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Remarks


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A shift from functionalism to constitutionalism is not a matter of changing the guards from one day to the other. These are incremental processes, over time. It is primarily a matter of attitudes and perceptions of existing instruments and their proper role and function. First of all, it influences the application and interpretation of existing instruments. It may lead, as experienced in the EEC, to recognition of implied exceptions. Second, it eventually influences the shape of agreements and instruments. It is submitted that the evolution has already begun in case law and could be traced in a number of adopted or unadopted panel reports still under the GATT of 1947, and in more recent panel reports and Appellate Body reports under the WTO since 1995. In the light of such historical experience, it is likely that positive standards will emerge in many other fields, including labour and the environment, exerting limiting effects on the free flow of goods and services.

Constitutionalism, finally, also addresses the legitimacy of policy goals and how they are being defined. Rule-making and standard setting needs to be able to bring about a high level of acceptance. It requires substantial involvement of producer, consumer and public good interests, all at the same time. It needs to strike a proper balance between the different branches of government in this process. As rules and standard-setting on the international level expand, we seriously need to think about how international organizations can be brought closer to elected representation.

In conclusion, these are all issues which go much beyond the WTO. The question of environmental or labor standards and the limits to trade, addressed by this panel, are the symptoms of a wider issue of governance. The problems addressed affect a great number of institutions, domestically, and on the international level. These are constitutional questions of governance of the global system at large. The WTO, and perhaps the Bretton Woods institutions, due to their political and economic effectiveness, are at the forefront of attention. The framework to address these issues, however, has to be a broader one. It fits to the title and theme of this conference: *International Law in Ferment*. In short, it is a matter of interfacing trade, environment, and human rights, of bringing about mutual support, and in case of conflict balance the interests based upon a coherent constitutional and intellectual framework. Ultimately, we are faced with the question whether international law as we knew it, from coexistence to cooperation, is up to the task of global integration, or whether constitutionalism will eventually lead to what we may call global law.

REMARKS BY JOHN H. JACKSON

The limits of international trade must be understood within the context of the institutional framework of the WTO, in particular, the decision-making and dispute settlement processes. The WTO dispute settlement rules are contained in the Dispute Settlement Understanding (DSU), which is Annex 2 to the WTO agreement. The DSU includes some comments on the philosophy, the direction and the purposes of the dispute settlement procedures. Article 3.2 of the DSU has some very interesting phrases. One of those phrases (roughly paraphrased) says, "None of the reports of the dispute settlement procedure should result in a change, addition, or subtraction from the rights and obligations of the members." Some have pointed to that clause as a warning against judicial activism. The panelists and Appellate Body members should not be changing the direction of the system in terms of its basic goals. Any changes to the direction of the system are to be left in the hands of the sovereign states, the nation states, and the members. I interpret Article 3.2 to mean: "Be careful."

These first five years of the WTO may have been the most interesting five years of international jurisprudence in the history of mankind. This jurisprudence has been quite remarkable because it has had to struggle intimately with the details of the tension between nation-state sovereignty ideas and the need for multilateral solutions in a cooperative mechanism, particularly in the economic area, but arguably in all areas. In the economic area, it is

something that addresses the so-called "prisoner's dilemma." In other words, if governments "go it alone" they actually create problems for everyone, including themselves. The WTO is part of the new attention by economists, including several Nobel Prize winners, to the institutions that underpin the market and the reality that the markets will not work without appropriate human institutions.¹

The WTO reflects an imbalance of human institutions, with its remarkably sophisticated dispute settlement process (i.e., the judicial branch) and its remarkably *constrained* decision-making process (which you could call the legislative branch). The constraints on the decision-making branch came about in the last three to four months of 1993, in the negotiations of the Uruguay Round, when the negotiators went to work more seriously on what we can roughly call the "WTO Charter."² That charter was much broader, more embracing, and more threatening to national sovereignty than the negotiators wanted. Therefore, the negotiators began to change that charter by rolling back the decision-making processes. Specifically, they began to constrain those processes with super-majority requirements and stricter requirements of consensus decision making. Consensus is not unanimity, but something approaching it, in that it can lead to any country having the right to block measures, thereby resulting in stalemate. Indeed, that is part of what we saw in the Seattle fiasco, in the selection of the director-general, and in numerous decisions made during the course of the first years of the WTO.

Turning more specifically to environment and labor questions, we can see a rich history of jurisprudence relating to the environment. This jurisprudence has been the most interesting, fundamental, and thoughtful about the relationship of environment to other norms, particularly trade treaty norms, that we have ever seen. One reason for this jurisprudence is the existence of the Appellate Body system. We have been tremendously lucky to have seven people with a diversity of backgrounds and knowledge appointed to the Appellate Body roster. They have interacted well with one another, and a system of collegiality has developed, which is extremely important in the Appellate Body system and hopefully can be continued with the new members.

We have had three important cases, namely, the *Gasoline* case against the United States by Venezuela and Brazil,³ the *Beef Hormones* case,⁴ and the *Shrimp/Turtle* case.⁵ The *Shrimp/Turtle* case raises some very fundamental issues, and the decision took the so-called "evolutionary approach" to interpreting treaty language. Yet, throughout the early jurisprudence of the WTO and the Appellate Body opinions, there have been constant statements of deference to nation-state sovereignty. Such deference statements are in cases such as the *Gasoline* case and the *Japanese Alcoholic Beverages* case,⁶ where the Appellate Body in fact held *against* the nation-state. Nevertheless, the Appellate Body held that the nation-state should have a very wide scope to regulate, but there are boundaries. These Appellate Body reports tell us what these boundaries are, which may or may not be the line that you would logically draw. But in the *Beef Hormones* case, the Appellate Body rolled back the first-level panel, saying that the panel had overstepped a bit. The Appellate Body was prepared to step back and give a wider scope to the nation-state.

In the *Shrimp/Turtle* case, though, there was an additional interesting layer added to some of these issues. Part of the jurisprudence carried forward from the GATT, going back to a case

¹ See RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988); Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990).

² Agreement Establishing the World Trade Organization, reprinted in 33 ILM 13, 15 (1994).

³ WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2 & 4/AB/R, adopted May 20, 1996.

⁴ WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 & 48/AB/R, adopted Feb. 13, 1998.

⁵ WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted Nov. 6, 1998.

⁶ WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, adopted Nov. 1, 1996.

called the *Belgian Family Allowances*,⁷ has been to look at the word “product” in Article III of GATT (the national treatment of like products). This suggests that the dispute settlement system and the treaty structure are focused on the characteristics of the *products* and not on the characteristics of how they were made, the home country that produced them, or the production process itself. The product-process distinction has been a fairly bright-line bulwark against sliding down a slippery slope of blocking products at the border for activities related to production, such as Sunday closing laws, hours for labor, or environmental measures. This distinction has been heavily criticized by some of the proponents of both labor and environment. In fact, the product-process distinction will probably not survive and perhaps *should* not survive. The key challenge is to know how far down the slope we are willing to slide, in other words, to find the handholds on the slope. The question then becomes: is an Appellate Body function or a negotiating function needed to address this problem?

In the *Shrimp/Turtle* case, the Appellate Body ignored that question, while at the same time suggesting that it could uphold border measures that were really targeted at process (i.e., a ban on shrimp caught with nets that kill sea turtles). This issue remains open, and it will be very interesting to see where it leads. Thus far, efforts to have a decision-making process or a negotiating process solve some of the environmental clashes with trade have failed, partly due to the institutional infirmities alluded to at the beginning of these remarks. Therefore, there is a very strong impetus to push those issues in the direction of a resolution, and the dispute settlement process is a logical target.

⁷Belgium – Family Allowances (Allocations Familiales), Nov. 6, 1952, GATTB.I.S.D. (1st Supp.) at 59 (1953).