International Economic Law in Transition from Trade Liberalization to Trade Regulation

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Oppenhein's International Law, published in its 9th edition in 1996, and one of the authorities of post-war international law, briefly discusses the General Agreement on Tariffs and Trade (GATT) at the very end of the second volume, dealing with the concept of Most-Favoured-Nation (MFN). Other books at the time and even more recently would not mention GATT and international trade as one of the chapters and canons of public international law, or merely discuss it briefly—despite the eminent role of trade in forming stages of international law in the 18th and 19th Century, together with the emerging law of the sea. Trade simply was not on the radar screen of international legal scholarship in the first part of the 20th Century. Obviously, after World War II and the new age of the United Nations, taxes and tariffs could not match the attractiveness, and importance of the emerging areas of decolonization and development, of human rights or environmental law. Ever since, things have changed. International trade very much is on the screen, and international economic law as a proper discipline considerably grew in stature (albeit most of public international law always had a strong connotation to economic interests and affairs). Trade- and world Trade organization (WTO)-related topics have become frequent subject in public international law journals of general coverage. Again, we witness what Wolfgang Friedman in 1964 called the changing structure of international when at the time a new emphasis on international cooperation emerged under the law of the United Nations. I recall these developments for two reasons.

Firstly, I recall this because John H. Jackson has travelled all the way, from the Kennedy Round in the 1960s to the present stalemate of the Doha Agenda, from the plurilateral days of GATT, to the multilateral rule based system, and today back to bilateralism and preferential trade agreements and newly emerging forms of plurilateral agreements, in particular the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP). He laid much of the foundations in his 1969 World Trade and the Law of GATT and subsequent works for scholarly recognition and development of the discipline of international economic law, its introduction into law school curricula and legal education around the world. Globalization eventually placed the topic with all its linkages centre stage, and found a powerful home in the WTO—a home of which John laid the intellectual foundations in his works and teaching in Ann Arbor, and subsequently in Washington. He founded and has been editing the Journal of International Economic Law which established itself as the intellectual backbone and leader of the discipline.

Secondly, I recall this because the increasing importance of trade related rules is due to a shift of what I should like to call the process from trade liberalization to trade regulation. The growing stature of international economic law is due to underlying changes in the normative structure. No longer is the field limited to guide and contain nations in what we call negative integration. No longer is the field limited to tariff negotiations, and long gone are the days when negotiators in a cosy club in Geneva were able to broker deals behind the scene and off the lime lights of the global stage. The focus on non-tariff barriers, beginning in the Kennedy Round, and the turn to services, intellectual property and domestic support levels in agriculture shifted the emphasis to what today we call behind the border measures, in fact to domestic legislation properly speaking. Market access increasingly is defined by means and in terms of domestic regulation. Modern trade rules harness and shape the foundations of domestic law. Much of international economic law shares this trait: trade, investment, labour, finance, and monetary affairs. Looking ahead to potential topics of a post-Doha agenda, this is likely to further increase: Climate change mitigation essentially focuses on Processes and Production Methods (PPMs), taxation and a stable framework for renewable energy, and climate change adaption turns to food security and migration. Further work on equal and fair conditions of competition—the core of WTO law—will turn to anti-trust, unfair competition, labour standards, and Corporate Social Responsibility, framing and partly harmonizing the law for business corporations. Aid for trade and trade facilitation will need to focus on product innovation and education and more effective ways of technology and knowledge transfers. Inextricable linkages to other fields—monetary, financial, environment, human rights, seeking a proper balance of competing constitutional interests, will bring about a more coherent architecture among different international


5 John H. Jackson, World Trade and the Law of GATT (Indianapolis: Bobbs-Merrill, 1969) and his subsequent works listed at: http://www.law.georgetown.edu/faculty/jackson-john-h.cfm
organizations. But foremost, the effect of these linkages, again, will be felt behind the borders of States or Unions.

This process reflects a shift from classical trade liberalization and negative integration to trade regulation and positive integration, from removing public law regulation and taxation, from privatization of monopolies to defining common rules based upon which international trade and transactions take place. Today, trade law essentially is about product regulation of goods and services. It is increasingly so, given all the linkages and impending challenges, seeking a balance between market access and other equally legitimate policy goals. This, of course, is not entirely new. Trade liberalization ever since has been a means to an end. It is not an end in itself. It seeks enhanced market access, respect for non-discrimination with a view to enhance economic growth, keeping in mind wider goals of prosperity and welfare in mind in accordance with the preamble of the WTO. Yet, the emphasis has shifted from removing regulations to redesign, harmonize or to converge regulations. The inclusion of services with the General Agreement on Services (GATS) and the inclusion of intellectual property in the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) further enhanced the shift to non-tariff measures in the Uruguay Round results. The recent trend to analyse international trade flows in terms of Global Value Chains (GVCs), increasingly integrating goods and services in what is called ‘servicification’ of integrated international production chains will further accentuate the importance of trade regulation in international law. New attitudes to the role of law and government in international commerce thus not only were induced by the Great Depression and subsequent remedies in financial and monetary law. It is inherent to globalization and the nature of modern international trade.

Also, it is not accurate to juxtapose trade liberalization and regulation. Even full liberalization by means of removing a tariff remains a regulatory affair and a change in tax law, defining zero rates to stay within a given framework of customs rules, including rules of origin. Yet, trade liberalization, at least prior to the financial crisis, was inherently linked to the idea of deregulation and privatization. These components essentially formed what was called the Washington consensus, together with its political dimension of democratization, informing the work of governments and international organizations, in particular the World Bank and the International Monetary Fund. Speaking of trade regulation was, in particular in Washington, a suspicious and not well respected term. It was immediately connected to government intervention, protectionism and big government. During the years of Reagonomics and Thatcherism, deregulation and privatization often was understood as a battle between law and neoliberal economics; regulation was juxtaposed to markets. It was meant to stay away from the law and to leave matters to the market and its own logic.

It is not in this way that I wish to use the term of trade regulation. Rather, it stands for the proposition that all markets are inherently constituted by law. They cannot work without fundamental legal institutions. Contracts, liability rules, and property rights are essential foundations of markets. They are part of law and regulation, and implementation depends upon public authority, the judicial system in particular. The functioning of the private sector inherently depends upon these legal institutions. It is a fallacy in principle to express the idea that the law should withdraw and matters should be entirely left to markets and the invisible hand. Adam Smith never used the term in such a manner. Rather, the controversy has been, and continues to be, about levels of regulation and the role of government in addressing market failures. It is about more or less, about how and when and on what level of governance. These are matters of degree, informed by ideology and defined constitutional goals, sometimes even physics (such as in electricity markets). There are numerous and various possible degrees of governmental intervention commensurate with political and constitutional constellations. Views differ on the basis of diverging political beliefs, ideologies, and foremost, of economic interests of stake holders, and power relations. It is a natural political battle ground, seeking to come to grips with diverging interests at stake. Outcomes are essentially defined by political processes; options are not limited to a single and predefined objective approach. The same holds true for defining the appropriate level of regulation, whether national, regional, or global. It is debated whether a market should be regulated by local, national, regional, or global law, much informed by the philosophy of subsidiarity. International law and constitutional law in place offer guidance. They are able to assess whether regulation goes beyond what is required to achieve a particularly defined goal; they do not exclude the possibility of different options in producing and maintaining public goods on different layers of governance. Yet, all these debates and options do not alter the fact that markets are legally constituted and depend upon regulation.

The shift observed above from border measures to behind the border issues and measures inherently entails increased levels of regulation in international law. The task is not limited to increasing market access but to define the framework for market operations in the first place. Thus, negotiations are about re-regulation, optimizing the balance of diverging interests at stake while avoiding outright rent-seeking protectionism. As a matter of degree, it therefore is justified, as a practical matter, to observe a shift from liberalization to international regulation or re-regulation of a globalizing economy. This does not remain without important implications. It partly explains the current stalemate at the WTO, the shift to preferential trade agreements, and, in the future, the eventual return of negotiations to Geneva mainly on behind the border issues.


7 Adam Smith first referred to the invisible hand in describing the even distribution of surplus goods in Knud Haakonsen, (ed.), The Theory of Moral Sentiments (1759) (Cambridge: Cambridge University Press, 2009) 215. The statement here, as well as a further reference in Adam Smith, The Wealth of Nations (1776) depicting the pursuit of private interests ‘to promote an end which was no part of of his intention’, i.e. the public interest, Edwin Cannan (ed.), New York: The Modern Library, 1994, p. 485, both were not aimed at law and trade regulation, as opposed to unregulated commerce. Instead, the importance of order and good government is particularly stressed. ‘...commerce and manufactures gradually introduced order and good government, and with them, liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors’, id. at 440.
The stalemate of the Doha Development Agenda during and after the Great Recession is due to a multitude of factors. They range from the shift to a new multi-polar world, the lack of pressures by the private sector due to existing levels of market access, and many more. One of them is that traditional modes of negotiations no longer are fully suitable in reply to the shift towards behind the border regulatory issues. The format of trade rounds does not sufficiently take into account the law making structure of issues under negotiations. And this in return, also affects the willingness to make progress in classical areas of market access.

Behind the border issues are currently negotiated mainly in preferential trade agreements. Building upon established disciplines of WTO law, these negotiations offer bilateral and plurilateral avenues in developing new concepts and engage in what we may call experimental legislation in a process of trial and error. Large markets use different templates and regulatory approaches, to which smaller markets will have to adapt. These smaller markets face the problem of adjusting their domestic laws to competing regulatory models. And yet, they inevitably have to enact a single type of regulation in domestic law. Moreover, these countries will subsequently offer recourse to their own legislation to all foreign products, persons, and countries alike. Behind the border regulations inherently have an MFN effect, sometimes, such as in Intellectual Property Rights (IPRs), even a legally mandatory one. All Members of the WTO, irrespective of reciprocity, are entitled to enjoy the most advantageous level of protection granted to any other country. Many will free-ride for what countries paid dearly in return for market access in a particular jurisdiction.

Over time, governments of most countries will therefore realize that negotiating behind the border issues in proliferating preferential trade agreements is not the most suitable avenues to address behind the border, regulatory issues. They will realize that these matters are best dealt with in the WTO or other multilateral fora, aiming at a single and uniform standard applicable to all Members alike. They will realize that these processes are more suitable to bringing about balanced and reciprocal commitment, and legal security.

Current negotiations on the Transpacific Trade Partnership among eleven American and Asian countries (including Japan) and on the Transatlantic Trade and Investment Partnership between the United States and the European Union are likely to produce new and common templates which eventually inform further negotiations and even emerge into global standards. One of the most interesting experiments currently discussed is the project of creating a new and on-going framework of transatlantic cooperation in standard setting and regulatory affairs within TTIP. A new mode of international legislation may eventually emerge. If successful, these negotiations are likely to accelerate and facilitate a return to the WTO and a process of multilateralization of these standards and rules.

At the same time, classical market access issues are likely to stay in preferential trade agreements. It is unlikely that preferential trade agreements, including TTP and TTIP, will be fully open to accession by all Members of the WTO. The historic mission of MFN, enshrined in the Atlantic Charter and prominently placed in Article I of GATT, to break up European imperial tariffs has been completed. The formation of the European Union, the accessions of China in 2001 and of Russia a decade later have changed the political rules of the game. Governments are increasingly unable and reluctant to offer market access on an MFN basis and revert to selective openings, in particular when it comes to services and labour mobility. The co-existence and mutual relationship of multilateral rules and preferential trade thus is likely to stay in a new constellation. The former will increasingly deal with behind the border issues shaping domestic regulation on an MFN basis. The latter will focus on defining differential market access rights. Paradoxically, tariff negotiations as market access for services will be primarily dealt with bilateral negotiations, while basic disciplines shaping markets will return to the WTO.

The WTO should prepare for this. The Organization should identify and seek its comparative advantage in regulating international trade. Removing tariffs and addressing regulatory, behind the border issues, call for a different types and modes of negotiations. The bargaining process, taking place bilaterally and multilaterally in tariff negotiations historically shaped the modus operandi of the GATT and subsequently the WTO. The idea of trade rounds is inherently linked to the tradition of tariff negotiations. Over time, it has adjusted to non-tariff barriers, and regulatory negotiations increasingly moved to the heart of trade rounds, addressing trade remedies (anti-dumping and subsidies), and technical barriers to trade, food standards, and intellectual property. Negotiations on services were scheduled to be held in traditional bargaining modes. It is here that we see the limits of traditional negotiations focusing on market access. The future has to adjust to modes which much more operate like legislation and a legislative process. The WTO, in the future, will much more work as an international legislator in an on-going process, addressing different issues in different fora and projects. Future negotiations, taking into account GVC analysis, will work on a sectorial approach, combining goods, services, intellectual property, and competition issues.

To conclude, the shift from trade liberalization to trade regulation is likely to result in continued preferential market access, and a return of behind the border measures to the WTO. Trade rounds will be a matter of the past, once the Doha Development Agenda (DDA) has been settled in a decent way. The Organization will adjust to normal, ongoing legislative modes which take up issues without packages. New and more flexible modes of decision-making will need to be found. The WTO will see a mixture of single undertakings, combined with graduation, plurilateral agreements based upon critical mass, and perhaps a stronger emphasis of soft law. It will see stronger links with other international organizations. And finally it will develop into what we may call a World Trade Court, having jurisdiction over preferential trade agreements beyond WTO law.

This process will take time. But we have learned from John H. Jackson to be calm, patient, but persistent. He taught us to carefully observe, to build stone upon stone, to remain optimistic despite a world driven by power, vested interest, money

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8 Inside US Trade reported on 11 October 2014: ‘The chief EU negotiator for the trade talks, Ignacio Garcia Bercero, said that the EU does have views on how such a regulatory body should work, but that the two sides are beginning to hash out between themselves more in detail how it could function. “We are beginning to have that discussion, but I think that this is a discussion that will continue and will develop as we make progress on the different aspects of the regulatory agenda,” Garcia Bercero said. Karel De Gucht, the EU trade commissioner, has called for the trade talks to lead to the creation of a “regulatory cooperation council” that would serve as a kind of early warning system on new regulations’.
bags and influence, and to strongly believe in the long-term effect of sound arguments. And foremost, he has taught us to believe in the multilateral system, being one of the most precious global public goods in the pursuit of peace, welfare, and legal coherence. For this, I may speak on behalf of all of us in this room, we are most grateful. Thank you.