europe came into being, but these were consultative and cooperative organizations that lacked the institutional framework necessary to effective integration.[3]

As is so often the case, it required an industry that was in great difficulties, for which no other solutions appeared appropriate, to overcome the political antipathy to integration. The European coal and steel industry was in a most depressed state when Robert Schuman launched his famous "Schuman Plan," seeking the establishment of a common

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[1] This paper will not consider the measures toward economic integration taken in the context of COMECON. For a discussion of COMECON, see HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW 1120-21 (1980).

[2] *See id.* at 1071.

[3] On the various efforts made, as well as on the OEEC (now the OECD) and the Council of Europe, see *id.* at 1071-72.

market in coal and crude steel. The European Coal and Steel Community (ECSC) Treaty became effective in July 23, 1952. It ushered in a new epoch in European economic and political conditions.[4]

The ECSC Treaty brought revolutionary change. It provided not only for a customs union, eliminating internal tariff and setting a common tariff structure for imports from abroad, but created a supranational structure for governing the community, comprised of a legislative branch (the Council), an executive branch (the High Authority), and a judicial branch (the Court of Justice).

The experience with the ECSC was so overwhelmingly favorable that the pressures towards further integration became irresistible. At first, it was integration in other sectors that was urged. The difficulties encountered in the agricultural sector lent impetus to proposals for a so-called "green pool."[5] But the six nations of Europe that were bound by the ECSC Treaty became bold and courageous. In less than a year, they drafted and negotiated the Treaty Establishing the European Economic Community (EEC), which became effective on January 1, 1958.[6]

The EEC Treaty provided for a transitional period of twelve years, subdivided into three four-year periods, within which the customs union and other elements were to be implemented. In fact, the customs union was achieved ahead of this schedule.[7] Other elements created significant problems, especially the market organizations in the agricultural field. However, in due course, the basic structures were established.[8] Undoubtedly the most remarkable feature of these developments is the role played by the Court of Justice of the European Communities. It can fairly be said that it has been the principle instrument in making the European Communities work.[9]

The European developments permit most useful insights for those who plan integration in other areas of the world. It is therefore appropriate that they be studied by those intent upon further integration in the relations between the United States and Canada. This will facilitate evaluation of the various kinds of integration and its benefits and drawbacks.

II. SECTORAL INTEGRATION

A. The Various Forms of Sectoral Integration

Sectoral integration is the integration of national markets in a particular sector of commerce, such as coal,[10] atomic energy,[11] wheat,[12] or

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4 *See id.*, at 1072.

5 A "green pool" is a common market in agricultural products.

6 The most comprehensive work in English on the EEC is H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY (1981).

7 *Id.* at 2:39.

8 On the market organizations in the agricultural field, see *id.* at 2:186.

9 *See id.* at 5:255.

10 The ECSC Treaty integrated the markets in coal and crude steel.

automobiles.[13] This integration can take various forms. It can take the form of a free trade area, in which internal tariff barriers are removed but each state retains its own tariffs on imports from third countries. It can take the form of a customs union, in which internal tariff disarmament is coupled with a common external tariff. Or it can take the form of a customs union in which the regulation of the economic forces affecting the market is entrusted to transnational institutions.

The ECSC and EEC are of the latter type. It creates more significant political problems because the assignment of regulatory powers to transnational institutions necessarily brings along corresponding curtailment of the powers of national institutions. The latter is looked upon askance by protagonists of national sovereign power.

Nevertheless, as the European examples clearly show, true and effective integration does require regulation by institutions of the integrated market. Unless such institutions are given the requisite powers, the operation of the integrated market can be impeded or frustrated by national measures. This is particularly true in the case of provisions relating to the integrated market that are not self-executing. Self-executing provisions can be enforced by national institutions—most significantly, the national courts.[14] But when implementation of provisions that are not self-executing is required, a state or its institutions[15] can stand in the way of integration by refusing to provide the necessary implementation.[16]

The importance of transnational regulation and enforcement is highlighted by a most interesting decision made by the Court of Justice in 1976.[17] This case concerned Article 119 of the EEC Treaty, which provides: "Each Member State shall during the first stage [*i.e.*, the first four years] ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." An air hostess, relying on Article 119, brought an action in a Belgian court seek-

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[11] The Euratom Treaty created a common market for nuclear energy.

[12] One of the special market organizations created pursuant to the provisions of the EEC Treaty is that for cereals. *See supra* note 6, at 2:336.29.

[13] The AutoPact is the prime example of sectoral integration in automobiles. On the AutoPact, see S. Reisman, Canada-United States Free-Trade (paper delivered at Conference on U.S.-Canadian Economic Relations, the Brookings Institution, April 10, 1984).

[14] While national courts may be influenced by nationalistic tendencies, their independence does provide a significant guarantee of impartiality. Indeed, national courts are perhaps the most effective institutions enforcing international obligations. On this function of national courts, see Scelle, *Le Phénomeňe Juridique de Dédoublement Fonctionnel,* in FESTSCHRIFT FUER HANS WEHBERG 324 (Schaetzel ed. 1956).

[15] National courts, especially in politically charged cases, may be more reluctant to construe international agreements to be self-executing than transnational institutions. *See infra* text accompanying note 17.

[16] Such refusal would constitute a breach of the state's international obligations that, for lack of an international enforcement mechanism, may go unsanctioned.

[17] Defrene v. Société Anonyme Belge de Navigation Aérienne Sabena, 1976 E. Comm. Ct. J. Rep. 455.

ing equality of pay to her male counterpart. It was admitted that both did the same work.

The question of whether Article 119 supported the claim was submitted to the Court of Justice pursuant to Article 177 of the Treaty, which provides for reference of questions of Community law, by national courts, to the Court of Justice. The Court ruled that Article 119 became self-executing, at the end of the first stage, for men and women doing the same work. It rejected the argument that Article 119, by its terms, merely imposes an obligation on Member States and that it speaks only of the "principle" of equal pay for equal work, although both elements appeared to support the view that Article 119 contemplated implementation.

Even more striking was the Court's dismissal of the argument that both the Member States and the EEC Commission had steadfastly acted on the assumption that Article 119 was not self-executing. In fact, the Member States, on the eve of the expiration of the first stage, had adopted a resolution delaying the implementation of Article 119 until December 31, 1964. And on February 10, 1975, the Council had adopted a directive, allowing Member States a period of a year to implement the principle of Article 119. Even the Commission, normally intent upon giving an interpretation to the Treaty that favors its reach and effectiveness, had failed to take the position that Article 119 was self-executing. It had merely threatened to take Member States to court for their failure to implement Article 119. The Court waved all of this aside. The practice of Member States and the Commission could not change the Treaty as the Court saw it.

The case illustrates not only the indispensability of transnational regulation of an integrated market, but also underlines the necessity of dealing comprehensively with the forces that operate in that market.[18] It is especially in the case of sectoral integration that comprehensive regulation may be most difficult.

B. The Difficulty of Effectively Integrating Sectoral Markets

A state's economy comprehends a great variety of complex market forces. It would appear most difficult to effectively separate out any particular sector or product without extensive regulation designed to avoid the impact of distortions created either by private or governmental action.[19] The problems of insulating a particular sector are best managed when the product involved is a raw material, such as coal. But even the mining of coal involves labor and capital whose movements may be af-

[18] If one Member State pays its female work force considerably less than its male counterpart, market forces may be distorted to the disadvantage of the Member State that does not discriminate.

[19] For example, a Member State may subsidize labor and capital in that sector of the market to support ailing industry; or the entrepreneurs may, by private agreement, fix prices, territories, quotas and the like.

fected by private or public action in other sectors of the economy.[20] And the problem of separately dealing with a particular sector increases when the product involved goes through an increasing number of production stages.

At each of the production stages, the potential effect of market forces operating in other sectors increases. For example, when national markets for coal are integrated, the integration may be affected by private or public action relating to movement of labor or capital into or out of the coal market. If the market in a product that goes through various production stages, and is composed of a great many materials, is integrated, the movement of labor and capital into the various stages, and the markets in the constituent materials, may be affected by private or public action. Since effective integration must deal with all of the market forces affecting the product, integration limited to a particular sector becomes increasingly difficult as the product becomes more complex.

Of course, if only a free-trade area or customs union is created, the integration may limit itself to internal tariff disarmament and, in the case of a customs union, creation of a common external tariff. But the European experience has taught that this is not enough if the integrated market is to be protected from undue distortions resulting either from government regulation or private action affecting economic forces operating in the integrated market.

The ECSC Treaty creates not only a customs union, it also provides for regulation of the economic forces operating in the newly created unit by transnational institutions. And the EEC Treaty, which seeks integration of the markets of the Member States in all sectors of the economy (except coal, steel and atomic energy) does the same.[21] Since proper sectoral integration, in order to be truly effective, requires transnational regulation and enforcement—which may create political problems—the question naturally arises whether a different, politically more palatable, approach may not be preferable.

III. THE FUNCTIONAL APPROACH

One such approach is that which seeks to eliminate artificial obstacles to the free flow of trade by international agreement which does not provide for transnational regulation.[22] It may be used in addition to providing for a sectoral free trade area or customs union. Under a functional approach, government procurement programs, investment

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[20] For example, the government may subsidize manufacturers of equipment used in both mining coal as well as in other sectors of the economy.

[21] Both Treaties, for example, specifically prohibit or regulate governmental subsidies and private contractual market arrangements. *See* European Economic Community Treaty, Mar. 25, 1957, 298 U.N.T.S. 11 (Arts. 85-90, 92-94).

[22] *See generally* DEP'T INT'L TRADE (CANADA), HOW TO SECURE AND ENHANCE CANADIAN ACCESS TO EXPORT MARKETS: DISCUSSION PAPER (1984).

subsidies, export subsidies, tax advantages and the like, may be eliminated or curtailed. The functional approach may avoid the necessity of transnational regulation and enforcement, but it cannot deal effectively and comprehensively with all artificial distortions of the free flow of market forces.[23]

The absence of transnational institutions and policing enhances the possibilities of adversarial politicking. While a sectoral free-trade area, or customs union, combined with an approach seeking to ensure a proper functioning of the market through self-policed international agreement is certainly preferable to the status quo, the responsible, effective, and (it would appear) politically more attractive approach, seeks to impose a new structure within which the integrated market is to operate.

IV. The Structural Approach

A. The Essence of the Structural Approach

The structural approach goes beyond creating merely a free trade area, or customs union, coupled with contractual safeguards against unilateral distortion by the trading partners. It recognizes that, if an integrated market is created, its proper operation must be safeguarded by an institutional structure that is not dependent on the will of any trading partner. Such a structure must be able to independently apply the rules agreed upon, create those necessary for the proper implementation of the basic rules, and adjudicate and settle disputes that may arise under these rules. The ECSC, the EEC, and the Euratom Treaties are all squarely based on this recognition. The structures elaborated in these treaties have generally worked well, and it is this type of structure that merits close study and emulation by the protagonists of United States-Canadian integration.

B. The Political Feasibility of Comprehensive Integration

The objection may be advanced that structural integration, although desirable, is politically not feasible. After all, the United States and Canada lost an historic opportunity to create a comprehensive free-trade area after World War II, when the political climate was most propitious.[24] The AutoPact has been a reasonable success, but Canadian political anxiety about being overwhelmed by its larger neighbor to the south seems unabated. Efforts to overcome this anxiety may again draw effectively upon the European experience.

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[23] The experience under the EEC Treaty has demonstrated that affirmative regulation and transnational enforcement are essential. For example, the EEC antitrust provisions did require implementation, and came to be enforced effectively only after the EEC provided the appropriate mechanisms. *See supra* note 6, at 3:53. Similarly, the elimination of inequalities resulting from different direct and indirect taxes requires affirmative action by transnational institutions. *See id.* at 3:425.

[24] *See* S. Reisman, *supra* note 13, at 15-17.

The Europeans first embarked upon integration with great reluctance and, similar to the North Americans, they provided only for sectoral integration, albeit of a more comprehensive kind. Their first effort produced the European Coal and Steel Community. When this proved a success, the Europeans considered additional sectoral integration.[25] But they ran into the same problems that confront the North Americans today.

Sectoral integration is attractive only if both parties expect to gain from it, and there are few sectors in which that condition can be met. The great advantage of comprehensive integration is that the advantages gained by one partner, in one sector, can be offset by advantages to the other partner in other sectors. As a result, political opposition in the participating countries becomes more diffuse, and support more comprehensive. In a real sense, therefore, comprehensive integration is politically easier than sectoral integration.[26]

Furthermore, structural integration brings very significant political advantages to the less powerful partner. While before integration it had no significant say in decisions that affected primarily its more powerful partner, structural integration necessarily gives it authority in all matters affecting the integrated market—including that of its partner. Thus, for example, a member of the EEC like Holland, rather than being overwhelmed by its larger partners, has played a role in EEC developments that certainly is disproportionate to its size and political power. Perhaps the most famous initiative, the Mansholt Plan, which set the pattern for all agricultural regulation in the EEC, was the brain child of a Dutch commissioner.[27] Paul Henri Spaak, the Belgian statesman, was an early leading force for integration in Europe. If anything, it may be fairly said that structural integration enhances the political power and influence of the junior partner.

C. The Role of Canada in a System of Structural Integration

The following is a brief review of how Canada might influence issues of North American concern more effectively and significantly, within the structure of an integrated market, than it can at present. The integrated structure must have (and exercise) legislative, executive and judicial powers. In the EEC, these powers have been granted, respectively, to the Council of Ministers (and to some extent to the European Parliament), the Commission, and the Court of Justice of the European Communities.

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[25] For example, they considered a so-called "green pool." *See supra* note 4 and accompanying text.

[26] It is, indeed, little short of miraculous that the six Member States of the original EEC managed to overcome all of their historical differences and nationalistic prejudices in agreeing upon structural integration of their economics. It was in no mean measure the comprehensive scope of the integration that facilitated this agreement.

[27] *See generally supra* note 6, at 2:336.25.

Similar institutions would have to be created by the United States-Canadian Community.

Certainly, at least in the beginning stages, Council decisions would require unanimity.[28] This would ensure Canada of effective participation in the legislative process. Similarly, in the Commission, Canada could protect itself against imposition of executive decisions against its will by requiring a qualified majority for important decisions.[29] Most importantly, in the Court of Justice, Canadian justices would decide, together with United States justices, the disputes which would arise under Community law.[30]

It is the latter aspect that appears to offer immensely attractive prospects for Canadian and United States lawyers alike. The Court of Justice of the European Communities has played a most prominent role in furthering European integration, and it is likely a United States-Canadian Court of Justice would do the same.

D. The United States Attitude

The political advantages of structural integration to Canada would appear so significant that the question arises whether the United States would readily agree to such integration. The political obstacles in the United States should certainly not be underestimated, especially now that protectionist tendencies are again strong in the Congress. However, structural integration would bring the United States at least two substantial benefits: it would grant the United States some measure of formal authority over what is already *de facto* (at least insofar as the United States is concerned) a single market;[31] and, it would further promote the free trade which the United States has consistently espoused since the Second World War.

The time has come for a bold new approach. It would appear entirely appropriate that it be taken by two countries that, despite their differences, are culturally, politically and economically as closely allied as are Canada and the United States.

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[28] This was the approach adopted by the EEC. Even today, unanimity on important decisions remains the rule. *See supra* note 6, at 5:120.

[29] The EEC Treaty endorses the principles of weighted voting and qualified majorities for important decisions by the Council. *See* Treaty *supra* note 21 (Art. 148). This is a realistic and effective approach that merits emulation. Equal votes would be likely to paralyze efforts to achieve effective integration.

[30] For such a court, an equal number of justices for each partner, with a United States president, would appear to be an attractive solution.

[31] More than 70% of Canada's exports go to the United States. Next is Japan, with little more than 5%, *supra* note 22, at 7. In 1983, Canada's exports to the United States amounted to more than $50 billion. Fry, *Sectoral Free Trade*, 3 INTERNATIONAL PERSPECTIVES (Sept./Oct. 1984).