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# THE ESSENCE OF ECONOMIC GLOBALIZATION : THE LEGAL DIMENSION

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## I. — INTRODUCTORY REMARKS

In assessing economic globalization much has been said about its economic, historical, and political aspects, but few about its legal and systemic aspects. Similarly, many have focused on its negative and perverse effects (for instance, increase in poverty, inequality, and vulnerability of the weak, while benefiting only a few) ignoring its legal positive aspects. As such conceptions are partially representing, or to a certain extent, misrepresenting, reality in international economic relations, for the sake of clarity we propose to reconsider economic globalization from the perspectives of public international law and international organization.

By focusing mainly on the observation of the dynamics of economic globalization, in this paper, we intend to answer the following broad questions : What are the main implications, in law, of this phenomenon ? To what extent is it influencing the *status quo* in international economic relations ? Is it paving the way for major changes in the field of international relations ?

We begin by assuming as well-founded the generalized conception that economic globalization is « integrative », but we will make obvious that this explanation is insufficient to explain the complexity of current developments in international relations as it can be easily demonstrated that economic globalization is also, by nature, « regulatory » and « unificatory », to the point that it has already created a new « global entity » with a corresponding « global legal structure ». We then discuss the main legal and

systemic implications of these assumptions. Basically, we argue that *economic* globalization has turned into an on-going global *legal* process, with ensuing revolutionary effects in the universe of reality. This paper, rather than asserting a theory, aims at providing with workable answers to the many questions raised by the present trends in international relations.

## II. — The new « global reality » brought by the process of economic globalization

Economic globalization, *i.e.*, the process by which the whole world economy has been linked across frontiers and from top to bottom, in short, may be explained by the convergence of the following mutually supportive courses of action : *(a)* advances of human knowledge in technology, and *(b)* the intervention of market forces in the form of cross-border liberalization of trade and services, and of market capitals, especially foreign direct investment. At present, this is the « basic operating structure » for encouraging innovation in technology, while pressing for further market liberalization and more freedom in capital movements.

As part of a major on-going process of actions and reactions (including overreactions), with causal effects at all levels, economic globalization accelerated in recent times with the improvement of the international political and economic conditions that emerged after the end of the Cold War. As a consequence, it has created an irreversible global economic process, which has generated its own dynamics (by definition, a dynamic system is a continually changing system). But because of its « instant effects » in the world of reality, mainly, as a result of widespread use of information technologies, this global process has created new spaces, inside and outside the economic field, has increased interdependence in general, and has produced changes in existing realities. Indeed, it has created a new and unique « global reality » for everyone and everything : a global history for all, with ensuing world-shattering implications at all levels.

Consciousness of this special historical feature of the globalization process is thus fundamental to understand the other main features of economic globalization.

## III. — The « integrative » nature of the process of economic globalization

The fact that economic globalization is, by nature, « integrative », is widely accepted, especially, in international economics, which explains the integrative aspect of economic globalization as follows : as productive activities expand, countries can derive more gains from expanded produc-

tion not only by concentrating their efforts in trading on those activities that each performs better (this is the famous *comparative advantage* doctrine), but also by integrating their national markets with others so as to widen the scope of their markets in order to allocate resources efficiently inside the integrated area, while benefiting from a larger economy of scale.

In this new « global reality », however, things happen otherwise. Independently of the types of integrated areas created by States (bilateral, regional, and multilateral or quasi-universal), and of the degree of market commitment put on them (customs union, common market, free trade area), it appears, as a matter of fact, that all sectors of economic activities, with a certain given potential, are likely to be « liberalized » from its domestic roots, by the « globalizing economic process » (this will depend of the ratio of convergence of the above mentioned « basic operating structure » : the higher the ratio the faster the « liberalization » of the sector). As a result, the « liberalized » sector is converted into a new « internationalized » subject (1).

As a matter of the process itself, the sectors that have been « liberalized », or that are being « denationalized » (*i.e.*, « liberalized » from its domestic roots), are « integrated », simultaneously, in a *de facto* or a *de jure* way (*i.e.*, by the process itself or by human intervention), into a new « globally-integrated » area, which, as in the case of the other types of integrated areas, is a different entity of its national component parts (we will see below — in section VI. The emergence of a « global territorial jurisdiction » — that this « globally-integrated » area is a specific feature of the new « global reality »).

Thus, from a systemic viewpoint, economic integration may happen (as, indeed, it happens) anywhere, at all times, inside or outside the integrated economic areas, and irrespective of the countries' economic rationale or political will (2). This perception is supported by reality, but before embarking on further discussion on the implicancies of this conjecture, we need, at this point, to get a clear understanding of what is meant by a *de facto* and a *de jure* economic integration.

(1) The term *internationalisation* has sometimes been used as a synonym of « globalization », but that term seems to be insufficient to display the « internal » and « external » faces of a very complex phenomena that ignore boundaries (for, « globalization » operates inside and outside the States' territorial jurisdictions, in a borderless manner). For a differentiation of the terms employed referring to this phenomenon, see Marcelo KOHEN, « Internationalisme et Mondialisation », *Le droit saisi par la mondialisation* (ed. by Ch.-A. MORAND), Bruxelles, éditions Bruylant, de l'Université de Bruxelles, and Helbing & Lichtenhahan Verlag, 2001, pp. 108-110.

(2) Accordingly, « globalization » is not a matter of choice as some market analysts have suggested, *inter alios* : Martin WOLF, in « Will the Nation-State Survive Globalization ? », *Foreign Affairs*, January/February 2001, p. 182.

## IV. — THE « REGULATORY » NATURE OF THE PROCESS OF ECONOMIC GLOBALIZATION

Given that economic globalization encompasses « integration » at all times and everywhere, in order to avoid chaos, in times of accelerated globalization, the existing processes of integration — namely, the different types of integrated areas, at one level, and the economic sectors undergoing a process of « liberalization/integration », at another level — can be identified only by means of reference to a fixing element (3) : the *legal* factor (for instance, a *hard* treaty, or a *soft* agreement). This does not imply that the processes that have not yet obtained the respectability and sanctity that legal recognition confers are not « integrated »; they are integrated, but by means of a *de facto* intervention of the « globalizing economic process » itself.

Hence, the following question arises : By what means and how exactly are these processes of integration reflected in the world of reality ? The answer is by operation of the legal technique, that is to say, by means of international « integrative regulation », or by evidence of its absence (in which case, as we already said, « integration » takes place anyway, but in a *de facto* manner). Here, it is assumed that « integrative regulation » means something more than classical international regulation. It means, formal acceptance of this relatively new type of international regulation, by national Parliaments, coupled with an *effective* implementation of these regulations at the domestic level. Here, « effectiveness » can be equated to an « enforceability » requirement, similar to that produced by the national legal systems (and, « effectiveness » in the national legal systems means, in its very basic conceptualization, the principle by which the courts of the country are able to adjudicate upon matters with regard to which they have the power to enforce) (4).

(3) To make market commitments more credible, in times of accelerated globalization, market actors, including the most important, States, opt for legal security, predictability, transparency, and judicial protection to which they often tend to adopt after a trial and error period. This was shown by the GATT CONTRACTING PARTIES when they endorsed a new *hard* multilateral legal system for the regulation of their *inter se* trading relations, after a long period of application of a *soft* multilateral trading regime (also called GATT *à la carte*).

(4) As to the question of « enforceability » in the UN system, Professor Oscar Schachter noted that the improvement « [...] of the judicial and institutional processes for furthering compliance and enforcement should not lead us to conclude that the UN system and general international law have provided for mechanisms comparable to those in domestic legal systems. It is still true that on the international level governments usually seek to cope with violations through various means of dispute settlement or self-help, rather than through judicial or institutional enforcement. [...] The [UN] Charter accordingly gives priority to the peaceful settlement of disputes, rather than to the coercive enforcement of law or compulsory jurisdiction of the International Court. Chapter VII enforcement authority was meant to be limited and to be applied only in cases where peaceful means of dispute had failed »; see Oscar SCHACHTER, « The UN Legal Order : An Overview », *United Nations Legal Order* (ed. by O. SCHACHTER and C.C. JOYNER), *The American Society of International Law and Grotius Publications*, Cambridge University Press, 1995, Vol. 1, p. 21.

However, as shown by State practice, even if it is real that each integrated area generates a corresponding « integrated legal structure », it does not necessarily follow that the legal regulations and outcomes of this legal structure are *per se*« integrative ». The attribution of this quality will depend of the « legal technique » applied by the States concerned. Take, for instance :

— the Southern Common Market (MERCOSUR) : this is an integrated area that has produced a corresponding sub-regional legal structure, but this cannot be deemed to be « integrative » since its State members have chosen, for its legal outcomes and regulations, basically, the same characteristics as those of classical international regulation (5);

— take now another regional legal structure, that of the European Communities, now the European Union (EU) : this integrated legal structure has evolved from « community law » — itself « integrative regulation » — into a sort of supra-national law or quasi-federal law, for not only can it be effectively enforced inside such an integrated area, but it can be « directly applicable », either by individuals or firms, before the national courts of the member States as soon as they enter into force (ratification by Parliaments is not anymore a requirement, save for changes of « constitutional » character, and the individuals can invoke these regulations against their own States in the eventuality of a failure on their implementation); on the whole, it can be said that this « regional » legal structure is self-similar to a national legal system;

— as to the North American Free Trade Agreement (NAFTA) : this integrated legal structure also shows the quality of generating « integrative regulation », because it provides that the objectives of the NAFTA agreement « as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to : [...] *e)* create *effective* procedures for the implementation and application of this Agreement, for its joint

(5) Overall, the Mercosur lacks *effectiveness* in the implementation and enforcement of its legal outcomes and regulations. Article 1 of Annex III, on the Settlement of Disputes, of the Treaty of Asunción, and Article 2 of the Protocol of Brasilia provide that the disputes « between the Parties as a result of the application of the Treaty shall be settled by means of *direct negotiations* » [emphasis added]. These central provisions, clearly, favour recourse to political and not to judicial means for solving trade conflicts inside that integrated area. Although, more recently, the Mercosur has made efforts to improve its dispute settlement mechanism, it has nevertheless limited the effect of its « community law » by creating a « simultaneous applicability system » which rests upon the foundations of classical « compartmentalized » international regulation. The obvious inadequacies of the Mercosur's legal structure (*inter alia* : proceedings controlled by the States; limited role for private parties and individuals; *ad hoc* nature of the arbitration tribunals) are analysed by Emilio CÁRDENAS and Guillermo TEMPESTA, in « Arbitral Awards Under Mercosur's Dispute Settlement Mechanism », *Journal of International Economic Law*, 2001, Vol. 4, n° 2, pp. 341-342, 365.

administration and for the resolution of disputes; [...] » (6). [emphasis added].

Consequently, even if there is not sufficient evidence to state that integrated areas lacking effective judicial enforcement machineries cannot succeed in their implementation, it is, however, sufficiently clear that prospects of success are associated with *(i)* having a « binding and enforceable » mechanism for the resolution of all disputes arising inside the integrated area, and with *(ii)* showing full respect for all substantive and procedural principles (including consistency, due process, efficiency, fairness, transparency, and law-based decisions).

The same criteria for distinguishing integrated areas can be applied at the multilateral or quasi-universal level; but here we find that only the « multilateral trading system », represented by the WTO, exemplifies an « integrative » process, because it is the unique « system » (7) that meets the « effectiveness » requirement in the sense described above (the specific features of this « globally-integrated » area will be described below in section V. The « integrative » role of the multilateral trading system) (8).

As shown, the integrative regulatory criteria makes the difference, but this is due to a large extent to the kind of regulation applied *inter se* by the States concerned, and, obviously, to the incentives that, previously, have made them to refrain from applying classical international regulation. In any event, it is clear that if States have opted for giving « effectiveness » to their « common » legal regulations and outcomes it is because they are persuaded of the economic benefits that may derive (*e.g.*, maximizing the national welfare) from self-imposing limitations on their sovereign powers.

(6) Text of Paragraph 1.e) of Article 102, on the Objectives of the North American Free Trade Agreement. On the similarities and differences of NAFTA and the WTO dispute settlement mechanisms, see Gabrielle MARCEAU, « The Dispute Settlement Rules of the North American Free Trade Agreement : A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization », *The New GATT Round of Multilateral Trade Negotiations : Legal and Economic Problems* (ed. by E.-U. PETERSMANN and M. HILF), Deventer and Boston, Kluwer Law and Taxation Publishers, 1997, p. 489 [hereinafter : *The New GATT Round* (ed. by E.-U. PETERSMANN and M. HILF), 1997]. On the success of NAFTA's system of panels, see Eric J. PAN, « Assessing the NAFTA Chapter 19 Binational Panel System : An Experiment in International Adjudication », *Harvard International Law Journal*, Spring 1999, Vol. 40, n° 2, pp. 440-445.

(7) « System » in the real sense of the word is : an organized whole, with a set or assemblage of things associated, interconnected, or interdependent so as to form a complex unity (the WTO's existence as a « system » stems from the endorsement, by its Members, of a « single package deal »). The notion of « system » thus sets aside simple assemblement of groups of things or parts, as well as assemblage of goings-on generating chaos. The present international financial and monetary regimes do not reach such a degree of substantial correlation. In the same sense it has been argued that « the present free policy system can best be described as a set of international arrangements rather than an international monetary system », *cf.* Petar SARCEVIC, « Impact of the International Monetary System on World Trade », *Legal Issues in International Trade* (ed. by P. SARCEVIC and H. VAN HOUTTEN), London/Dordrecht/Boston, Graham & Trotman and Martinus Nijhoff, 1990, p. 212.

(8) WTO trade diplomats often refer to « effectiveness » with this expression : « the WTO has teeth ».

Consider now sectoral economic integration at the multilateral or quasi-universal level — the natural scenario of the on-going process of economic globalization —, here we find that *de jure* economic integration has been achieved only as a result of the application of « multilateral integrative regulation ». Here the sectors of economic activities that had been integrated *de jure* are those that have passed through the WTO multilateral integrative regulatory process. These sectors are now subjected to a multilateral rules-based system that operates globally (*i.e.*, nationally and internationally, in a borderless manner).

But given that economic integration happens anywhere, at any time, inside or outside the integrated economic areas, and irrespective of countries' economic rationale and/or political will, we also have to deal with a range of *de facto* sectoral processes of global economic integration. Here the sectors of economic activities that have been integrated in a *de facto* manner — *i.e.*, integrated by the process itself — are those which have not yet passed (or that their processes of passing are not sufficiently clear, are incipient, or are still exploratory) through any « multilateral regulatory process ». At the most, internationally, these sectors are subjected to kind of *soft law* regulations, always within the sphere of classical international regulation.

Illustrating the *de jure* integration cases, on the one hand, are those sectors regulated under the multilateral trading system (for instance, trade of goods and services, trade-related intellectual property rights, including *per se* « borderless » and « integrative » sectors such as telecommunications, information technology, and financial services) (9). These sectors have been « liberalized » and are fully « integrated » into the new « globally-integrated » world economy by means of binding and enforceable « multilateral regulation », domestically and internationally.

(9) On financial and monetary matters, since its inception, GATT asserted « jurisdiction » over all trade measures taken for balance-of-payments purposes to safeguard a contracting party's external financial position in cases of a serious decline of its monetary reserves. In 1995, with the entry into force of the WTO Agreement, which included two Annexes to the GATS on Financial Services, a Decision on Financial Services, an Understanding on Commitments in Financial Services and a Protocol to the GATS, the WTO asserted « jurisdiction » over trade in financial services (insurance and insurance-related services, and banking and other financial services). Subsequently, in December 1997, within the framework of the GATS, the WTO expanded even further and « materialized » its coverage through the successful conclusion of an agreement on financial services which established the MFN and national treatment as the fundamental principles for the running of trade in financial services. Although the Financial Services Agreement, strictly speaking, does not regulate capital flows, however, by means of regulating the establishment and expansion of a commercial presence of foreign banks in domestic markets, the WTO brings into play, indirectly, the regulatory element to the deregulated world of capital movements. This is so because capital movements and banking or financial services are inextricably interlinked, for these are like the water and the water-pipe. Consequently, these instruments have had the overall effect of bringing the trade-related aspects of finance and money under the multilateral rules-based system (thereby paving the way for further « spilling-over » of the WTO « integrative » regulatory powers).

On the other hand, illustrating the *de facto* integration cases, are those sectors of economic activities and the goings-on presently operating inside the international financial and monetary sphere. These are, for instance, the case of the unregulated international market capitals, in particular, the *soft law* regulation of major international players (especially hedge funds and other highly leveraged institutions) (10); the existence of off-shore havens, money laundering, corruption (11), moral hazard, financial volatility, and herd instinct in market capitals; the negative effects of short-term capital transfers (12) (hot money) and non-productive financial tools and techniques such as derivatives in international banking and finance; the illusion of numerical figures in account settlements and the financial bubble thereby created in the international « payment and settlement systems »; the Darwinian *modus operandi* of the floating exchange rates mechanism, and the subsequent lack of protection of the transactional value of international trade operations inside the unpredictable world of exchange rates; the lack of transparency and non accountability in international banking and finance; the existence of lobby and pressure groups, rent-seeking groups, free riders, and other economic predators (typically, but not exclusively, currency speculators) (13), as well as other disfunctionalities.

Clearly, these sectors and goings-on have been « liberalized » and are operating « globally », but are not integrated *de jure* into the present « globally-integrated » world economy, for they have not yet been the sub-

(10) For instance, in the United States, at the request of the private financial sectors, the governmental financial and monetary authorities recommended the House of Representatives, *inter alia*, to eliminate the « impediments to innovation » in the sector of over-the-counter derivatives (and, indeed, to financial derivatives generally) by removing « legal obstacles » and « unnecessary regulatory burdens » posed by U.S. futures laws; see *Over-the-Counter Derivatives Markets and the Commodity Exchange Act*, Report of the President's Working Group on Financial Markets (Department of the Treasury, Board of Governors of the Federal Reserve System, Securities and Exchange Commission, and Commodity Futures Trading Commission), November 1999.

(11) « The Enron debacle is not just the story of a company that failed; it is the story of a system that failed. And the system didn't fail through carelessness or laziness; it was corrupted. [...] The truth is that key institutions that underpin our economic system have been corrupted. The only question that remains is how far and how high the corruption extends »; see Paul KRUGMAN, « A System Corrupted », *The New York Times*, January 18, 2002, p. 23.

(12) As a general rule, capital transfers are not subject to the IMF's central obligation of convertibility. Under the IMF Agreement members are free to control capital transfers, provided that they do not « impose restrictions on the making of payments and transfers for current international transactions » (Article VIII, Section 2(a)). A similar provision is contained in Article XI of GATS, which requires Members « not [to] apply restrictions on international transfers and payments for current transactions relating to specific commitments. »

(13) The *Enron case* gave evidence that accountants from auditing firms may engage in « aggressive accountancy » and pyramid schemes to inflate earnings; see Paul KRUGMAN, « Two, Three, Many ? », *The New York Times*, February 1, 2002, p. 25; see also, « Enron Considered Influencing Accounting Body », *The Financial Times*, February 13, 2002. The *Merill Lynch case* gave evidence that financial corporate analysts may engage in financial misinformation activities (New York's General Prosecutor is currently investigating other investment firms for conflict of interests between the banks and their financial analysts).

ject-matter of a « multilateral integrative regulatory process » of the WTO-type. On the international plane, they are subjected at the most to a sort of *soft law* regulation in the form of business and corporate international standards or codes of conduct developed through cooperation and coordination by the authorities of a small group of countries (usually, the Quad countries or the G7); and, domestically, they are subjected to permissive legal environments.

In view of the fact that the presence of the legal element is essential for both integrated areas and sectoral economic integration to exist in the universe of reality, and that economic globalization is an « integrative » process encompassing a « regulatory » course of action at the systemic level, we therefore submit that *economic* globalization is, in essence, an integrative global *legal* process.

## V. — The « integrative » role of the multilateral trading system

In this on-going revolutionary process of global legal integration taking place within a non-perfect, non-transparent, and non-optimally « globally-integrated » world economy, we propose now to analyse more in detail the « integrative » role of the WTO legal framework (presently, the first and unique *de jure* integrated system regulating various sectoral global economic activities by means of « multilateral integrative regulation »). Here we argue that this integrative process corresponds remarkably to the successful contribution as a pivotal role of force of global legal integration developed by the WTO.

By global legal integration, we mean the gradual, permanent and irreversible penetration of WTO law into the domestic law of its Members (14). This process has two dimensions. First, is the dimension of formal penetration of the WTO law, in the form of treaty law into the domestic law of its Members. This operates through *(a)* the ratification processes of international conventions by national Parliaments, in which multilateral integrative legislation becomes part of domestic law; and by *(b)* the range of cases in which WTO law is applied by its Members before *ad hoc* panels, and by private parties before domestic courts (still limited to a few disciplines such as antidumping, subsidies and countervailing measures, government procurement, and trade-related intellectual property rights).

(14) This section is based on the theoretical framework developed to explain the European legal integration through the courts and community law submitted by Anne-Marie Burley and Walter Mattli in « Europe Before the Court : A Political Theory of Legal Integration », *International Organization*, Vol. 47, n° 1, Winter 1993, pp. 41-76; it is also based on earlier work developed by Ernst Haas in « International Integration : The European and the Universal Process », *International Organization*, Vol. 15, n° 3, Summer 1961, p. 366.

Second is the dimension of substantive penetration. This operates through the « spilling-over » of the WTO norms from the narrowly trade domain into major economic-related areas such as information technology, telecommunications, cyberspace, financial services, and even non-economic areas such as health and safety (15), infrastructure and human capacity building, and poverty (16) issues, among others.

This spilling-over process of the WTO integrative regulation also generates : *(a)* in national settings, the reaccommodation of the expectations of domestic law-makers, policy-makers, and national economic actors, after the official approval by the WTO Dispute Settlement Body of the Panels and Appellate Body reports (which are not only merely binding, but carrying as well the means of their potential enforcement); and *(b)* internationally, the likelihood of new calls for reforms within the United Nations system, in the sense that they eventually should have to convert their « linear » system into a « dynamic » one in light of the WTO general principles and substantive rules.

In this « unificatory » process, then, the WTO possess « full legislative powers » (17) to solve conflict situations on trade policy matters and does so through « parliamentary diplomacy », which is a procedural machinery that allows its Members to maximize the representation of their interests. Here, all the fundamental decisions are made by the WTO Ministerial Conference, and by the General Council « in the intervals between meetings of the Ministerial Conference » (18).

The immediate effect of these decisions are by themselves highly integrative because they derive legitimacy from two of the WTO special characteristics : (1) that of being a « Member's driven organization », which basically means that the Secretariat, although very influent at a technical level — especially at economic trade policy-supervision — has no « power of initiative », and remains impartial and outside of the decision-making process; and (2) that of being obtained by the operation of the « golden rule » of consensus, which means that in all fundamental decisions of the organization there is, at least officially and theoretically, full participation of its Members (even if, in practice, developing country Members and, particularly, LDCs experiment chronic organizational problems and limited financial means to afford and ensure a permanent presence in all the meetings of the WTO Councils, Committees, Working Groups, Sub-Committees, and in the many Member's informal meetings). These decisions are

(15) See, for instance, the WTO Doha Declaration on the TRIPS Agreement and Public Health, Doc. WT/MIN(01)/DEC/W/2, 14 November 2001.

(16) See, for instance, the WTO Plan of Action for the LDCs (*inter alia*, Doc. WT/LDC/SWG/IF/1, 29 June 2000 and Doc. WT/LDC/SWG/IF/9/Rev.1, 17 January 2001).

(17) A type of law-making function that the United Nations (linear) system lacks.

(18) Paragraph 2 of Article IV of the Marrakech Agreement Establishing the World Trade Organization (the WTO Agreement).

further reinforced by (3) the Ministerial Conference, and the General Council's « exclusive authority » to adopt legal interpretations of the WTO agreements, which increases even more the potential for spilling-over from the inside — narrow but rules-based — trade field into the outside *de facto* integrated economic areas and non-economic fields, as well as into the new expectations on policies and political processes which they imply.

The WTO also possess « full judicial jurisdiction » (19) to work out a positive binding and enforceable solution to a dispute. The « dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system » (20). This function may not necessarily be achieved at an ultimate higher instance (*i.e.*, in the Appellate Body), but it is always accomplished at the highest level (through the approval of the Panel or Appellate Body reports by the Dispute Settlement Body, which is the General Council in discharge of its judicial functions), and are resolved primarily, if not solely, on the basis of law. Broadly speaking, compliance with panels and Appellate Body recommendations are generally quite positive and satisfactory, which reinforces even more the autonomy, comprehensiveness, credibility, and legitimacy of the WTO dispute settlement system.

So, if full legislative, and judicial functions, are typical of politically integrated communities, in the case of the WTO it is indicative not only of a very intense degree of economic integration, but one that has a very advanced degree of legal integration.

At the same multilateral organizational level, given that for the first time in history a *de jure* integrated sector of the global economy (the multilateral trading system) has put into place a dynamic legal structure, the placing of it has given rise to a new « globally-integrated territorial jurisdiction », whose emergence constitutes a revolutionary legal development.

## VI. — The emergence of a « global territorial jurisdiction »

At the systemic level, it is a historic rule that where a new *corpus juris* emerges a new jurisdiction takes place. Its « scope », which, in practice, is expressed in terms of « territorial jurisdiction », will be determined by the *corpus juris* itself, as it will be the case with regard to its evolution.

As seen above, the « multilateral trading system » constitutes a new « global legal structure » which possess its own jurisdiction (territorially speaking, quasi-universal) which is one superposed, but different, to the

(19) WTO « full judicial jurisdiction » here means « compulsory jurisdiction » over all WTO Members (a type of judicial function that the United Nations system lacks).

(20) Paragraph 2 of Article 3 of the WTO Dispute Settlement Understanding.

national legal jurisdictions of its Members. Thus far there is nothing new. However, its singularity consists in that it belongs to the type of « integrative » legal structures, which means — in addition to the « effectiveness » requirement — that the same law is applied at domestic and international levels without possibility for its Members to consider whether to implement it or not (21). Although classical international legal structures may overlap with those of its members, however, they do not penetrate inside the members' domestic jurisdictions, they rest outside, mainly, because classical international law leaves to the States the task of deciding the means of its « incorporation » into the national legal system (this explains to a great extent why classical international regulation is said to be « compartmentalized »). As « integrative » legal structures consist of the same legal structure inside and outside its national component parts, it follows then that the WTO global legal structure is self-similar to a « national legal system », at a different scale.

Thus, the emergence of this new entity, the « globally-integrated territorial jurisdiction », to which evidence of its existence is provided by the presumption *juris et de jure* that each integrated area brings a corresponding integrated legal structure, is reflected, at the « legal technique » level, upon the form of conventional international law.

Similarly, at the legal and systemic levels, this global territorial entity has materialized from the uniting of three « internal » factors : *(i)* the ongoing process of implementation of the WTO Agreements and Decisions, including the last Doha Decision on Implementation-Related Issues and Concerns (22); *(ii)* the instauration of an integrated dispute settlement mechanism for conflict resolution inside the system; *(iii)* the adoption of *per se* « borderless » and « integrative » multilateral trade agreements (the « technological » ones, information technology and telecommunications, plus financial services); and, « externally », by the intervention of a continuing superseding force : *(iv)* the *dynamic* of the globalizing/unificatory economic integration process, which bears a great potential energy content.

This global legal structure, presently, covers the totality of the people and the territories of the Members and separates customs territories to which the WTO Agreement applies. In substantial terms, it constitutes a « common territorial entity », different from those of its Members' territories, in which goods and services can compete with their like in any of the national territories comprising the « common territory ».

(21) Provisions like that of paragraph 4 of Article XVI of the WTO Agreement (which reads as follows : « Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements ») are contained in a number of WTO (sectoral) agreements on trade in goods and in services. Moreover, a multilateral periodic review of their domestic implementation is also provided for in these agreements.

(22) Doc. WT/MIN(01)/W/10, 14 November 2001.

In terms of market, this « common territory » is a « multilateral market » (the most « global » form of market), one equivalent to the sum of the markets of the WTO Members, in which the economic activities *(a)* can be carried out under transparent and non-discriminatory conditions, and *(b)* are governed by the disciplines, rules and principles prevailing in the multilateral trading system. This global market is thus a rules-based market because, from the customs' viewpoint, the current national schedules of tariff concessions, specific commitments, and other binding measures (which are integral part of the WTO Agreement) continue to specify the legitimate levels of trade protection allowed to each domestic market.

As it could reasonably be expected, the new common entity also posses its own interests (the « global interests »), which are different from those of its Members' individual interests. In this regard, however, such an advanced legal system lacks provisions for the effective protection of the collective created as, for example, a Members' duty of solidarity toward the new « common territory ». It does not contain collective, institutional, or simple legal devices to address properly and effectively the « global commons », neither mechanisms to cope with and remedy unexpected economic crisis arising outside of the multilateral trading system but having a real direct negative impact inside it, so as to defeat the original economic context and conditions in which the implementation of the multilateral trade agreements was supposed to take place. As matters stand, the preservation of this « common territory » (for, it is a perishable and scarce resource) has not been even addressed.

In spite of this bulk of evidence, it seems that a great number of, if not all, WTO Members are ignoring the existence of this new global jurisdictional unity. Quite more surprisingly is the fact that they are equally ignoring the overall impact produced by the revolutionary process of global legal integration, because Members are still thinking and acting purely in terms of classical « compartmentalization » between the international and national legal structures. Yet many have even taken it for granted and are behaving exclusively in pursuance of their self-interests as they do inside the UN « linear » system.

Thus, recognition of this new global territorial jurisdiction corresponding to the « globally-integrated » world economy would have immediate and practical effects likely to bring into change our current perceptions of the institutions and subjects of international relations. We will see, briefly, in the next section, some of these main legal and systemic effects brought by the intervention of the globalizing/unificatory economic process.

## VII. — Some legal and systemic effects resulting from intervention of the globalizing economic process

In the preceding sections, it has been demonstrated that « contemporary » economic globalization has produced a new « global reality », that is to say, a common history for everyone and everything, which is characterized for having « instant effects »; that, it does not take into account countries' economic rationale or political will because it happens continuously anywhere, at all times, inside and outside the integrated economic areas created by States; and, that it encompasses a « regulatory » course of action, which means that, in essence, it is an integrative global *legal* process. Moreover, this integrative legal process corresponds remarkably to the successful contribution as a pivotal role of force of global legal integration developed by the WTO; the multilateral trading system, as elaborated in the Uruguay Round and subsequent agreements, has put into place an « integrative » and « unificatory » legal structure, produced not by means of classical international regulation but by « integrative » regulation; the placing of this dynamic legal structure has brought about a new « global territorial jurisdiction » inside the « globally-integrated » world economy. This overall development of actions and reactions and ensuing causal effects, as well as their impact in the real world constitute a revolutionary legal development in international relations.

In this section we discuss very briefly some of these effects in the fields of international law and international economic relations, from the legal and systemic viewpoints.

### A. — *The upgrading of international economic law into a « superior » legal order*

According to the generally accepted view (23), that only coercive legal orders (typically but not exclusively, national legal orders) are superior legal orders, « integrative » legal orders meeting the « effectiveness » requirement, to the same extent as in national legal orders (24) would thus be deemed superior legal orders. Then, if it is accepted that large and very important sectors of international economic law have upgraded from the

(23) In particular, Professors Hans Kelsen and Paul Guggenheim, while Michel Virally considered that international law is merely « different » and *sui generis*; see Michel Virally, « Sur la prétendue 'primitivité' du droit international », *Le droit international en devenir : essais écrits au fil des ans*, Institut universitaire de hautes études internationales de Genève, PUF, 1990, pp. 92, 98.

(24) Although national legal orders are inherently « coercive », in practice, many are nevertheless « ineffective » regarding the implementation and enforcement of law. But given that all national legal orders are, theoretically, capable of becoming « effective » legal orders, the presumption *juris et de jure* that all national legal orders are « superior » is thus well founded.

stage of a « primitive » order of « self-help » (25) and legal « softness » into a « coercive » and « hard » legal status, similar to national legal orders, it follows that international economic law has reached to a great extent the stage of an advanced legal order.

This is so not only because the rights and obligations of the multilateral trading system are legally « binding » and « enforceable » (save its set of rules on developing countries and LDCs) (26), but because the system itself is « coercive », for it shows the same character as domestic law : it has established special organs for the creation, application and enforcement of its norms. As to the special characteristics of this legal order, « collective creation » and « collective application and enforcement » are applied as general rules and are exerted, respectively, by the WTO General Council and the WTO Dispute Settlement Body (the former in discharge of its « judicial functions »).

### B. — *The emergence of a new type of international regulation : the « law of integration »*

As the new global reality is evolving very fast, both recognized types of legal regulation, the « law of coexistence » and the United Nations institutionalized « law of cooperation » regime (27) soon appeared to be insufficient approaches to cope with a continually changing international environment. This was most obvious in the field of international economic relations, where the process of economic globalization unveiled the necessity of having a legal system as effective as possible. Hence, it is not surprising that the conversion of the GATT into a *hard* multilateral trading system, and its subsequent reinforcement in Singapore, Geneva and Doha, were responses to the pressing needs of the globalized markets.

However, what was not fully realized at first is that a *hard* international legal system could generate major law-making treaties, disciplines, principles and rules of law through the application of the legal technique of « multilateral integrative regulation ». The use of this by the WTO has turned it into the leading rule-maker of the global economy to the point that

(25) « Self-help », a broad and imprecise term, « covers a range of non-forceful actions that may be taken by a State injured by a violation of legal obligations owed to it. Analytically, it falls into the category of actions to achieve compliance or to enforce obligations. The term 'counter-measures' has come to be used for self-help action in place of the older terms 'reprisal' and 'retorsion' »; see Oscar SCHACHTER, *op. cit.*, p. 21.

(26) On the matter of *soft law* rules inside the GATT/WTO legal system, see this author's paper on « The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs », *Journal of World Trade*, Vol. 35, n° 3, June 2001, pp. 545-551.

(27) For the *summa divisio* original submission, see Wolfgang FRIEDMANN, « The Changing Dimensions of International Law », *Columbia Law Review*, Vol. 62, November 1962, n° 7, pp. 1147-1165. See also, Georges ABI-SAAB, « Whither the International Community ? », *European Journal of International Law*, Vol. 9, n° 2, 1998, pp. 248-265.

today everything is « linked » to it, and not the contrary (this explains why it is the gravitational economic force).

In this regard, on the one hand, notwithstanding that it may be emphasized that it is not a legislature, the WTO Ministerial Conference and the General Council (the latter in the intervals between the meetings of the Ministerial Conference) act to a large extent as global parliamentary bodies as much in their proceedings as in their legal outcomes. On the other hand, given that the quality of supply stimulates demand, its Members, the international civil society, the international business community, the international public opinion, the academic world, as well as the individuals repeatedly call for solutions to the world's problems through such law-making (or norm-creating) process.

In view of this evidence, it is hardly possible to deny, first, that there has emerged a new type of legal regulation, the « law of integration », and, second, that this, at presently, is being applied, at a global scale, only by the WTO (which, to some extent also applies the « law of cooperation », just as the other international organizations).

By law of integration, we essentially mean the law that aims at substantiating and managing the integration of the liberalized sectoral economic activities inside a legally integrated area by means of the application of « integrative regulation ». Just as the « law of cooperation » does, it also envisages the achievement of the common objectives and purposes of integration (*inter alia* : (i) raising standards of living, (ii) ensuring full employment, and (iii) protecting and preserving the environment) (28) through common efforts and in an institutionalized context (29), but unlike this, it does not apply regulation in a « best endeavour » manner nor does it envisage its implementation in a « compartmentalized » way, neither does it leave violations without *hard* sanctions nor effective enforcement (except,

(28) Accordingly, « trade liberalization » (which can be defined as the gradual or complete removal of existing impediments to trade) is no more than the main vehicle to achieve these objectives, but not one of the objectives neither the objective itself (as many economists and market analysts suggest).

(29) For Professor Virally, « integration is a process, a transitory method for the accomplishment of a change of status, in the specific case the transformation of separate elements that may be different within a coherent whole in which all are associated or merged [...] integration — or rather its ultimate objective : the unity — constitutes an objective by itself. Cooperation does not. [...] »; cooperation is no more than « a method of action »; he further argues that it is possible that « integration is accelerated, at regional or at universal international society levels, by the progress in international cooperation [...] integration deserve its name only if it brings, more or less rapidly, to at least a relative unity », see Michel VIRALLY, « La notion de fonction dans la théorie de l'organisation internationale », *Mélanges offertes à Charles Rousseau : la communauté internationale*, Paris, Pédone, 1974, pp. 289-290.

as we have noted before, its set of rules on developing countries and LDCs, which are envisaged from the perspective of the « law of cooperation ») (30).

More precisely, to manage the integration process, integrative rules require Members to do more than « cooperative efforts » (typically of the « law of cooperation »). Generally, either they oblige not to interfere with the integration process (« negative » integration rules), or they require « to do » or « to give » effectively (« positive » integration rules). Illustrating the former are the non-discrimination principles (MFN and national treatment) (31); as to the latter they are exemplified by the obligations of result assimilated to the preposition « shall » (if its context has not been weakened by hortatory language, *e.g.*, « shall to the fullest extent possible... accord high priority to... », « shall ensure », « shall consider ») contained in the different WTO agreements (32).

Thus this approach is particularly workable in the context of the new global historic and economic reality as it seems to reflect better the new trends towards the instauration of a more integrated international society based on principles of law universally recognized, rule of law, the emergence of a « globally-integrated » territorial jurisdiction for the world economy, emergence of democratically-participatory mechanisms for all global actors inside that jurisdiction, and the rising of global interests and values.

(30) Even on this subject (GATT/WTO set of *soft law* rules), in Doha, the Ministerial Conference decided to take some specific action by instructing the Committee on Trade and Development « to identify » those rules that are « mandatory in nature » and « non-binding in character », to consider the legal and practical implications of « converting » them into « mandatory provisions », to identify those that « should be » made mandatory, as well as « to examine additional ways » in which they can be made « more effective »; see paragraph 12, on cross-cutting issues, of the WTO Doha Decision on Implementation-Related Issues and Concerns, Doc. WT/MIN(01)/W/10, 14 November 2001.

(31) As to the argument that they are « negative » because they do not tell governments what policies to adopt, Debra Steger noted that « [r]ather, they tell governments what they cannot not do. [...] Governments are free to exercise their sovereignty to the fullest in designing policies to promote certain public policy objectives, with one caveat : they cannot discriminate as between products originating in different countries that they are trading with and as between imported goods and like domestically produced goods »; see, Debra P. Steger, « Afterword : the 'Trade and...' Conundrum-A Comentary », *American Journal of International Law*, Vol. 96, n° 1, January 2002, pp. 141-142.

(32) It is useful to note that the terms « negative » and « positive » integration are not new in the literature on economic integration ». The term *negative integration* was coined by Tinbergen (1965) to denote those aspects of regional integration that simply involve the removal of discrimination and of restrictions on movement, such as arise in a process of regional trade liberalization. This he contrasted with *positive integration*, which he saw as concerned with the modification of existing instruments and institutions and the creation of new ones, *for the purpose of enabling the market to function effectively* [emphasis added] and also to promote other broader policy objectives in the union; see Peter Robson, *The Economics of International Integration*, London and New York, 4th ed., 1998, p. 2.

### C. — *The primacy of the rule of law in international economic relations*

In the specific field of international economic relations the following happens : to the extent that the globalizing economic process allows the WTO rules-based system to penetrate new economic areas that before were within the exclusive domain of national legal orders, its tendency toward regulating them increases (accordingly, the WTO regulatory vocation is all-embracing) ; to the same extent, the techniques of *soft law* regulation and self-help, characteristic of « rudimentary » legal orders, are replaced, in the new areas covered, by the practices of « collective creation » (of, mainly, « firm law »), and « collective enforcement » brought by the « law of integration ».

As a result of the application of these new techniques, and by virtue of the establishment of a « compulsory jurisdiction » mechanism for conflict resolution in international trade and trade-related matters, there is a new growing legal trend : the instauration of a « rules-based » world economy, which means the progressive instauration of the rule of law as the paramount legal principle of the « globally-integrated » world economy.

According to this fundamental principle, treaty law produced in the « globally-integrated » area by means of multilateral integrative regulation, and customary law arising from this overall process of global legal integration, predominate all over the « globally-integrated » territorial jurisdiction.

The central characteristic of this principle is that it excludes any arbitrary application of the integrated rules by Members inside and outside their respective domestic jurisdictions. If faced with that eventuality, the rules can be applied and enforced collectively through the dispute settlement mechanism which is meant to provide security and predictability to the system, and to preserve the balance of rights and obligations between the Members.

### D. — *The tendency to « judicialization » of international economic relations*

In the same field, insofar as economic integration gets deeper (at sectoral economic levels and inside the integrated areas), due to intervention of the globalizing economic process, interaction between international actors increases giving as an inevitable result more potential for conflict in existing as well as in new « liberalized/integrated » areas. This fact, added to the ensuing need for effective mechanisms for the application and enforcement of treaty law, and the consequent establishment of central organs for the collective prescription, application and enforcement of the legal norms in international trade and trade-related matters, all have led to a more fre-

quent recourse, by international actors, to the dispute settlement procedures created for solving international economic disputes.

This trend is quite clear in the field of international trade and trade-related matters, where success of the WTO dispute settlement system for solving international trade conflicts is significant. Likewise, less noticeable but nevertheless operational for solving international business disputes are the dispute settlement mechanisms of the Court of Arbitration of the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes of the World Bank, the *ad hoc* international arbitration system under the UNCITRAL Arbitration Rules, and the arbitration system of the World Intellectual Property Organization.

However, despite these developments in conflict resolution in international economic matters, most conflicts in the sub-sectors of international finance and money, particularly those related to the settlement (*e.g.*, recovery) of State external monetary debts (a question of paramount importance in international economic relations), are not presently covered by a similar device on dispute settlement. Paradoxically, they still remain subjected to the domestic jurisdictions of tribunals of creditor countries, if not subjected to the « pragmatic approaches » of « power-politics » at the international level playing field (for instance, the cases of debt negotiations, renegotiations and rescheduling practices). Economic globalization, by virtue of being an all-embracing integrative legal process, therefore, poses the necessity of spilling-over integrative regulation over that sub-sector via the collective prescription of firm law, non-discrimination principles, balance of rights and obligations, rule of law, compulsory jurisdiction, and collective enforcement of such law.

Parallel to these developments in the field of international economic relations, in the more general field of international relations there is also a general trend toward « judicialization », especially with regard to the development of the legal status of individuals (33) *vis-à-vis* general international law (*e.g.*, the concept of « universal jurisdiction » over crimes against humanity, the institution of an International Criminal Tribunal). By and large, these developments cannot be seen otherwise than positive because the need for a more effective enforcement of international norms can only

(33) The development of judicial resolution of disputes in the field of human rights and humanitarian law obey more to ideological reasons. « In this area the main driving force has been the idea that in every human community an inviolable zone of personal freedom must be granted to the individual if the community is not to fail to achieve its purpose »; see Christian TOMUSCHAT, « International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction », *Judicial Settlement of International Disputes : International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation* (An International Symposium), *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Band 62, 1974, p. 405. And for the development of a new *summa divisio* between States and individuals, see Robert KOLB, « Du droit international des Etats et du droit international des hommes », *The African Journal of International and Comparative Law*, Vol. 12, 2000, pp. 226-239.

be ensured through the establishment of international tribunals, the sole way for integrated legal systems to exclude the arbitrary application of their norms.

In this regard the evolution of international law is also similar to that of national law : once the system has established the mechanisms for the creation of its norms, it needs to institute special organs for the application and enforcement of its norms.

### E. — *The « globalization » of the State*

To the main actors, States, the landscape has thus been completely modified. On the one hand, the globalizing/unificatory economic process has taken from them many economic sectors and activities that were traditionally under their exclusive jurisdiction. On the other hand, because « globalization » has also reached non-State actors (34) (individuals, intergovernmental and non-governmental organizations, transnational actors market forces, and public opinion) these are increasingly challenging States in almost every issue in foreign affairs and policy-making generally (including economic and trade policies); States therefore deal with a rather destabilizing panorama.

However, by virtue of their gravitational force *vis-à-vis* the system, for they hold the law-making power and only they are able to guarantee law application and law enforcement, States remain the central actors of the globalizing economic process. By virtue of their primary participation (whether conscious or not) in such a dynamic process, they also get « globalized ». This essentially means that their functions (for many, reflected in the advancement of their « national interests »; and for a few, particularly, some developed countries, the expansion of the particular interests of their rent-seeking and pressure groups), traditionally envisaged « inside », are now envisaged in an integrated manner, *i.e.*, in a borderless manner. For the many who have not yet realized that transformation they still envisage foreign affairs and policies in a « compartmentalized » manner (*i.e.*, they believe to be operating essentially between segregated blocks).

Thus States are not disintegrating nor disaggregating into separate but distinct functional parts. As a result of intervention of the globalizing/unificatory economic process they have even expanded the « scope » of their formerly « exclusive », now « integrated », operating fields, for not only do they benefit today from their participation in economies of regional and global scale but from the wider globally-integrated territorial unit. Evidence of this is provided by the increasing number of meetings that

(34) « These new players have multiple allegiances and global reach » : see Anne-Marie SLAUGHTER, « The Real New World Order », *Foreign Affairs*, Vol. 76, n° 5, September/October 1997, p. 183.

State ministers and government officials of the different sectors and subsectors of governmental activity have to attend outside in international fora (*e.g.*, agriculture, environment, finances, foreign affairs, health, industry, justice, labor, trade, among many others), whereas before only foreign affairs officials were concerned.

The view that States are disappearing lies as much in the perception that market forces (*i.e.*, the power exerted behind the scenes on State law and policy-making) are substituting public power in many areas, as in the preach of the dominant neoliberal ideologies which maintain that « less government » and « more market self-adjustment » is better (35). What is real, however, is that too much of both have contributed to cause a growing imbalance between countries as to the benefits from economic globalization (*e.g.*, more global poverty) to the point that today's international society looks more a *leonina societas* (36) rather than a normal (rules-based) international society.

Accordingly, the view that economic globalization is to bring to an end the State-centered international system has not yet come nor has it prospects of becoming a reality, at least not in the near future; on the contrary, States have emerged even stronger than before (save the weak ones who are even more vulnerable, but, again, given that all weak national systems are, theoretically, capable of becoming stable systems, at any given time, the presumption *juris et de jure* that all weak national systems can develop into effective and solid systems is thus well founded) (37).

Another effect of such a transformation is that typically « domestic problems », for instance, « poverty », or developing countries « external debt », are now viewed as « global problems », that is to say, belonging not to a specific group of countries but to the globally-integrated territorial unity, and which are to be solved only through collective action in an institutionalized context. The same can be said of other « global problems » faced by the global unity, *inter alia* : greenhouse gas emissions, deforestation, biodiversity loss, fisheries depletion, water shortages, demographic explosion, and (from September 11) terrorism.

(35) « That [economic and social development] can be accomplished by the market and the private sector alone is doubtful. Only a rather unworldly optimist can believe that the market alone would protect the weak and the vulnerable or safeguard the interest of future generations. Nor would a weakened and 'withered' State be able to invigorate the law and assert the authority necessary to cope with the conflicting demands and pressures in their countries », see Oscar SCHACHTER, « The Erosion of State Authority and its Implications for Equitable Development », *International Economic Law with a Human Face* (ed. by F. WEISS, E. DENTERS and P. DE WAART), The Hague/Dordrecht/London, 1998, p. 44.

(36) Partnership in which one or a few partners take all the profits (the lion's share) while the rest carry all the losses.

(37) On how globalization affects the power of States, see Peter MALANCZUK, « Globalization and the Future Role of Sovereign States », *International Economic Law with a Human Face* (ed. by F. WEISS, E. DENTERS and P. DE WAART), The Hague/Dordrecht/London, Kluwer Law International, 1998, pp. 45-65.

### F. — *The « invisible hand » theory in a dynamic rules-based system*

One of the central myths in economics is the old theory that explains how people promote the interests of society when they pursue their own interests (38); this theory says that they are led by an *invisible hand* to promote an end which was not part of their intentions, and, as a result of pursuing their own interests, they promote the interests of society more effectively than if they really intended to promote it. In our times, of prevailing neoliberal economics, the « invisible hand » also involves the idea that the market itself holds mechanisms of self-correction, self-restraint and self-regulation, and, in view of that, there is no need for intervention of public regulators. The latter, implied in the very much professed *Washington consensus* (39), as further developed and applied by the IMF and the World Bank, involves the idea that the market is the supreme legislator, bestowed with intelligence and will, as a supernatural person, and that by virtue of holding self-regulatory powers it expects to be obeyed (it has thus been ranked as a credo).

While, in theory, it may make sense that by buying or selling products and services each of us contribute, directly or indirectly, to the welfare of society, it nevertheless needs to be proved that there is no need for individuals and public institutions to control and survey the functioning of the markets, in other words, that theory holds true. So far this has not been the case in practice, especially with regard to the functioning of the global financial markets. Quite the reverse, it has already been confirmed that, in non-regulated sectors, market actors neither self-correct nor self-regulate without the intervention and scrutiny of private standardizing organizations and public powers. As evidence of high levels of corruption has now taken place in major centers of financial activities (*cf.* the cases

(38) Very old indeed. The *invisible hand* is « [t]he underlying mechanism of a market economy which causes self-interested economic agents through exchange to promote the general good of society. The idea originated in the discussion of natural law by the English philosopher John Locke but it is usually with Adam Smith who, in his *Theory of Moral Sentiments* and less so in his *Wealth of Nations*, developed this Physiocratic notion. Smith's use of the principle was less sensational than Mandeville's which described how private vices promote public virtue. Ahmad has identified four functions of the 'invisible hand' : to limit the size of the landlord's stomach, to curb the residual selfishness of a landlord, to optimize production and to preserve the natural order »; see Donald RUTHERFORD, *Dictionary of Economics*, Routledge, 1992, p. 239.

(39) The *Washington consensus* is composed by ten policy recommendations for countries willing to reform their economies that gave World Bank's economist John Williamson in 1989. As applied and developed by the IMF and the World Bank (with the backing of the U.S. Treasury), it requires developing countries to implement policies of deregulation, privatization and liberalization as a condition for their financial support. However, the same author recognized, more recently, that his « first formulation was flawed in that it neglected financial supervision, without which financial liberalization seems all too likely to lead to improper lending and eventually to a crisis that requires taxpayers to pick up the losses from making bad loans »; see John WILLIAMSON, « What Should the World Bank Think About the Washington Consensus ? », *The World Bank Research Observer*, Vol. 15, n° 2, August 2000, p. 258.

of Enron, Andersen, Merill Lynch, Worldcom, Xerox, among others), the overall effect of this on the economy has been to undermine confidence in global markets.

One explanation of this state of affairs is that these theories aim at maintaining the liberalized sectors in a condition of permanent deregulation, that is, integrated only *de facto* but not *de jure*. This is so because, for them, the regulatory functions are exerted by the market forces alone. As a consequence, their advocates fervently oppose very simple arguments in favour of integrating the crucial sector of market capitals to a multilateral rules-based system. However, they mistakenly overlook, for instance, that : (1) lack of rules involves risky guesses for the task of a more efficient allocation of scarce resources; (2) lack of rules involves serious consequences for non-compliance; and, that (3) lack of rules favours discretionality, discrimination, non-accountability, non-transparency, and power-politics to the detriment of legal certainty, stability and rule of law. By the same token, they deny what is a *prima facie* evidence : that a functional multilateral rules-based system, as it is a continually changing system of trial and errors and cross-checkings and balances, is intrinsically efficient and reliable. Finally, they also disregard that, in a « globally-integrated » territorial unity, liberalization encapsulates a regulatory course of action (whether in the form of « cooperation law » or as « integrative regulation »), for the natural tendency of a « globally-integrated » territorial unity is to upgrade all its component parts from a primitive state of « economic Darwinism » (40) into a highly sophisticated rules-based global economic system (thus reflecting the changes brought by the new global reality).

It therefore cannot hold true, neither in theory nor in practice, that markets self-correct, self-restraint and self-regulate. Given that market actors' *raison d'être* are purely and exclusively monetary profits, the dynamic of non-regulated markets is necessarily the advancement of market actors' self-interests. On self-regulation we cannot but agree with Sir John Donaldson, MR, in *R v. Panel on Take-overs and Mergers, ex parte Datafin plc* (41). He stated that :

> « '*Self-regulation*' is an emotive term. It is also ambiguous. An individual who voluntarily regulates his life in accordance with stated principles, because he believes that this is morally right and also, perhaps, in his long-term interests, or a group of individuals who do so, are practising self-regulation. But it can mean something quite different. *It can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising.* [...] ». [emphasis added]

(40) On « economic Darwinism », see Oswaldo DE RIVERO, *The Myth of Development*, London and New York, Zed Books, 2001, pp. 79-81.

(41) *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 566, Court of Appeal.

To the extent that the basic presumption underlying these economic theories is that they seek the expansion of the markets in order to bring a more efficient allocation of resources within sectoral and integrated areas, and, as a result, bring welfare to society, to the same extent it is to be realized that this is feasible only by integrating the more markets as possible into the existing « globally-integrated » territorial unity and by bringing to the whole unity harmonization, stability, integrative regulation, and rule of law. For these reasons, it is correspondingly clear that in order to bring welfare to society the *sine qua non* condition is that the whole unity needs to be integrated *de jure*, and not only a part of it. From this, it follows *a contrario* that sub-sectors generating chaos and market failures, inside the « globally-integrated » territorial unity, proscribe themselves gradually from the global process of economic/legal integration.

Moreover, from the systemic viewpoint, given that in integrated systems not fully regulated (*i.e.*, with a component part in a state of chaos), small deficiencies are likely to lead to a large deficiencies (because of the « butterfly effect » — a law of physics in chaotic systems); it follows then that the need for eradicating chaos generating these deficiencies is as pressing as the need to subject these sub-sectors to a multilateral rules-based system. As we have already noted, chaos is here represented by those sectors and sub-sectors, and goings-on, of economic activities operating in a borderless manner but which had not been integrated *de jure* nor have passed through a multilateral integrative regulatory process of the WTO-type.

Finally, as the global market is an international public good, created by and for the necessities of humans and not by and for the markets themselves, the international community is under the legal and moral obligation to rescue it from the *invisible hands* of a few (namely, currency speculators and other Darwinian economic predators) by using the technique of « multilateral integrative regulation ».

### G. — *The anti-systemic nature of flexible exchange rates in a « globally-integrated » world economy*

We have seen, in the preceding sub-section, that in integrated systems containing sub-sectors in a state of chaos, market actors neither self-correct nor self-regulate without the intervention and scrutiny of private standardizing organizations and public powers, and, small deficiencies are likely to lead to large deficiencies; that, mainly, for these reasons, the necessity has arisen to subject the non-regulated sub-sectors to a functional multilateral rules-based system of the WTO-type. This, in turn, implies a more general presumption : in order to make functional the whole unity and, by this means, bring welfare to society, the *sine qua non* systemic condition is that the whole unity needs to be integrated *de jure*, and not only a part of it.

In this sub-section we will refer more concretely to the inconvenience of having flexible exchange rates (42) as the central mechanism for the international payments system in a « globally-integrated » world economy. It is argued that in a world committed to integration there is a categorical need for the protection of the transactional value of international trade operations. As prevailing flexible exchange rates does not fulfill the task of preserving the transactional value of international trade operations but rather, the contrary, it is likely to produce disintegration, the case is made for bringing to an end flexible exchange rates (43).

Broadly speaking, the exchange-rates mechanism is central for the purposes of settling international monetary and trade transactions (between imports and exports, and between national currencies, and currency areas and blocks). In that regard, it is crucial for bringing either economic and monetary stability, or economic and monetary chaos. As the latter has been more frequent than the former, it became something that the world economy knows as endemically and never under control. Especially, with regard to the weak and failed States monetary chaos has rather been a constant. History has also shown that financial and monetary chaos may lead up to nationalism, protectionism, unilateralism, and furthermore to tragic events such as hunger and war.

On the subject of flexible exchange rates there has been a lot of debate, especially in monetary economics. A study on this subject conducted by the League of Nations (44) became widely recognized in the 1960s as the traditional argument against flexible exchange rates; it stated that :

> « Freely fluctuating exchanges involve three serious disadvantages. In the first place, they create an element of risk which tends to discourage international trade. The risk may be converted by 'hedging' operations where a forward exchange market exist; but such insurance, if obtainable at all, is obtainable only at a price and therefore generally adds to the cost of trading. [...]
>
> Secondly, as a means of adjusting the balance of payments, exchange fluctuations involve constant shifts of labor and other resources between production for the home market and production for export. Such shifts may be costly and disturbing; they tend to create frictional unemployment, and are obviously wasteful if the exchange-market conditions that call for them are

(42) *Flexible* means « freely determined in an open market by private dealings and, like other market prices, varying from day to day » : see Milton FRIEDMAN, « The Case for Flexible Exchange Rates », *Essays in Positive Economics*, The University of Chicago Press, 1953, p. 157.

(43) For previous works in this sense, see Otto HIERONYMI, « In Search of a New Economics for the 1980's : the Need for a Return to Fixed Exchange Rates », *Annals of International Studies*, Geneva, Vol. 12, 1982, pp. 107-126.

(44) League of Nations' Economic, Financial and Transit Department, *International Currency Experience : Lessons of the Inter-War Period*, 1944, pp. 210-211. Commenting on this conclusion Dornbusch noted « that flexible rates are unstable, move about erratically, and often aggravate the macroeconomic stability problem. The experience of the last ten years would certainly lead an observer to endorse that view. [...] »; see Rüdiger DORNBUSCH, « Flexible Exchange Rates and Interdependence », *IMF Staff Papers*, Vol. 30, n° 1, March 1983, p. 4.

temporary. The resources would have to be shifted back again once a temporary disequilibrium has been removed.

Thirdly, experience has shown that fluctuating exchanges cannot always be relied upon to promote adjustment. Any considerable or continuous movement of the exchange rate is liable to generate anticipations of a further movement in the same direction, thus giving rise to speculative capital transfers of a disequillibrating kind tending greatly to accentuate any change that may be required for the balancing of normal transactions. Moreover, the normal transactions may also come to be affected by speculative anticipations : a fall in the exchange value of a country's currency may lead to a rise in imports and a decline in exports if traders at home expect the prices of foreign goods to be still higher in the future and if foreign buyers hold off in anticipation of still lower prices as a result of an expected further decline in the exchange. Self-aggravating movements of this kind, instead of promoting adjustment in the balance of payments, are apt to intensify any initial disequilibrium and to produce what may be termed 'explosive' conditions of instability. »

Another argument often quoted by economists, as authoritative evidence against flexible exchange rates is the following statement (45) made by the Federal Republic of Germany in 1964 :

« Fixed exchange rates are an indispensable element in a world committed to integration; with a system of flexible rates the existing readiness to cooperate and integrate might be destroyed at the first appearance of serious difficulties since flexible rates would offer such an easy opportunity for isolated action. »

Despite that, economic theory and practice have extensively demonstrated that the use of flexible rates has an overall destabilizing effect on the world economy (46), developed countries (the holders of the key for change) by virtue of having an effective control over the international law-making process in this crucial sub-sector (47), have always been

(45) See Milton FRIEDMAN, *op. cit.*, p. 176; Robert A. MUNDELL, *The International Monetary System : Conflict and Reform*, Canadian Trade Committee Private Planning Association of Canada, 1965, p. 47; and, Rüdiger DORNBUSCH, *op. cit.*, p. 25.

(46) Another citation illustrates plainly the destructive effect of fluctuations : « Floating exchange rates have created extreme currency instability, which in turn has created an enormous mass of 'world money'. This money has no existence outside the global economy and its main money markets. It is not being created by economic activity like investment, production, consumption, or trade. It is created primarily by currency trading. It fits none of the traditional definitions of money, whether standard of measurement, storage of value, or medium of exchange. It is virtual rather than real money. But its power is real. The volume of world money is so gigantic that its movement in and out of a currency have far greater impact than the flows of financing, trade, or investment. This virtual money has total mobility because it serves no economic function. Billions of it can be switched from one currency to another by pushing a few buttons on a keyboard. And because it serves no economic function and finances nothing, this money also does not follow economic logic or rationality. It is volatile and easily panicked by a rumor or unexpected event »; see Peter F. DRUCKER, « The Global Economy and the Nation-State », *Foreign Affairs*, Vol. 76, n° 5, September/October 1997, p. 162.

(47) So far the United States alone can block any intent of reform inside the IMF and the World Bank (a fact radically opposed to the fundamental concepts of « member's driven organization », « consensus », « integrative regulation », and « collective prescription, application and enforcement of law » prevailing at the WTO).

reluctant to bring about a real change. Not so surprising, each time chaos has came up they have been able to bypass it and have even taken advantage from international public financial and monetary institutions for mastering the world economy (48). Developing countries, in contrast, have generally been passive and rather unable to assess the course of events. As crude political realities fall outside the scope of this paper suffice to mention these features.

Turning back to the issue of the protection of the transactional value of trade operations : How do the current workings of flexible exchange rates affect it ? One authoritative explanation as to how the fields of finance, money and trade interact is the following : « Fluctuation and oscillation of currencies and exchange rates have many times the effect of cancelling or nullifying in some hours the advantages brought by tariff concessions which were hardly negotiated in a context of difficult equilibrium of exchange of concessions. For instance, a tariff negotiation that cuts down to 15 per cent a product is a good result. But if a country has to endorse a devaluation of 25 per cent or more, by this act alone, the results of former tariff negotiations get eliminated » (49).

Since it is obvious that currency encrypts the relative value (price) of a good, or a service, of every single trade transaction, the fields of trade and money appear as inextricably interlinked (50). By the same token, the task of preserving the transactional value of international trade operations, in an extreme volatile exchange market, emerges as a common task in both trade and monetary fields. However, up to now, such a task has been, indeed, very problematic to achieve. This has been so because extreme instability and unpredictability in exchange rates, as well as in commodity prices, have had as a supplementary effect that of generating « new » forms of protectionism that discourage trade (51).

(48) In this regard, « [o]nly a small number of currencies are strong enough to be accepted in worldwide international trade. By influencing the decisions made by bodies such as the G-5, the governments of these currencies are in a position to control the behavior of international monetary markets as if they were an industrial oligopoly [...] »; see Petar SARCEVIC, *op. cit.*, p. 213.

(49) See Rubens RICUPERO, « La Carta de La Habana — 50 Años Después », *UNCTAD*, May 1998, p. 6.

(50) This fundamental link has been recognized by the economic theory since its origins. « [M]oney has become in all civilized nations the universal instrument of commerce, by the intervention of which goods of all kinds are bought and sold, or exchanged for one another » : see Adam SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations (1776)*, London and Toronto, and New York, J.M. Dent and Sons Ltd, and E.P. Dutton & Co., 1910, Vol. I, p. 24.

(51) « With the advent of the floating exchange-rate system after 1973, however, we witnessed an upsurge of 'new' protectionist policies — including quotas, VERs, market-sharing schemes, anti-dumping, and countervailing duties »; see Ronald MCKINNON and K.C. FUNG, « Floating Exchange Rates and the New Interbloc Protectionism : Tariff Versus Quotas », *Protectionism and World Welfare* (ed. by D. SALVATORE), Cambridge/New York/Melbourne, Cambridge University Press, 1993, pp. 227, 240-241. They also advanced the view that exchange rate volatility contributed decisively to the formation of regional trading blocs, thus eroding GATT

Indeed, it can be said that monetary fluctuations are the largest category of non-tariff barriers to trade faced today by exporters and importers. This is so because :

*(i)* they undermine the principle of non-discrimination (developing countries' currencies are accepted only by a limited number of partners while developed countries' currencies are widely accepted);

*(ii)* they affect unequally trade operators (a monetary devaluation amounts to a subsidy on exports and has an effect similar to an import tax, or to an increase in customs duties, while « the overvaluation of a nation's currency is equivalent to an import subsidy and an export tax by the nation » (52);

*(iii)* they distort the competitive relationship between domestic and imported products (by choosing to buy a product from Member B and not from Member A, because of sudden fluctuations in exchange rates, it nullifies or impairs the reasonable expectations of benefits to be derived under the trade agreements) (53);

*(iv)* they affect all terms of trade (exchange rates fluctuations produce automatic effects on imports and exports) (54);

MFN principle : « For economies closely integrated in foreign trade, a zone of exchange rate stability now seems necessary to preserve free trade in goods and services while reducing investment risks », *ibid.*, p. 241. On the link between currency swings and protectionism, see also Petar SARCEVIC, *op. cit.*, p. 215.

(52) See Dominick SALVATORE, « Protectionism and World Welfare : Introduction », *Protectionism and World Welfare* (ed. by D. SALVATORE), Cambridge/New York/Melbourne, Cambridge University Press, 1993, p. 6.

(53) Accordingly, « a contracting party may bring a complaint against another contracting party not only in the case of the violation of the Agreement but also if a benefit accruing to it under the Agreement is nullified or impaired as a result of the application of 'any measure, whether or not it conflicts with the provisions of the [General Agreement]'. The CONTRACTING PARTIES have recognized that the benefits arising from a tariff concession are nullified or impaired if : — a measure was introduced after the tariff negotiations, which upsets the competitive relationship between the product for which the tariff concession was granted and another directly competitive product; and — the measure could not have been reasonably anticipated at the time the tariff concession was negotiated. Article XV :4 can be interpreted to create a presumption that a contracting party which negotiated a tariff concession has had the reasonable expectation that the purpose of the tariff concession would not be frustrated by exchange actions » : see Frieder ROESSLER, « The Relationship Between the World Trade Order and the International Monetary System », *The New GATT Round of Multilateral Trade Negotiations : Legal and Economic Problems* (ed. by E.-U. PETERSMANN and M. HILF), Deventer and Boston, Kluwer Law and Taxation Publishers, 1997, pp. 222-223. As to the practice, see WTO, *Guide to Law and Practice (Analytical Index)*, Geneva, 1995, Vol. 1, p. 435.

(54) It affects equally the profitability of trade and may wipe out all profits, *e.g.*, « a UK exporter sells machinery to the US which is priced in US dollars. The contract was awarded when the exchange rate was $ 1.60; however, the actual cash was received ninety days later (as per contract) when the exchange rate was $ 1.6950. If we assume the notional value of the contract was $ 250,000, the exporter needed to recover † 156,250, *i.e.*, $ 250,000 divided by $ 1.60. However, owing to events beyond their control, the company only received $ 147,492.63, *i.e.*, $ 250,000 divided by $ 1.6950. In this case a foreign exchange loss would be suffered. Transaction exposures also arise on cash movements including dividends and interest, and can also markedly affect the profitability of trade. In the extreme, contracts with very low profit margins can become loss makers owing to an unforeseen FX swing », see Francesca TAYLOR, « Currency

*(v)* they defeat the original context in which trade agreements were to take place (private contracts' terms are altered by unpredictable changes in the circumstances) (55);

*(vi)* they decrease world efficiency (if monetary policy is used as a commercial weapon, as it is often the case, *e.g.*, they produce « monetary dumping »);

*(vii)* they lead to an unfair trade (devaluation may result in the obtention of undue advantages in trade);

*(viii)* they lead to unreasonable businesses (*e.g.*, auctions of national corporations to foreigners at fire-sale prices);

*(ix)* they lead to self-defeating macroeconomic and monetary policy measures (*e.g.*, the waste of public money by central banks to defend their currencies from speculative attacks); and, last but not least,

*(x)* they increase poverty in developing countries (instability brought by fluctuations in exchange rates reduces the economic, financial and monetary autonomy of the small and weak economies and increases their vulnerability to externalities) (56).

Despite such overwhelming evidence supporting the view that the fields of trade and money are the two faces of the same coin, and that extreme monetary fluctuations are tremendously damaging to the globally-

Management for Protection and Profit », *The Handbook of International Trade Finance* (ed. by C. DUNFORD), New York/London/Toronto/Sydney/Tokyo, Woodhead-Faulkner, 1991, p. 183.

(55) On exchange rate risks due to changes in economic circumstances, a special study conducted by the WTO Secretariat recognized that : « both exporter and importer run the risk that between the order and delivery economic circumstances may change in such a manner that the profitability of the trade deal is undermined for at least one of the parties. Exchange rate risk can produce such a change in economic circumstances, as large exchange rate changes can significantly increase or reduce the benefits of from a trade transaction. An importer, for example, who orders goods for one million US dollars may benefit much less (or not at all) from the trade transaction if his home currency suddendly depreciates by 20 per cent and he has to pay 20 per cent more for the imports in terms of his own currency » : see Michael FINGER and Ludger SCHUKNECHT, *Trade, Finance and Financial Crises*, Geneva, WTO, Special Studies, 1999, p. 8. On the legal steps to be taken by persons engaged in international business transactions to minimise the risk of loss caused by the depreciation of currencies, see Clive SCHMITTHOFF, « Legal Aspects of Monetary Problems in Export Transactions », *Clive M. Schmitthoff's Select Essays on International Trade Law* (ed. by Ch.-J. CHENG), Dordrecht/Boston/London, Martinus Nijhoff Publishers and Graham & Trotman, 1988, pp. 384-401.

(56) Increasingly « less autonomy » and « more vulnerability » of nearly all developing countries are indeed consequences of the effects of internal policies of some others (namely, Quad or G-7 countries), which « are passed through to other countries certainly via trade in goods and services but also via technology and financial flows »; for instance, « a subsidy reducing a foreign competitor's costs by 5 % is perceived as an unfair advantage in the competitive game, while currency swings of 50 % are endured with fatalism as a sort of 'Act of God'. The question remains, however, whether trade policy measures can effectively and adequately operate in the face of large currency swings », see Jacques BOURGEOIS, « The GATT Rules for industrial Subsidies and Countervailing Duties and the new GATT Round — The Weather and the Seeds », *The New GATT Round of Multilateral Trade Negotiations : Legal and Economic Problems* (ed. by E.-U. PETERSMANN and M. HILF), Deventer and Boston, Kluwer Law and Taxation Publishers, 1997, pp. 222-223.

integrated world economy, very little has been done to explore further such a systemic relationship and even less to find out whether fluctuations in exchange rates are the primary causes of serious disturbances affecting the globally-integrated world economy (57). In this regard, it is submitted that if a corrective measure is not taken so as to safeguard the multilateral trading system from external financial and monetary shocks, such a functional system is endangered by the predatory behavior of unregulated financial flows and cyber-capitals (indeed, a product of extreme fluctuations in exchange rates) (58).

From the systemic viewpoint there is another argument. To the extent that the present world economy is a « globally-integrated » system containing regulated (trade, and trade-related matters as recognized *de jure*) and non-regulated sub-sectors (market capitals and capital-related goins-on) in permanent interaction, we can reasonably expect, as logic and obvious result from such an interaction process, that the non-regulated ones, as long as they exist, will hold the potential to cause serious harm and undermine the regulated fields, thereby introducing permanent instability, legal uncertainty and unpredictability to the whole world economy. This has already been recognized by a former WTO Director-General at the occasion of the Asian financial crisis, who said that it is « now equally clear that continued financial and exchange rate instability can — and will — have a negative effect on world trade, investment, and development. Declining commodity prices, weakening imports in the affected countries, excessive export competition in the advanced markets, and the threat of further

(57) « The evidence therefore indicates that changes in real effective exchange rates have significant effects on international trade flows-and, through trade, on key domestic economic variables such as output, employment and prices » : see Fred BERGSTEN and John WILLIAMSON, « Exchange Rates and Trade Policy », *Legal Problems of International Economic Relations : Cases, Material and Text on the National and International Regulation of Transnational Economic Relations* (ed. by J.H. JACKSON and W.J. DAVEY), St. Paul, Minn., West Publishing Co., 2nd ed., 1986, p. 844. More recently, a report carried out by the Joint Economic Committee of the United States Congress found evidence that « currency crises have become more frequent since 1973, when the major international currencies began to have floating exchange rates with one another. [and that] twin crises [*i.e.*, currency and banking crises] have been much deeper since 1973 than they were from 1945 to 1971, when the exchange rate were pegged under the Bretton Woods gold exchange standard. » : see Jim SAXTON (chairman), *Features and Policy Implications of Recent Currency Crises*, Joint Economic Committee, United States Congress, November 2001, pp. 4, 5.

(58) A first step has been taken in that direction. In Doha, the WTO Ministerial Conference established a Working Group for the Study of the Relationship between Trade, Debt and Finance whose mandate is to examine the relationship between trade, debt and finance « [*inter alia*] with a view to safeguarding the multilateral trading system from financial and monetary instability » (paragraph 36 of the Doha Ministerial Declaration, Doc. WT/MIN(01)/DEC/1, 20 November 2001). Educational work is currently under way. The original proposal was submitted during the preparatory meetings for the Seattle Ministerial Conference by the Dominican Republic, Indonesia, Malaysia, and Thailand. They sought the establishment of a working group for the study of the interaction between the fields of trade, finance and money, in order to : « (i) safeguard the multilateral trading system from new external financial and monetary disruptions, (ii) provide certainty and predictability to the continuous expansion of trade, and (iii) to ensure that Members genuinely benefit from further liberalization efforts » : see Doc. WT/GC/W/347, 8 October 1999.

devaluations — all these forces are introducing new uncertainties, new risks, and new protectionists pressures into the global economy » (59).

It is therefore plain that exchange-rates fluctuations neither fulfill the task of preserving the transactional value of international trade operations nor result in more integration. In view that the world economy has been totally modified by the intervention of the globalizing economic process, it is correspondingly clear that there is a categorical need for exchange rate stability inside the globally-integrated world economy. If flexible exchange rates continue to prevail as the central mechanism for settling international monetary payments and trade transactions the multilateral rules-based trading system is fully exposed.

### H. — *The effects of government (unilateral) measures inside the « globally-integrated » territorial jurisdiction*

About the effects of national measures inside integrated systems, in general — insofar as they relate to integrated sectoral economic activities —, by virtue of being applied over a borderless territorial area it can be presumed that their reach automatically extend to the entire integrated area. This will be so even if they are explicitly intended to be « only national » in scope. Thus, in integrated systems, all government measures relating to integrated sectoral economic activities, whether integrated *de jure* or *de facto*, are not purely domestic in nature but are meant to be « integrated » measures.

In practice, however, all national measures relating to integrated sectoral economic activities do not have the same impact. This varies depending of who does undertake the measure. This point may be illustrated by having recourse to a well-known metaphor of Professor Georges Abi-Saab : though « the elephant's and the mouse's abstention are identical and have the same nature — not moving — their respective movements in themselves and by their effects, are very different » (60).

In view of the fact that, in integrated systems, « national » measures are « integrated » measures — that is to say, measures involving the interests of all members as well as the specific interests of the common entity — the positive or negative impact of a national measure over them, as a result of being an « integrated measure », is of a direct concern of all members as well as of the integrated area in question. This means that, in integrated systems, all the parties, as well as the common entity, have a « legal interest » in any « national measure » of the other partners insofar as every one is likely to be affected; for, in integrated systems, the concept of « legal

(59) See Renato Ruggiero, « A Global System for the Next Fifty Years« , address delivered at the Royal Institute of International Affairs, London, 30 October 1999, p. 2.

(60) See Georges Abi-Saab, *op. cit.*, p. 253.

interest » is much wider than in a « compartmentalized » international system : in integrated systems, the « legal interest » does not emerge only by virtue of the simple acceptance of conventional international law but by virtue of the nature of the measure itself, which is that of being an « integrated measure ». Hence, as a matter of systemic principle, each time the elephant moves it has the legal and systemic duty to take into account the mouse's position, and its legal and material interests. The same is true *vice versa*.

Thus far there is no problem in dealing in that way (through a rational law) with a reality of international relations, but another thing is the anomalous result, particularly, inside the globally-integrated territorial jurisdiction, of this material inequality between partners with regard to measures issued relating to the *de facto* integrated sectoral economic activities (for instance, the rise and adjustment of *domestic* interest rates). As the reach of these measures also extend, automatically, to the entire integrated territorial area (by action of the process itself), so far, in practice, their net effect of being effectively applied have been only to bring about more legal and material inequality between its members. Given that this happens because it is still possible to maintain that these measures are *de jure* « only national », whereas *de facto* (in reality) they are no more purely « national » but are « integrated » measures, the result of maintaining this abnormality is that two diametrically opposed regimes, with conflicting mechanisms, are currently operating inside the globally-integrated territorial jurisdiction with respect to measures issued by the same subjects relating to integrated sectoral economic activities.

Quite different is the effect of national measures (not relating to integrated sectoral economic activities) inside a « compartmentalized » international system. Here, by definition, national measures do not extend automatically to other jurisdictions unless they purport « extraterritorial » effects. Another group of national measures affecting foreign jurisdictions will be considered « unilateral », by international law, insofar as they affect others' individual interests (here the « collective interests » are rarely claimed from the outset, save in cases of serious transgressions of international obligations, because in a « compartmentalized » international system of « self-help » it is up to each State or subject of international law to assert its individual interests); yet more, in some cases, under the occurrence of some special conditions of a customary international law nature, a number of unilateral acts may become recognized by international law as legally binding on the international system.

Taking into account all these factors, it thus seems apparent that, in integrated systems, all « national » measures have the potential to fulfil a dualistic function, inside and outside the national jurisdictions, in a borderless manner, for they are likewise « integrated » measures. This general

proposition, however, needs to be further verified in consideration of the abnormality posed by the existence of at least two conflicting regimes operating inside the same common territorial entity.

As to their degree of impact, we have seen that this depends, basically, of *(a)* the individual's inherent « economic » strength : the stronger the member issuing the measure the more decisive its impact over the common territory. As regards the quality of the measures, their negative or positive effects will depend principally of *(b)* whether they are measures taken over *de jure* or over *de facto* integrated economic activities (the first of which, by definition, will give raise to a *prima facie* lawful and legally binding set of measures *vis-à-vis* the integrated system, and the second, by definition too, to a *prima facie* unlawful set of measures entirely inconsistent with the dynamic system in question). Furthermore, it may be easily observed that the combination of *(a)* plus *(b)*, the latter in its *de facto* form, gives as a result an increase in the legal and material inequality between the subjects of the same territorial jurisdiction, for, the stronger is the degree of material impact of a *de facto* measure the more unlawful will be its net effect in legal terms.

Given that it is under these conditions that all « national » measures perform their dualistic function inside the globally-integrated system, the following propositions also get verified : that, as a matter of fact, any « national/integrated » measure issued by any participant is of a direct concern of the other counterparts and of the collective created; and, that, as a matter of law, any « national/integrated » measure creates an interest which is recognised and protected by the rule of law and by the system itself, and the respect for which is a legal and a systemic duty (needless to say that it is irrelevant that the measure in question is intended to be « only national »).

All this being true, it further follows that, any exercise of regulatory powers relating to integrated sectoral economic activities necessarily belong to all the participants as well as to the collective created, and that, any exercise, by a partner or a small group of partners (whether in concerted action or not), of such regulatory powers, is, by necessary implication, not only anomalous but entirely unlawful, insofar as 1) it is not carried out accordingly, that is to say, in an « integrated » manner, and, that 2) it takes away the fundamental rights of the others (61). In other words, if the elephant and/or the mouse, when moving, do not bear in mind each other's legal and material interests the ensuing consequence of that omission is to render illegal their own movements to the extent that they encroach upon the other's.

(61) On this point, we join a general perception already advanced by other authors : that, at present, there exists a « mainmise sur l'ensemble des régimes juridiques existants », see, *inter alios*, Marcelo KOHEN, *op. cit.*, p. 110.

As to how to cope with and remedy this abnormal situation, there exists only one suggestion (*ergo*, one solution) : as long as these *de facto* integrated sectoral economic activities do not upgrade to a *de jure* status (attainable only by using the technique of « multilateral integrative regulation »), there will be a continuous increase in intensity in the legal and material inequality between the participants of the same common territorial unity.

## VIII. — Concluding observations

The global landscape has changed quite substantively since the process of economic globalization started to turn into a global process of legal integration. For this reason, economic globalization can no longer be treated as a purely economic process and envisaged primarily through the magnifying glass of economic theories. Economic globalization is a multi-dimensional on-going process of actions and reactions (including overreactions), with ensuing causal effects in the universe of reality. Amid its most distinctive features, from the legal and systemic perspectives, we have noted the following :

1. Given that economic globalization happens continuously, anywhere, at all times, inside and outside the integrated economic areas created by States, it has brought a new global reality characterized for having « instant effects », which means, a common history for everyone and everything.

2. To the extent that it is an integrative and unificatory process, economic globalization encompasses a regulatory course of action, which means that it is, in essence, an integrative *legal* process.

3. In this on-going dynamic *legal* process, an important gravitational force is developed by the multilateral trading system, which is setting up the principles, rules and disciplines that constitute the basis of the new globally-integrated world economy. The multilateral trading system, as elaborated in the Uruguay Round and subsequent agreements, has put into place an integrative and unificatory legal structure, produced not by means of classical international regulation, but by « integrative regulation ».

4. The placing of this dynamic legal structure has brought about a new « global territorial jurisdiction » inside the globally-integrated world economy, which is one superposed, but different, to the national legal jurisdictions of its Members. Its singularity consists in that it belongs to the type of « integrative » legal structures (*i.e.*, the same *corpus juris* inside and outside its national component parts). At present, it is quasi-universal; it covers the totality of the people and the territories of the Members and separates customs territories to which the WTO Agreement applies. In substantial terms, it constitutes a « common territorial entity », different of

those of its Members' territories, in which goods and services can compete with their like in any of the national territories comprising the « common territory ». This « common territory » is a rules-based « multilateral market » in which the existing national schedules of tariff concessions, specific commitments, and other binding measures continue to specify the legitimate levels of trade protection allowed to each domestic market. It also posses its own interests (the « global interests »), which are different of those of its Members' individual interests.

On the basis of these main assumptions, we have also noted that some legal and systemic developments, brought by the globalizing economic and legal process, have already taken place and some others have surfaced inside the globally-integrated world economy. These can be summarized as follows :

*a*) A large and very important sectors of international economic law have upgraded from the stage of a primitive order of self-help and legal softness into a coercive and *hard* legal status, which means that international economic law and relations have substantively been transformed, and, reached, to a great extent, the stage of an advanced legal order.

*b*) It has emerged a new type of legal regulation, the « law of integration », which is, at present, being applied at a global scale only by the WTO; this approach is particularly workable in the context of the new global historic and economic reality.

*c*) There is, as a result of the application of the technique of integrative regulation, and by virtue of the establishment of a compulsory jurisdiction mechanism for conflict resolution in international trade and trade-related matters, a new growing legal trend : the instauration of a rules-based world economy, which means the instauration of the rule of law as the paramount legal principle of the globally-integrated world economy (it essentially means the exclusion of any arbitrary application of the integrated rules by Members inside and outside their respective domestic jurisdictions).

*d*) There is a general trend to a more frequent recourse, by international actors, to the dispute settlement procedures created for solving international economic disputes; due to intervention of the globalizing economic process, interaction between international actors have increased giving as an inevitable result more potential for conflict in existing as well as in new « liberalized/integrated » areas.

*e*) Regarding States, the view that economic globalization is to bring to an end the State-centered international system has not yet prospects of becoming a reality; for States still hold the law-making power and no other power than them are able to guarantee law application and law enforcement.

*f*) Concerning the markets, in light of recent developments, it has became apparent that market actors neither self-correct nor self-regulate

without the intervention and scrutiny of private standardizing organizations and public powers; the theories attributing exclusive self-regulatory functions to the market forces thus become without any real and theoretical basis; on the contrary, the globalizing economic process makes evident that the *sine qua non* condition for the best allocation of resources and, thereby, for bringing welfare to society, is that : the whole unity needs to be integrated *de jure*, and not only a part of it.

*g*) About fluctuations in exchange-rates, it is plain that in a world committed to integration, there is a categorical need for the protection of the transactional value of international trade operations; given that the flexible exchange-rates mechanism neither fulfill the task of preserving the transactional value of international trade operations nor does it produce more integration; that, instead, it is likely to produce more chaos and new forms of protectionism, there is a strong case for bringing to an end flexible exchange-rates; there is also a categorical need for exchange rate stability inside the globally-integrated world economy; if flexible exchange-rates continues to prevail as the central mechanism for settling international monetary trade transactions, the multilateral rules-based trading system is fully exposed.

*h*) With regard to national (unilateral) measures inside integrated systems, any « national » measure (*i.e.*, any « integrated » measure) issued by any participant is of a direct concern of the other counterparts and of the collective created, even if the measure in question is intended to be only « national » in scope; it follows then that the concept of « legal interest », in integrated systems, is much wider than in a « compartmentalized » international system.

Finally, a general observation on the evolution of international law regarding the *de jure* integrated economic areas and sectors : in many respects it is similar to that of national law which, broadly speaking, is characterized by collective prescription of law, and also public application and enforcement of law.