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THE CHANGING FACE OF GLOBALISM

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I might say a few words about my role in these matters. At the end of the Occupation of American and Allied Governments in Germany, two people, and I was one of them, were asked to write an opinion as to whether we thought the creation of the Coal and Steel Community was a good thing for the world, and for the United States. We both concluded it was, and I must say that I am not disappointed with the result. I think we made the right decision, and I think it was important to have this organization.

When the International Trade Organization conference broke down, three “wise men,” Eugene Rostow, Sigmund Timberg, and myself, were asked by the Economic and Social Council of the United Nations to write on a world system governing anticompetitive practices. If you examine early publications of the United Nations, you will find three little blue volumes issued by the UN which contain the results. We thought it was perhaps feasible, but then our government changed. President Eisenhower said he was not interested in the project. So, nothing is permanent, and I have learned to be skeptical about predicting the future in any case.

Here I would like to discuss my perspective on globalism. The brochure for this conference said that the global trading system is being fundamentally changed. Technology is driving a new level of economic integration. However, if you begin to reflect on this as more than a preamble to an interesting conference, then there really is a question whether we can talk about globalism if Russia and China are not members of the World Trade Organization (“WTO”). What can be done to accelerate the possibility that the global system will accommodate the integration of these countries?

The second matter requiring further reflection is that, as far as I can see, just as strong as the drive to globalism is the drive to regionalism. You have now in Europe a Community of fifteen, but it is projected sooner or later to be a Community of twenty-seven. The Communities are committed to creating a single market without fron-

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tiers. Viner says that this will increase world trade. But, what is "world trade?" How does it increase? Can you really say that intra-Community trade is world trade when it does not obey the rules of world trade because it operates on totally different premises and dispute resolution facilities?

I have been intrigued with how to measure world trade. As you know, the United Nations has statistics about the direction of world trade, but how do you really measure it? I tried to investigate the statistical authority of the United Nations. I tried to discover how the European Community ("EC") compiles its statistics. I always received the same answer: "We have to report what the governments give to us." What does a government give us? How does the government know, particularly after the decline of the various frontiers in the Community, the level of trade across its borders? How can you measure world trade in this context, and why do you say that intra-Community trade constitutes part of world trade? If I may be permitted to quote from the recently adopted Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, it begins with the following words:

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;¹

If you look at that closely, I think that you might say, or that you can say, that the first proposition is not really true, and that the second proposition is not truly realistic.

It is very difficult to see how increased trade in the regional systems covers world trade, or how it improves the most-favored-nation system that was hammered out in the old GATT 1947, when all the GATT regulations are not applicable to intra-Community trade between fifteen, and perhaps eventually twenty-seven, nations. How do you resolve the antinomy between regionalism and increased, or improved, or whatever you wish to call it, globalism? In deference to

1. *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994*, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs & Trade, Annex 1A, 33 I.L.M. 1125, 1161 (1994).

our Brazilian participant, I want to point out that the EC is not the only common market in the world. There is the common market in Latin America between Argentina, Brazil, Paraguay, and Uruguay, and there are of course many others, now numbering seventy-six all told. All of these organizations need to be concerned with the application of Article XXIV.

Common markets have become members of international organizations. The European Union ("EU") has no separate international personality. The Communities are members of the WTO, and not the EU. The Communities are not only members of the WTO; that is merely the second international organization of which the EC is a member. The first one is the Food and Agriculture Organization ("FAO"), reflecting the intense interest of the Community in the agricultural sector. I would like to stress that originally the international community was composed only of states, and only states could be parties to treaties, only states could appear before the International Court of Justice, and so statehood was the only criterion for being effective on the international scene. That has changed very much, at least following World War Two.

The first "groups" which played an international role were individuals, as a consequence of the protection of human rights. The first period in post-war history saw an increase in the possibilities for individuals to be heard by international commissions and committees, the Court in Strasbourg, and so forth. We now have a new phenomenon which bears reflecting on. International institutions such as regional economic institutions join international institutions such as the FAO and WTO. It is likely that you will have a new international currency in Europe (known as the euro)—there is no assurance of that—and if you have such a currency the next international organization that the European Communities would need to join would be the International Monetary Fund, and perhaps even the World Bank. This calls for reflection on what John Jackson referred to as "structural considerations." How do we reconcile the joining of regional organizations with global organizations?

I would like to call your attention to an interesting provision, and then a puzzle in the WTO Charter as it relates to the EC. Article IX of the WTO Agreement deals with the interrelationship between the votes of the member states and the vote of the Communities, within their respective competencies. It provides:

Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States [footnote 2] which are Members of the WTO.²

This seems to envision a situation in which not all member states of the EC are members of the WTO. Then read footnote 2 referred to in this provision:

The number of votes of the European Communities and their member States shall in no case exceed the *number of the Member States of the European Communities*.³

The footnote seems to suggest that the European Communities and some of their member states might each vote on the same matter. Yet the text provision says that the Communities will have the number of votes of its member states that are members of the WTO. Could the Communities vote for six members, leaving nine to vote on their own behalf? Might this occur when the competencies of the Communities and the member states are mixed? What about member states of the Communities that may not be members of the WTO? If the Communities vote their common commercial policy interests in the WTO, will the nonmembers of the WTO be bound by this expression of the Communities' common policy? Presumably yes as a matter of EC law, yet the nonmembers of the WTO will not have the rights of WTO members. Could the Communities initiate a dispute settlement proceeding in the WTO regarding the interests of a member state that is not a member of the WTO? In other words, could the Communities pursue a general EC interest on behalf of a country not a party to the WTO?

These puzzles may appear rather abstract, yet there will likely be a number of accessions to the Communities in the not far distant future, and some of the acceding countries may not yet be WTO Members. Furthermore, the allocation of internal competencies within the Communities remains unsettled.

That leads me to another question: the view from the Communities themselves regarding participation in these international organizations. There are two very interesting documents dealing with the membership of the Communities. One is the opinion of the European Court of Justice dealing with the respective powers of the Communities and the member states to join the WTO.⁴ The conclusion of the

2. *Marrakesh Agreement Establishing the World Trade Organization*, art. IX, GATT Doc. MTN/FA, reprinted in 33 I.L.M. 13 (1994) (emphasis added).

3. *Id.* at n.2 (emphasis added).

4. See Opinion 1/94, *Re the Uruguay Round Treaties*, 1994 E.C.R. I-5276 [1994], 1 C.M.L.R. 205 (1995).

Court of Justice was that the Communities had exclusive jurisdiction over everything except the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The GATS and TRIPS had to be "mixed agreements" ratified by both the member state governments and the EC.

The second of these documents relates to the conclusion of the agreement on the establishment of and the membership of the Community in the WTO, in which the Council authorizes the conclusion, which starts:

Having regard to the Treaty establishing the European Community, and in particular Articles 43, 54, 57, 66, 75, 84(2), 99, 100, 100a, 113, and 235, in conjunction with the second subparagraph of Article 228(3), thereof, the Community concludes that these agreements are within its competency.⁵

One preambular clause is particularly intriguing:

Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in the Community or Member State courts,
⁶

This means that all these agreements are declared to be nonself executing, and therefore cannot be invoked by individuals in the courts, subject perhaps to a version of what the Court has said in other instances, most recently in the case concerning the Banana regulations.⁷ So there is some question of reconciling all these agreements with the internal law of the Communities, and this goes even further. I would like to indicate concern without being too critical. Perhaps Professor Ehlermann can resolve this for me.

I also have some worries about an argument made by Portugal in the hearings on the competence of the Community to ratify the agreements negotiated in the Uruguay Round before the European Court of Justice, concerning a provision of the Portuguese Constitution that says that Portugal can only become a member of an international organization like the WTO if the Parliament of Portugal has voted on it.⁸ The Court says, what the Constitution of Portugal says does not concern us at all. As a matter of Community law, we can decide

5. Council Decision 94/800/EC of 22 December 1994 Concerning the Conclusion on Behalf of the European Community, as Regards Matters Within its Competence, of the Agreements Reached in the Uruguay Round Multilateral Negotiations (1986-1994), 1994 O.J. (L 336) 1.

6. *Id.*

7. Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973 [1994].

8. [1994] E.C.R. I-5267, at 5350, 5394/5 nn. 19 & 20.

within the framework of our competency whether the Community will be a member, and thereby also whether the member states will be members. It is a very interesting inversion of function. The Community can decide which member states are members in what international organizations.

At this moment I am only pointing out in some documents bad forebodings of problems that will arise because of the increased level of regionalism. Those are my comments with respect to the relation between regionalism and globalism, as to which we face a number of other difficult choices.

I wish now to call your attention to two additional points: one as regards the entry of the People's Republic of China ("PRC"), and the other the entry of Russia, into the WTO. In looking at the literature on the PRC, I found and would like to call your attention to an article by Professor Robert Hauser of the University of Cologne. The title in German is *Die VerGATTung des chinesischen Aussenhandelsrechts*,⁹ which is sort of a subtle pun, but could be translated as *The Gattification of Chinese Foreign Trade Law*. He discusses the new statute of the PRC, that will not only protect TRIPS, but will also include criminal sanctions for violating TRIPS. It is very interesting to see what the attitude of the PRC is, and what it is promising if it becomes a member of the WTO. Global welfare depends on these questions. A very good argument can be made that you cannot have a global system if the PRC's massive population is not a part of the organization.

Similar things can be said about Russia and the Soviet successor states. Efforts are being made in the East to reach forms of government that are responsible, and can keep engagements, including engagements to be made in joining the WTO. Perhaps the situation in Russia and elsewhere in Eastern Europe is more complicated than the situation in the PRC in terms of assuring that there is responsible membership in the WTO. Nevertheless, in general I think that if we are going to talk about globalism, we should take globalism seriously, and not have a pseudoglobalism. We have to have an arrangement in which every nation in the world, including Russia and the successor states in Eastern Europe, can become members. If the Eastern European states become member states of the European Community, perhaps because of the legal situation that I have already mentioned, they

9. Robert Heuser, *Die VerGATTung des chinesischen Aussenhandelsrechts*, 40 RECHT DER INTERNATIONALEN WIRTSCHAFT 1010 (1994). In this article the author offers a translation of a law of May 12, 1994, which according to chapter 1, section 4, is based on the principle of a fair and free system of foreign trade.

will thereby become members of the WTO, at least in so far as the competency of the Communities is concerned. To me the possibility is very disturbing that a state might become a member of the Communities, but not a member of the WTO.

I think we have to come to grips with all of these issues regarding what I call the "changing face of globalism." These issues require serious thinking by governments and their advisors.

