

1995

International Economic Law: Reflections on the "Boilerroom" of International Relations

John H. Jackson

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Jackson, John H. "International Economic Law: Reflections on the "Boilerroom" of International Relations." American University International Law Review 10, no. 2 (1995): 595-606.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

INTERNATIONAL ECONOMIC LAW: REFLECTIONS ON THE "BOILERROOM" OF INTERNATIONAL RELATIONS

John H. Jackson*

INTRODUCTION

The pace of international economic activity and the developing interdependence of national economies is head spinning. Governments increasingly find it difficult to implement worthy policies concerning economic activity because such activity often crosses borders in ways to escape the reach of much of national government control. This can be true for subjects as diverse as insurance, brokerage, product health and safety standards, environmental protection, banking, securities and investment, professional services such as medical or law, and many more.

The American Society of International Law and its "interest group" devoted to International Economic Law (IEL) is one of those institutions that must confront, in scholarship and policy advocacy, these international trends. This interest group and its leaders must be commended for their dynamic role in the ASIL, manifested inter alia by organizing conferences and scholarly works such as this volume.

The task assigned to me in this connection is to provide some reflections and perceptions concerning the general domain, objects and purposes of "international economic law", with which I have been associated as a scholar and teacher for many years. The comments which follow have been partly stimulated by this assignment, and by the successful

* © John H. Jackson. John Jackson is Hessel E. Yntema Professor of Law at the University of Michigan. Professor Jackson is author of "World Trade and the Law of GATT" (1969), "The World Trading System" (1989), and the current and third edition of "International Economic Relations" West Publishing Company (1995). He has been General Counsel for the U.S. Trade Representative's Office (1973-74), and has been consultant to the United States and various other governments on a number of matters. He was member of the Board of Editors of the American Journal of International Law from 1981 to 1993, and Vice President of the ASIL during 1991 and 1992.

conference organized by the IEL leaders with many interesting presentations, including one by Professor David Kennedy in which he appraised and analyzed some of my own previous work.¹

First, I will make some general observations about international economic law and its characteristics. Second, I will briefly reflect on developments in the Uruguay Round. Third, I will suggest some broader implications of the Uruguay Round and other activities of international economic law, namely the problems posed today for government regulation of international economic behavior. Finally, I will offer a few conclusions.

I. SOME GENERAL OBSERVATIONS ABOUT INTERNATIONAL ECONOMIC LAW

At the outset, it is appropriate to ask what we mean by "international economic law." This phrase can cover a very broad inventory of subjects: embracing the law of economic transactions; government regulation of economic matters; and related legal relations including litigation and international institutions for economic relations. Indeed, it is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another. Much of this, of course, does not have the glamour or visibility of nation-state relations (use of force, human rights, intervention, etc.), but does indeed involve many questions of international law and particularly treaty law. Increasingly, today's international economic law issues are found on the front pages of the daily newspapers.

One of the problems for a law teacher in this field, is what to include in a course. Clearly my co-authors, other colleagues and I have decided to focus on the core "system" aspects of international economic regulation, what I often call the "constitution." This avoids too much of a "smorgasbord" approach of sampling many varied subjects and also represents a priority choice that downplays the transactional law and

1. I want to thank the IEL conference leaders Joel Paul and Joel Trachtman for organizing this conference and for inviting me to deliver a keynote address to it, from which this paper is largely derived. I also thank Professor David Kennedy for his extraordinary paper delivered at the opening session of this conference. I am surprised and pleased to learn how he has appraised my work. Of course, I reserve the right to disagree with some of his conclusions, but I confess he has been embarrassingly perceptive about my views, including those he has read from "between the lines." See David Kennedy, *The International Style in Post-War Law & Policy*, 7 UTAH L. REV. 6 (1994), reprinted *infra* 10 AM U. J. INT'L & POL'Y 671 (1994).

focuses more on *regulation* by government institutions, including both national and international institutions.² We recognize, however, that there are other worthy views on these choices.

Another problem for the legal scholar is the choice of subjects for research and the approach to that research. Again, I will reveal some of my predilections. These preferences are to shape research so as to be useful for the "active users," the legal professionals (government or private) who must regularly cope with international law concepts and legal rules. This is a "policy research" preference rather than a "theory" preference, although obviously there are many situations in which theory has important relevance to policy. But such theory needs to be "good theory," and generally I feel good theory must be tested, most often by empirical observation. Thus, there is a strong component of empiricism in my preferences.

In trying to describe international economic law, I would like to mention four characteristics about the subject:

1) International Economic Law (IEL) can not be separated or compartmentalized from general or "public" international law. The activities and cases relating to IEL contain much practice which is relevant to general principles of international law, especially concerning treaty law and practice. Conversely general international law has considerable relevance to economic relations and transactions. It is interesting, for example, to compare the number of cases handled by the GATT dispute settlement system (approximately 250)³ to those handled by the World Court (approaching 100). Numbers don't tell the whole tale, but there certainly are some GATT cases that have had as profound consequences on national governments and world affairs as have ICJ cases. The GATT cases are rich with practice relating to the general question of international dispute resolution, and some of this practice has broader implications than simply for the GATT (and now WTO) system itself.

2) The relationship of international economic law to national or "municipal" law is particularly important. It is an important part of understanding international law generally, but this "link," and the interconnections between IEL and municipal law are particularly significant to the operation and effectiveness of IEL rules. For example, an important

2. JOHN H. JACKSON, WILLIAM DAVEY, AND ALAN SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995).

3. See ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 417-585 (1993) (indexing 207 GATT complaints from July 1948 to November 1989).

question is the relationship of treaty norms to municipal law, expressed by such phrases as "self executing" or "direct application."⁴

3) As the title phrase—international economic law—suggests, there is necessarily a strong component of multi-disciplinary research and thinking required for those who work on IEL projects. Of course, "economics" is important and useful, especially for understanding the policy motivations of many of the international and national rules on the subject. Obviously, it is just as important to understand some of the criticisms of economic analysis, and to treat with skepticism some of the economic "models." Likewise, there are alternative value structures which should balance some economic notions of "efficiency." Thus, various lifestyle choices, and certain long-range value objectives can at least appear, and perhaps actually be, contradictory to some economic objectives, at least as some of those economic objectives are phrased by certain writers.

In addition to economics, of course, other subjects are highly relevant. Political science (and its intersection with economics found generally in the "public choice" literature) is very important, as are many other disciplines, such as cultural history and anthropology, geography, etc.

4) As previously noted, work on IEL matters often seems to necessitate more empirical study than some other international law subjects. Empirical research, however, does not necessarily mean statistical research, in the sense used in many policy explorations. For some key issues of international law there are too few "cases" on which to base statistical conclusions (such as correlations), so we are constrained to use a more "anecdotal" or case study approach. This type of empiricism, however, is nevertheless very important, and a good check on theory or on sweeping generalizations of any kind.

Since this often requires a study of particular cases, or at least of certain groups of cases, with considerable quantitative elements, it is frequently necessary to master a considerable amount of detail to understand some of the interplay of forces affecting international economic relations and the law concerning those relations. What does all this imply for research? As many of us represented in this volume realize already, our task in selecting priorities for research and successfully carrying out such research is not easy. Empiricism, multi-disciplinary approaches, and the breadth of legal understanding to relate not only gen-

4. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1993) (examining policy issues concerning the relationship between international treaties and domestic law).

eral international law principles with IEL, but also both with national constitutional and other law, create quite a burden.

Some of these points remind me of an experience I had recently which I will share with you. About a year or two ago I received a call from a journalist editorial writer of one of the major U.S. national papers. He had been trying to understand something about dumping cases which were prominently in the news, and he had been referred to me by a mutual friend. We talked for more than an hour on the telephone about the essential attributes of the international dumping rules, as well as the way the United States applies those rules in its national law. We worked through some hypothetical cases illustrating the difficulties and the "tilts" in the rules and their administration. As any of you who have had to grapple with this subject know, this comes fairly quickly to the "me-go" stage ("my eyes glaze over"). However, my caller gallantly mastered the logic, and finally at the end he said "Boy, this certainly is the boiler room of international relations!"

II. URUGUAY ROUND DEVELOPMENTS: AN EXAMPLE OF RESEARCH NEEDS

At this time shortly after the completion of the GATT Uruguay Round negotiation, it is almost unthinkable to write about the subject of this paper without some reference to that round and to what it means for this subject.⁵

I for one, have been greatly impressed with the achievements made in the Uruguay Round. We are all aware of the difficulties encountered in this Round which caused a prolongation of the negotiation. The 1988 failure of the Mid-Term Review Ministerial Meeting in Montreal, as well as the 1990 "impasse" at the Brussels Ministerial Meeting did not give cause for optimism about the Round. Nevertheless, in December 1991 the then GATT Director-General Arthur Dunkel directed a coordinated effort of secretariat officials and diplomats to achieve a complete draft of the status of the negotiation at that time. This "Dunkel Draft" was flawed in many respects, but it was the first time that nations and their officials could have an overall look at what was being done. Two years later, after a number of national elections, economic difficulties, and other political changes, the resulting agreement achieved in December 1993 is extraordinary, and largely based on the "Dunkel text." This

5. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *opened for signature* April 15, 1994, Marrakech, Morocco.

achievement has now entered into force.

I will not here go through an inventory of each of the achievements.⁶ We are all familiar with the importance of incorporating into the trading system the subjects of trade in services, as well as intellectual property protection. Likewise, we know the difficulties of bringing GATT discipline to agriculture, and we admire that at least a start has been made in that respect. Other achievements include significant market access with impressive tariff cutting, a start towards remedying problems in the textile trade, a more complete integration of developing countries into the rule oriented system, and new "codes" for subsidies, safeguards, and product standards.

Perhaps the most significant achievement, however, at least from the point of view of this group, is the result of the Uruguay Round concerning institutions. Not only has an impressive new set of dispute settlement procedures been put forward, but a new charter for an international organization—the World Trade Organization (WTO)—has been approved as a sort of "capstone" for the many complicated provisions of the negotiation results.⁷

The previous institutional structure (GATT) was frail and beset by what I have often called "birth defects." We recall that the GATT was never intended to be an organization, but evolved into one because of the failure (shortly after 1948) of nations to ratify and put into effect the then drafted charter for an ITO—International Trade Organization.⁸ As the defects and weaknesses of the GATT institutional structure became more apparent, just during a period of time when the problems of international economic relations became more aggravated, it was clear to world leaders that an improvement was needed in the institutional structure, and I believe the WTO Charter represents such improvement.

The new charter is not perfect by any means and certainly is not an

6. See John H. Jackson, *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* Ch. 3, 131-52 (Peter B. Kenen & Institute for International Economics eds., 1994).

7. *The World Trade Organization and U.S. Sovereignty: Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. (June 1994) (statement of John H. Jackson).

8. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 1-24 (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*] (examining international economic regulations); JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 45-87 (1990) (examining perspectives on international economic institutions). See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

ITO. The new charter is more a "mini-charter," which is designed to carry forward the practices and customary procedures that have been developed through trial and error within the GATT system for more than forty years. Indeed, in many ways the new charter better protects the institutional structure and the sovereignty of the members than did the GATT structure with its defects. Many practices which under GATT were merely customary, such as the "consensus" technique of decision making, have now been partially defined and embodied in treaty language, with fall-back procedures that will help protect against misuse of power or institutions. The WTO will facilitate implementation of the Uruguay Round by extending an institutional umbrella to the new subjects, and by reinforcing the "single package idea" of the Uruguay Round. (All the principal treaty agreement clauses will now become required for each WTO member, unlike the results of the Tokyo Round where nations could more or less pick and choose among ten or so "side agreements.")

The new dispute settlement procedures will for the first time establish a unified set of procedures for disputes of all types under the various WTO agreements, and will embody these procedures for the first time in a legal text (as compared to the rather imprecise views about customary practice that tended to prevail before.) If the new procedures work, certain specific defects of the system, such as the blocking of panel reports, will be overcome, substituting instead an ingenious appellate procedure almost unique in international law.

I think it is difficult to over-emphasize the potential significance of these achievements. The Uruguay Round itself has been the most ambitious of the trade rounds under GATT, and would be a success with half of its achievements. When you add to this a number of other current developments including the deepening and broadening of the European Union, the implementation of the North American Free Trade Agreement (NAFTA),⁹ and the developments of the economies "in transition," such as the parts of former Soviet Union and of mainland China, I think it is plausible to argue that we are witnessing a watershed shift and the most profound change in international economic relations, institutions, and structures since the origin of the Bretton Woods System at the end of World War II.

What the WTO will face in the future is still not clear. High on the priority list of many persons' agenda is a thorough consideration of the

9. North American Free Trade Agreement, Dec. 17, 1992, Can-Mex-U.S., 32 I.L.M. 296 and 32 I.L.M. 605.

policies of environmental protection as they relate to international trade.¹⁰ Additionally, considerable work on the relationship of competition policy (antitrust) and trade rules is suggested. Embedded in the Uruguay Round results is a very extensive work agenda, because many of the agreements call for follow-up activity on, for example, services, agriculture, subsidies, and intellectual property. Perhaps further down the road there will be demands on the WTO system to consider the relationship of other important subjects to the world trade rules, including labor standards, human rights, and other "link" issues now forming an important part of the trade questions. Further study on some of the goals and assumptions of trade economics will undoubtedly be undertaken, and a number of issues we might call "cultural clash issues" will be given attention, including internal economic structures of distribution and retail trade, gender equality and other questions of discrimination, and the relationship of political structures and democracy to successful long term trading relationships.

III. SOVEREIGNTY, SUBSIDIARITY AND SOCIETY OR THE PROBLEM OF REGULATING INTERNATIONAL ECONOMIC BEHAVIOR

I would like now to turn to some tentative and more fundamental thinking about our subject. To some extent, I am trying to anticipate what may be important directions for scholars and thinkers relating to international economic law in the future.¹¹

I start with the observable circumstances of a world that is becoming increasingly intertwined and interdependent. Some call this "globalization." The manifestations are many. As you look at some of the major developments during the last few years, including the completion of NAFTA, the Uruguay Round completion itself (awaiting implementation), the intricate and remarkably detailed bilateral negotiations between the United States and Japan (some in the context of the Structural Impediments Initiative—SII), the directions of the European Union towards greater integration in Europe, and the remarkable developments of the economies in transition, including Russia and the former partners of the Soviet Union, China, and indeed many developing countries, we can see

10. See, e.g., John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1269, 1272-78 (1992).

11. John H. Jackson, *Alternative Approaches for Implementing Competition Rules in International Economic Relations*, 177-200, *Aussenwirtschaft—SWISS REV. INT'L ECON. REL.* No. 2/94 (St. Gallen Switzerland, 1994).

many manifestations of this greater "globalization." If you examine in particular some of the language in NAFTA, such as that in Chapter 11 or Chapter 18, it is truly astonishing how deeply the treaty norms "intrude" into what has previously been termed "sovereign prerogative." The deepening regulation in Europe confirms that trend, and to a somewhat lesser extent, but nevertheless on a much broader scale, some of the Uruguay Round achievements (particularly the potential of the services agreement and the intellectual property agreement) point to a similar direction.

These efforts respond to a major problem of today's international relations, namely: the difficulty of government regulation of international economic behavior. Whether it is a banking scandal such as BCCI, or the difficulty of harmonizing certain consumer or food product standards, or the differential effects of taxes, social security, medical insurance, and labor immobility, there is today hardly any subject that can be said to be effectively controlled by a single national sovereign. This, of course, is frustrating to many national government leaders, since in many circumstances it prevents them from effectively fulfilling their constituents' needs or desires. Sometimes an attempt to "go it alone" can simply generate counter-responses from other countries, such as escalating tariffs, competitive devaluation of currencies, "race to the bottom" in connection with regulatory standards or taxation, and other difficulties. Many economists analyze these problems as the "prisoner's dilemma," which when analyzed under game theory techniques suggests the need for international cooperation.

In these circumstances, governments often find (as they do internally) that various worthy policies are conflicting. The trade liberalization policies are designed to promote enhancement of world welfare and to preserve the peace against rancorous economic quarreling. Often, however, these policies appear to conflict with environmental goals, human rights norms, and labor standards. When these "dilemmas" of policy conflict occur within a nation-state, they must be ironed out through governmental institutions of that nation. When these similar conflicts occur on an international scale, then we must look to international institutions for this task. Unfortunately, the international institutions are notably weaker than most national institutions. Clearly then, there is an important field of policy research and endeavor for members of our ASIL interest group in exploring the techniques, mechanisms, and institutions for providing the necessary international cooperation.

IV. SOME CONCLUSIONS

I think you can now see some of the directions my thinking takes us. Legal scholars as well as economists and political scientists must struggle with these problems using different types of governmental activity: unilateral, bilateral, regional, or multilateral. They must try to appraise the longer term effectiveness of these various levels of activity, and they must try to assist policy makers in determining appropriate courses of action. The legal scholar, however, has a particular, and I would say more important role. In a broad sense what we are struggling with is the development of the "constitutional law" of international economic relations. By this I refer to the international economic or trade system as a whole, and the institutional structures which allow it to operate effectively. Thus, we face issues for which the lawyer's role is, at least partly, to help protect the longer range constitutional provisions from certain short-term or ad hoc expediency temptations of governments or other players in that system, and to help shape the direction of that constitutional development.

Very important to this "constitutional" approach, is the question of appropriate allocation of power, and the protection against the misuse of power. The needs for international cooperation lead to the development of international organizations, but such organizations can be misused and their power abused. For example, leadership of an organization can be unresponsive and relatively self-perpetuating (given the diplomatic difficulties of selection of leaders in the context of more than one hundred nations participating). Such leaders, or power structures within organizations can cause a miss-allocation of the resources of the organization (such as for a marble headquarters, or an inappropriately high percentage of expenditures for low priority activity). There have even been some occasional allegations of fraudulent activity. Furthermore, some countries which are heavy contributors resent being outvoted by large numbers of mini-states which are arguably irresponsible because the projects the latter favor do not require any contribution by them.

This also brings us to the question of sovereignty and subsidiarity. In some peoples' eyes, sovereignty is an outdated idea. Insofar as sovereignty implies the right of governments to do what they will, including torture their own citizens, I believe most people would recognize that the ancient concepts are no longer viable today. In addition, the actual circumstances of the "globalized market" impose realistic constraints on the unilateral exercise of "sovereignty" to solve certain problems. Some would argue that we should virtually do away with the concept of sov-

ereignty. On the other hand, there may be a newer approach to defining sovereignty that could be significant and worthwhile. This would embrace the idea that the concept of national sovereignty is really part of "subsidiarity" (a term often discussed in Europe) meaning that sovereignty in this sense is a claim that the appropriate allocation of power among different levels of government leads to a conclusion that certain types of decisions should be made only at the national level and not in an international organization or cooperative mechanism. The concept of subsidiarity, however, could go further. It could lead to a conclusion that other kinds of decisions must be *elevated* to the international level. In addition, it could lead to the conclusion that sub-national, regional or even cultural units should be endowed with the exclusive power to make certain kinds of decisions. These are matters of considerable importance which I think IEL legal scholars should address.

Connected with these issues are dozens of more detailed legal issues regarding the structure of a charter for an international organization and the procedures for various kinds of decision making. These include whether voting should be by majority or a super-majority, whether there should be "veto rights," whether voting should be weighted, and whether there should be some small "steering group" power centers.

In addition, an increasingly important issue for these constitutional problems of "international governance," is the dispute-settlement procedures and mechanisms associated with them. Particularly with reference to international economic relations, I have argued elsewhere that a "rule-oriented" approach is very significant.¹² Such an approach gives additional predictability and stability such that millions of individual entrepreneurs and investors will have a higher degree of confidence in the decisions which they make. This can lower transaction costs, lower certain risk premiums that might otherwise apply, and thus better allocate investment or market decisions so as to enhance world welfare. These rules and their evolution can also be a major mechanism for mediation between conflicting policy goals of the international economic system.

There are certainly many other institutional and "constitutional" issues that can also be addressed by IEL scholars including some of the detailed questions involving secretariats, privileges and immunities, budget making, the role of officials in organizations, and activity of such officials such as mediation and good offices. The relationship of trade institutions to the monetary organizations and the Bretton Woods System

12. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 8, at 85-88.

clearly needs more attention.

There is much to do and, I might add, rather severely limited resources with which to do it. I think one of the important roles of the American Society of International Law and of this particular interest group is to encourage research in these various subjects. As part of that process of encouragement, I believe it is useful for an interest group such as the IELG to prod its members to think more broadly and more fundamentally about the "constitutional" issues of the system and how their research can contribute to improving those constitutional issues and generally improving the system.

To close, the reader can probably see that these remarks and reflections confirm some descriptions of me as an exponent of the "pragmatist school" of international law scholarship.¹³ I would also add the phrase "normative realist." Like many scholars, I feel the pressure of responsibility for moving the subject forward despite the difficulty and limitation of resources, and despite the sometimes pessimistic viewpoint that mere "realism" can engender.

13. See *supra* note 1.