

# GLOBAL ECONOMICS AND INTERNATIONAL ECONOMIC LAW

*by John H. Jackson\**

## INTRODUCTION

It is commonplace to comment on the extraordinary evolution of international economic activities towards linkages and interdependence, and the stress which these developments are putting upon existing economic and governmental institutions, both national and international. This article tentatively explores these circumstances in the context of some of the fundamental theoretical and policy thinking about international economic affairs today, reflecting on the role of law and institutions in those affairs, and in turn on the potential contribution of legal and multidisciplinary scholarship to those affairs and the theories and policies which shape them.

## 1. THE GLOBAL ECONOMIC LANDSCAPE AND IMPLICATIONS OF INTERDEPENDENCE: OF STOCK MARKETS, BANANAS, AND PUMPKINS

It surprises few people today to see comments about the profound and growing extent of international economic interdependence and linkages. The causes of these developments are numerous: incredible advances in efficiency of communication, extraordinary reductions in transport costs, growing prevalence of instant tele and cyber transactions, treaty and other norms causing reduction of governmental barriers to trade, an economic climate more favourable to principles of markets economics, cross-border influences of competition which have driven increases in production and service efficiencies, and last but not least: the blessing of relative peace in the world.

Manifestations of this 'globalization' abound: stock market trends that flow quickly around the world; impacts of national government monetary and fiscal decisions; effects of fraud within certain banking or other financial enterprises; worries about health and safety of products moving across borders such as foodstuffs, pharmaceuticals, machinery, appliances; effects of

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governmental mismanagement and sometimes corruption; worries about the power of non-government and private enterprises and their capacity in some cases to operate on the global economy while largely ignoring particular national governmental regulatory protections; and flows of ‘cultural’ influences involving various media often moving swiftly with new communication techniques to transmit music or drama across borders (with substantial economic implications and other effects, even to cause a new taste in Paris for halloween pumpkins!). A road-map of the various links and cause-effects of a multitude of economic actions becomes an impenetrable maze of pathways, commonly without clear guidebooks to assist their understanding.

Almost every conceivable type of government economic regulation now must take account of the international and competitive implications of its activity, and often national government officials feel frustrated at their relative inability to control economic forces that vitally affect their constituents and prevent fulfilment of official goals and promises on behalf of their constituents. Sometimes governments are tempted to utilize their power to influence economic forces to benefit better their own constituents at the expense of other societies (a beggar-thy-neighbour approach). In some of these cases competition among governments to capture such benefits can result in damaging the welfare of all participants – a phenomenon suggesting a ‘prisoner’s dilemma’ analysis. One astute experienced political leader has said, ‘All politics is local’.<sup>1</sup> But another astute economic writer has noted, ‘All economics is international’.<sup>2</sup> When juxtaposed, these pithy comments reflect some of the policy dilemmas with which political leaders must grapple.

In recent years, particularly, as the cold war and its threat of major disaster seems to have receded, there has been much discussion and speech-making about the shifting emphasis from ‘geo-politics’ to ‘geo-economics’ (or some would say to the game of ‘geo-monopoly’). News media attention has begun to refocus on economic matters, with front page attention given to international trade, legislative initiatives relating to trade, problems of food safety, World Trade Organization (WTO) cases about bananas, the activity of financial institutions such as the World Bank or the International Monetary Fund (IMF), and many other economic subjects relating to investment, competition policy, etc. Scholarly efforts and governmental policy studies have also been giving increased attention to the problems mentioned above. Nevertheless, the careful observer is struck by how much we do not know, and how often scholarship and studies seem only to repeat the obvious or emphasize advocacy of preconceived positions or struggle without adequate

<sup>1</sup> See Tip O’Neill and Gary Hymel, *All Politics is Local* (1994).

<sup>2</sup> Peter F. Drucker, *Trade Lessons from the World Economy*, *Foreign Affairs*, January/February 1994, page 99.

empirical data on which to make judgments.<sup>3</sup> Very high government officials have been known to disparage solidly accepted economic wisdom or make statements about legal norms that are misleading or plain wrong. It seems clear to this observer that there is great need and opportunity for reflective scholarly attention to many different systemic and ‘constitutional’ issues about our globalized economy.

The degree to which treaties and international law now appear to ‘intrude’ on national and subfederal government decision-making seems to support the statements made above. Governments sometimes feel hemmed in, and sometimes object that they cannot take action sought even by their democratic constituencies. The North American Free Trade Agreement (NAFTA) in some respects went very far in its measures seeking national government changes arguably necessary to fulfil the NAFTA international obligations. This was true for the NAFTA investor protection rules, and also in relation to environment and labour standards.<sup>4</sup> World Trade Organization provisions, perhaps particularly those in the intellectual property agreement<sup>5</sup> which require governments to fulfil certain standards regarding their court systems, and also some of the detailed agreements relating to services (especially financial services or telecommunications),<sup>6</sup> appear to insert their rules quite deeply into national legal systems. Of course, one answer to at least some of the criticisms of international rules which operate to constrain governments, is that the global market forces already constrain governments, and sometimes in ways which are not as healthy as the negotiated treaty text.

The remaining parts of this article will explore some particular facets of the problems outlined above. Part 2 will note the importance which significant thinkers and theorists attach to human institutions and the role of legal rules associated with such institutions.

Part 3 will look at the meaning of the phrase ‘international economic law’, noting some of the dimensions of such a subject title, and some of the difficulties for policy, theoretical, and scholarly work focusing on this subject. Part 4 will then look at some traditional market economic concepts regarding the role of government action (presumably to enhance the effective working of markets) and suggest how these concepts are affected by globalization and the legal rules of international institutions.

Part 5 will briefly reflect on some attributes and activities of existing international economic institutions, with a focus on the newest and arguably the most important of these, namely the WTO (although most of the discussion

<sup>3</sup> See, for example, papers delivered at a conference at Harvard University Center for Business and Government, October 1995 on ‘World Trade and Services’, which discuss the lack of accurate empirical information concerning trade in services.

<sup>4</sup> North American Free Trade Agreement, entered into force 1 January 1994. See especially chapters 11 and 18, as well as the NAFTA Side Agreements on Labour and Environment.

<sup>5</sup> See WTO Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>6</sup> World Trade Organization (note 8) Annex 1C (TRIPS) and 1B (Services).

could easily apply to other international economic organizations). Finally, Part 6 will examine some of the thinking about future directions of the world trading system and its constitution, and reflect on the implications of those for scholarship on subjects embraced within the broad topic of ‘international economic law’.

Throughout these parts, however, there is at least one common focus for the discussions found in this article. This is the notion that we are dealing with a form of ‘constitutional law’, involving in this area the broad concept of ‘constitution’ going considerably beyond a written document, and embracing a variety of interconnected governmental institutions as well as evolving practice of many such institutions. The focus is truly the ‘world trading system’, and its legal framework – that which we can here call the ‘constitution’.

## 2. MARKETS AND GOVERNMENTS AND THE ROLE OF LAW

Whether economic policies which are based on market principles<sup>7</sup> are the best approach for maximizing human satisfaction is, of course, controversial. Various alternatives have been much debated, and many of those largely rejected, but substantial arguments are made in favour of some sort of mixture of policies, perhaps to temper the perceived negative effects of ‘too pure market approaches’. Whatever mixture may appeal to certain societies, however, it seems reasonably clear that markets can be very beneficial,<sup>8</sup> and even when not beneficial, market forces demand respect and can cause great difficulties when not respected.<sup>9</sup>

Yet even when stressing the benefits of market economics, important thinkers note the importance of human institutions which guide and shape markets. Two Nobel Prize winning economists stress this proposition. Ronald Coase has stated:<sup>10</sup>

It is evident that, for their operation, markets . . . require the establishment of legal rules governing the rights and duties of those carrying out transactions . . . To realize all the gains from trade, . . . there has to be a legal system and political order . . . Economic policy consists of choosing those legal rules, procedures and administrative structures which will maximize the value of production. . . .

More recently Douglas North said:<sup>11</sup>

<sup>7</sup> See Richard Lipsey, Paul Courant, Douglas Purvis, and Peter Steiner, *Microeconomics* (10th edn, 1993); Avinash K. Dixit and Barry J. Nalebuff, *Thinking Strategically* (1991); Max Corden, *Trade Policy and Economic Welfare* (1974); Peter B. Kenen, *The International Economy* (1994); Paul Krugman, *International Economics: Theory and Policy* (1994).

<sup>8</sup> For an overview of the economic principles which support policies of liberal international trade rules, see in this issue the article by Alan Sykes.

<sup>9</sup> See, e.g., James Flanigan, *Turmoil is Free Market Watershed*, *Los Angeles Times*, 29 October 1997, page 1 Home Edition.

<sup>10</sup> Ronald Coase, *The Firm, the Market and the Law* (reprint of 1960 article) ch. 5. Note, see also C.A.E. Goodhart, *Economics and the Law: Too Much One-Way Traffic?* (1997) 60 *MLR* 1.

<sup>11</sup> Douglas C. North, *Institutions, Institutional Change and Economic Performance* (1990).

That institutions affect the performance of economics is hardly controversial.  
 . . . Institutions reduce uncertainty by providing a structure to everyday life.  
 . . . Institutions affect the performance of the economy by their effect on the costs of exchange and production.

Human institutions embrace many structures and take many forms, but it is very clear that law and legal norms play the most important part of the institutions which are essential to make markets work. The notion that 'rule of law' (ambiguous as that phrase is) or a rule-based or rule-oriented system of human institutions is essential to a beneficial operation of markets, is a constantly recurring theme in many writings.

With respect to international economics, the world is fortunate to have the advantage of institutions such as the Bretton Woods system (including the General Agreement on Tariffs and Trade, GATT) established through the vision of statesmen, scholars and diplomats at the end of World War II. At least some of the credit for relative peace and economic growth of the past half century goes to those institutions and their rules.<sup>12</sup> And now, of course, we have a major new organization established on 1 January 1995 in our landscape of economic institutions, namely, the WTO, with an extraordinarily elaborate set of rules.

A critical question almost always asked by anyone confronted with an international law rule is 'Why do they matter?' Put another way, there exists much cynicism about the importance or effectiveness of international law rules. Frequently the public can read news of violations of such rules by major and minor nations. In some cases such violations, even when admitted to be such (often there is bitter and inconclusive argument on this question), are rationalized or declared 'just' by national leaders. Thus the cynicism about international rules cannot be surprising.

A more careful examination of the role and effectiveness of international rules is necessary, however. First, it should be observed that not all domestic rules are always obeyed either. Yet there are many international rules which are remarkably well observed. Why this is so has been the subject of much speculation<sup>13</sup> which will not be repeated here. Notions of reciprocity and a desire to depend on other nations' observance of rules lead many nations to observe rules even when they do not want to.

At least in the context of economic behaviour, however, and particularly when that behaviour is set in circumstances of decentralized decision-making, as in a market economy, rules can have important operational functions. They may provide the only predictability or stability to a potential

<sup>12</sup> John H. Jackson, *World Trade and the Law of GATT* (1969) ch. 2. At least some credit for over 50 years of relative peace (avoiding a World War III) can be attributed to reasonably successful activities of the International Monetary Fund and the World Bank.

<sup>13</sup> See Louis Henkin, *How Nations Behave* (2nd edn 1979); Roger Fisher, *Improving Compliance With International Law* (1981) at 12-16; Abram Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

investment or trade–development situation. Without such predictability or stability, trade or investment flows might be even more risky and therefore more inhibited than otherwise. If such ‘liberal trade’ goals contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare. To put it another way, the policies which tend to reduce some risks, lower the ‘risk premium’ required by entrepreneurs to enter into international transactions. This should result in a general increase in the efficiency of various economic activities, contributing to greater welfare for everyone.

Assuming then that institutions are important, and that law plays a significant role in those institutions, what legal principles can we identify that play such a role? Obviously this can be a vast subject, certainly ripe for scholarly and policy attention of various kinds for years to come. But perhaps one particular principle can here be mentioned, namely the value of a ‘rule oriented’ approach to design of international institutions relating to economic activity.<sup>14</sup>

The ‘rule oriented approach’ focuses the disputing parties’ attention on the *rule*, and on predicting what an impartial tribunal is likely to conclude about the application of a rule. This in turn, will lead parties to pay closer attention to the rules of the treaty system, and this can lead to greater certainty and predictability which is essential in international affairs, particularly *economic* affairs driven by market oriented principles of decentralized decision making, with participation by millions of entrepreneurs. As noted above, such entrepreneurs need a certain amount of predictability and guidance so that they can make the appropriate efficient investment and market development decisions.<sup>15</sup>

The phrase ‘rule orientation’ is used here to contrast with phrases such as ‘rule of law’, and ‘rule-based system’. Rule orientation implies a less rigid adherence to ‘rule’ and connotes some fluidity in rule approaches which seems to accord with reality (especially since it accommodates some bargaining or negotiation). Phrases that emphasize too strongly the strict application of rules sometimes scare policy-makers, although in reality they may amount to the same thing. Any legal system must accommodate the inherent ambiguities of rules and the constant changes of the practical needs of human society. The key point is that the procedures of rule application, which often centre on a dispute settlement procedure, should be designed so as to promote as much as possible the stability and predictability of the rule system. For this purpose the procedure must be creditable, ‘legitimate’, and reasonably efficient (not easy criteria).

For example, suppose countries A and B have a trade dispute regarding

<sup>14</sup> See, e.g., John H. Jackson, *The World Trading System* (1997) at 109; John H. Jackson, *The WTO Constitution and Jurisprudence* (forthcoming in 1998) ch 4.

<sup>15</sup> See e.g., Douglas North, above n. 12.

B's treatment of imports from A to B of widgets. One technique would involve a negotiation between A and B by which the most powerful of the two would have the advantage. Foreign aid, military manoeuvres, or import restrictions on other key goods by way of retaliation would figure in the negotiation. A small country would hesitate to challenge a large one on whom its trade depends. Implicit or explicit threats (e.g., to impose quantitative restrictions on some other product) would be a major part of the technique employed. Domestic political influences would probably play a greater part in the approach of the respective negotiators in this system, particularly on the negotiator for the more powerful party.

On the other hand, a second technique suggested – reference to agreed rules – would see the negotiators arguing about the application of the rule (e.g., was B obligated under a treaty to allow free entry of A's goods in question?). During the process of negotiating a settlement it would be necessary for the parties to understand that an unsettled dispute would ultimately be resolved by impartial third-party judgments based on the rules so that the negotiators would be negotiating with reference to their respective predictions as to the outcome of those judgments and not with reference to potential retaliation or actions by the exercising of the power of one or more of the parties to the dispute.

In both techniques negotiation and settlement of disputes is the dominant mechanism for resolving differences; but the key is the perception of the participants as to what are the 'bargaining chips'. Insofar as agreed rules for governing the economic relations between the parties exist, a system which predicates negotiation on the implementation of those rules would seem, for a number of reasons, to be preferred. The mere existence of the rules, however, is not enough. When the issue is the application or interpretation of those rules (rather than the formulation of new rules), it is necessary for the parties to believe that if their negotiations reach an impasse the settlement mechanisms which take over for the parties will be designed to fairly apply or interpret the rules. If no such system exists, then the parties are left basically to rely upon their respective 'power positions', tempered (it is hoped) by the good will and good faith of the more powerful party (cognizant of its long-range interests).

As the world becomes more economically interdependent, more and more private citizens find their jobs, their businesses, and their quality of life affected, if not controlled, by forces from outside their own country's boundaries. Thus they are more affected by the economic policy pursued by their own country on their behalf. In addition, the relationships become increasingly complex – to the point of being incomprehensible to even the brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their needs and their perceived complaints. The result of this is increasing citizen participation, and more parliamentary or congressional participation

in the processes of international economic policy, thus restricting the degree of power and discretion which the executive possesses.

This makes international negotiations and bargaining increasingly difficult. However, if citizens are going to make their demands heard and influential, a ‘power-oriented’ negotiating process (often requiring secrecy, and executive discretion so as to be able to formulate and implement the necessary compromises) becomes more difficult, if not impossible. Consequently, the only appropriate way to turn seems to be toward a rule-oriented system, whereby the various citizens, Parliaments, executives and international organizations will all have their inputs, arriving tortuously at a rule which, however, when established will enable business and other decentralized decision-makers to rely upon the stability and predictability of governmental activity in relation to the rule.<sup>16</sup>

The degree of desired flexibility for rules is a subject discussed by important writers, sometimes with a suggestion that certain rules be raised to ‘constitutional status’ and embedded in national legal systems.<sup>17</sup>

With these ‘policy building blocks’ in mind, we can now turn to several other dimensions of the subject of international economic law.

### 3. UNDERSTANDING INTERNATIONAL ECONOMIC LAW

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 90 per cent 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 (IEL) issues are found on the front pages of the daily newspapers.<sup>18</sup>

To some extent IEL can be divided into two broad approaches which cut across most of the subjects embraced by IEL. These approaches can roughly

<sup>16</sup> Adapted from John H. Jackson, ‘Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT’, 13 *J World Trade Law* 3–4 (1979) and John H. Jackson, ‘The Crumbling Institutions of the Liberal Trade System’, 12 *J World Trade Law* 98–101 (1978); John H. Jackson, *The World Trading System* (2nd edn 1997).

<sup>17</sup> See, e.g., Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991). Professor Petersmann has also written profoundly on this theme in some of his other numerous writings. See also articles in this issue by Petersmann and Cottier.

<sup>18</sup> A more elaborate version of some of these thoughts are expressed in the following article: John H. Jackson, ‘International Economic Law: Reflections on the “Boilerroom” of International Relations’, 10 *Am U J Int’l Law Policy* 595–606 (1995).

be termed 'transactional' or 'regulatory'. Both have their place, but activities of research and policy formulation can be substantially different, and should be understood.

Transactional IEL refers to transactions carried out in the context of international trade or other economic activities, and focuses on the way mostly private entrepreneurs or other parties carry out their activity. Much of the literature, for example, is descriptive. It can be valuable as instruction for potential players, to show 'how to do it', and warn against pitfalls. It can also go further and make suggestions for change.

Regulatory IEL, however, emphasizes the role of government institutions (national, local or international). Although it can be argued that the international trade transaction is the most government regulated of all private economic transactions (usually requiring at least a report for each transaction, e.g., a customs declaration), nevertheless, most traditional attention to IEL has been focused, perhaps for practical and pragmatic reasons, on transactions. Yet arguably in today's world the real challenges for understanding IEL and its impact on governments and private citizens' lives, suggest a focus on IEL as 'regulatory law', similar to domestic subjects such as tax, labour, anti-trust, and other regulatory topics.

But apart from its breadth, what are some of the characteristics of IEL which, for example, might affect the approach to it of scholars or policy-makers? The following are some tentative ventures to explore these characteristics, but they are obviously by no means complete.

(1) International economic law 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)<sup>19</sup> to those handled by the World Court (approaching 100). Numbers do not 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 International Court of Justice (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

<sup>19</sup> See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993) at 417–585 (indexing 207 GATT complaints from July 1948 to November 1989).

effectiveness of IEL rules. For example, an important question is the relationship of treaty norms to municipal law, expressed by such phrases as ‘self executing’ or ‘direct application’.<sup>20</sup>

(3) As the title phrase ‘international economic law’ suggests, there is necessarily a strong component of multidisciplinary 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 scepticism 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 be contradictory to some economic objectives, 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) 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.

(5) Another characteristic of IEL, or at least of the problems of research and producing scholarship about IEL, is that, like many subjects of international relations, there is often a substantial problem with obtaining information. Diplomatic habits and sometimes legitimate needs of governments for confidentiality can impose special burdens on scholars, although in recent years a variety of special information sources, such as focused newsletters and internet sites, have ameliorated some of these burdens.

<sup>20</sup> See John H. Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86 *Am J Int’l Law* 310 (1993) (examining policy issues concerning the relationship between international treaties and domestic law); see also Thomas Cottier, ‘The Relationship of WTO Law, National and Regional Law’ in this issue.

(6) As the subjects of international economics became more central to government policy decisions and studies, these subjects also became more prominent in the news media and more deeply interconnected with political groups and agenda. Of course, historically there have been periods of intense public debate about international economic policies such as tariffs, or ‘anti-dumping’ and unfair trade arguments.<sup>21</sup> But with a post-cold war shift to ‘geo-economics’ and with developing fears among certain citizen groups about the influence of globalization on their personal and family well being<sup>22</sup> the ‘politization’ of international economic policy issues, and therefore of legal issues related to them, has led to various studies by different groups on IEL issues (such as those involved in the debate about the ‘fast track’ procedure with respect to the USA’s treaty-making rules involving the US Congress).<sup>23</sup> These competing studies, sometimes with vastly different conclusions, obviously pose risks to the careful scholar.

What does all this imply for research? Clearly it influences the selection of priorities for research and successfully carrying out IEL research. Empiricism, multidisciplinary approaches, and the breadth of legal understanding to relate not only general international law principles with IEL, but also both with national constitutional and other law, create quite a burden.

In some cases (maybe most) it would seem preferable 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 normally good theory must be tested, usually by empirical observation.

#### 4. REGULATING CROSS-BORDER ECONOMIC ACTIVITY

Earlier sections of this article noted the very broad range of subjects related to IEL, and hinted at the problems facing governments who wish to regulate economic activity to achieve a wide variety of government objectives. Almost daily the news media suggest new or recurring problems of this type. The recent case of an airline merger involving Boeing and MacDonal Douglas is an example of potential problems for nation-states attempting to regulate anti-trust and competition policy.<sup>24</sup> Tainted foodstuff imports is

<sup>21</sup> For example, discussion about the Smoot-Hawley Tariff Act of 1930, and debate in 1948–51 about an International Trade Organization (ITO).

<sup>22</sup> Debates during the May 1997 French Elections, and the 1994 debate in the USA on WTO acceptance come to mind.

<sup>23</sup> See, e.g., numerous news articles in the USA during October and November 1997.

<sup>24</sup> See, e.g., Teresa Wyszomierski and Christopher Lingle, ‘Lessons of the Boeing Merger’, *The Journal of Commerce* 29 July 1997 at 8.

another example.<sup>25</sup> The international ‘breakthrough’ in early 1997 regarding a telecommunications international agreement is yet another example<sup>26</sup> as is the banking crisis in Asia and various response attempts (often focusing on IMF activity).

In the financial services area, we also have to worry much more about problems of fiduciary relationships, prudential protections of consumers, fraud, reminding us of the BCCI case. Other subjects include environment regulation, continuing work on agricultural trade, product standards, consumer protection in its broader ramifications, securities regulation as we move into a 24-hour market. If you begin to push the frontier of the subject, you have to think also of such things as labour regulations, labour standards, and even human rights.

Indeed, almost every conceivable area of economic activity which for one reason or another attracted governmental concern and often regulation, is now impacted by actual or potential international regulation of one kind or another. Thus we need to step back and ask what are the common elements of these many specific topics and often ad hoc government responses? The fundamental subject appears to be the question of ‘regulation of economic behaviour which crosses national borders’. How should policy-makers (and scholars) approach this broad question? Are there some general principles of government regulatory activity which could be applied in most or all situations involving cross-border economic behaviour? Can we develop some sort of general framework for policy analysis of this type? Here is a preliminary and tentative (‘work in progress’) attempt to do that.<sup>27</sup> These and many more questions can appropriately engage scholarly and policy-makers’ attention for years to come.

Look first at typical economic analysis of regulation.<sup>28</sup> Generally speaking market-oriented economists talk about avoiding governmental interference, except when there is something called ‘market failure’.

As to market failure, the most familiar and the most commonly reiterated in the economics literature are the problems of monopoly (competition policy); the problems of asymmetry of information (for instance, the consumer versus the expert sellers); the problems of government distortions for a

<sup>25</sup> See, e.g., Stephanie Nall, ‘Meat Dispute Threatens to Spoil US–Europe Trade’, *The Journal of Commerce* 27 March 1997 at 1; Stephanie Nall, ‘EU, US Sling Charges, Threats at One Another’, *The Journal of Commerce* 3 April 1997 at 1.

<sup>26</sup> See, e.g., John Zarocostas, ‘US Urged to Back Telecom Accord’ *The Journal of Commerce* 14 February 1997 at 1a.

<sup>27</sup> These thoughts are drawn partly from this author’s following publications which may also interest the reader: John H. Jackson, Hyman Soloway Lecture: The Uruguay Round, World Trade Organization, and the Problem of Regulating International Economic Behaviour (1994) (published in 1995); John H. Jackson, ‘Reflections on Constitutional Changes to the Global Trading System’, 70 *Chi Kent L Rev* (1996) at 511.

<sup>28</sup> See, e.g., Richard Lipsey, Paul Courant, Douglas Purvis and Peter Steiner, *Microeconomics* (10th edn, 1993) especially Part 4.

variety of reasons (and those get very, very troublesome because there are many different valid policy reasons why governments step in that do not have to do with the functioning of the market, and yet they cause distortions in the market). There is also the public goods problem, where the market cannot adequately give incentive for the creation of things that the public needs, because there is the opportunity for the whole public to use it, or capture it, i.e., to 'free ride'. This is a subject, of course, that is very close to intellectual property questions. And there are questions which are related to some of the others just mentioned, such as the question of distributive justice, or other alternative policies of governments.

One of the interesting features of this fairly traditional economic analysis is that it is almost always developed in the context of a single domestic economy. We must now ask, 'What difference does it make that we are in the kind of international-linked world that we are in?'. Look first at monopoly, or competition policy. In some cases, you are really talking about a world economy; you are not talking about a national economy. And, so, that may change entirely your first judgment as to whether government intervention is necessary. For example, maybe there is a national monopoly, but, over time, borders have been thrown open to the product in such a way that the national monopoly really is no longer a market failure, because it has to struggle against the rest of the world. But, you can also see that the opposite conclusion is possible. It may be that things that do not look like they are a market failure domestically, when you look at or hypothesize a closed economy. However, when you move to the international system, because of various formal or informal linkages of various kinds, you may indeed find that there is market failure. And so, the international dimension of this creates the potential for different judgments on the question of whether we have the particular market failure or monopoly or competition policy questions.

Asymmetries of information is another case very ripe for difficulties enhanced by the international market. First of all, we have language differences worldwide, which makes it much harder for many persons to understand information. We have deep cultural differences where a 'yes' means 'no', a 'no' means 'maybe', and vice versa. We have a whole variety of factors: distance, different legal systems, the ability to enforce contracts in different ways, and so on. So, the asymmetries of information can give rise to many different conclusions, based on international activities.

Government distortions, of course, provide many possibilities. Are we beginning to face *international* government distortions? Are we beginning to face the regulations, for instance, of GATT, such as its textile system, as an illustration of how the international regulatory system begins to create distortions?

Public goods provide yet another set of market failure possibilities. There are many public goods in the worldwide *international* landscape. One is peace

and security; peacekeeping in the United Nations, for instance. Another is human rights. There are certain broader values than just economic market-oriented values. Thus again the international landscape would lead us to a conclusion that the market is not able to cope in the way that we think that it ought to.

Distributive justice suggests a variety of policies within the scope of a domestic market progressive taxation, welfare, safety nets, a social market economy etc. But, internationally, of course, we have this problem also the developing countries argue for certain preferences. They argue for an international financial safety net, almost the equivalent of international bankruptcy.

So the next question is what should be the government response to market failure? In the economic literature, there are generally several kinds of responses that have been suggested – ways that governments can intervene. The government can tax. The government can subsidize. The government can regulate, create penalties for deviant behaviour of various kinds. The government can try to alter various market incentives, such as by creating a system of permits, for instance, that are purchased or bid for, to allow certain environmental degradation under certain systems.

However, some of the governmental responses suggested in the event of national market failure cannot easily be used in a globalized situation. How is a government going to tax foreign people? Suppose a domestic government tries to regulate but a foreign government sees an opportunity to assist its own business participants by lax regulations, a so-called ‘race to the bottom’ idea or ‘regulatory competition’? Thus many of the tools for government responses will not work in the same way in a globalized situation. And that forces us to consider the problems of regulatory competition, ‘race to the bottom’ and downward harmonization, something that the environmentalists have warned about during the last few years. When one begins to analyse these situations, sometimes with the aid of game theory (particularly the so-called ‘prisoners dilemma’)<sup>29</sup>, one is pushed towards *international* cooperation as a necessary ingredient for handling these issues.

However, there are arguments for and against such internationalization. Governments may or may not be acting in the best interests of their society because of the distortions of governmental policy that are sometimes described by public choice theories. For example, a government leader wants to be re-elected this autumn and therefore will not vote for a trade treaty. There is also a reverse side. An international institution can provide an additional buffer for national policy officials to make arguments in favour of the goals of an international institution. They can say that their nation is constrained by the international law and must obey these obligations.

<sup>29</sup> Avinash K. Dixit and Barry J. Nalebuff, *Thinking Strategically* (1991).

However, there are risks in international co-operative activity or international 'governance'. Some of those risks are in the institutional details, such as the danger of decision rules like 'consensus' that lead to the lowest common denominator approach that inhibits some countries from embracing higher standards concerning product safety or environmental considerations. There are situations where it is going to be very hard or impossible to achieve agreement because of the cultural differences and the economic diversities in the world. And we have to worry that some institutions can be abused, that when we yield 'sovereignty' to some institutions, we could find that down the road (as has been alleged in some of the existing international organizations) there is corruption or misallocation of resources, or a distortion of the voting patterns.

Economists teach us that trade liberalization creates more goods or more welfare for everyone overall, but you can not say that every particular person will be better off. There will be some winners and some losers. What do you do about the losers, particularly if they are disadvantaged? Who should bear adjustment costs? Beyond that clearly there are goals that are not so oriented towards economics, such as keeping the peace, which is an important element of international relations theory and international economic theory.<sup>30</sup> So we have to construct the institutions that will follow or mediate among these and other goals such as human rights, crime abatement, drug traffic reduction etc. These considerations thus pose various questions about whether the relevant international institutions are the appropriate place to resolve these issues.

Furthermore, even though globalization may affect a nation's decision as to 'market failure' and the need for government intervention, that does not necessarily lead to the desirability of international intervention. It could be that the market failure consequences are confined to the domestic economy, even though they have been partly caused or influenced by globalization effects. Or, it could be that national government action could effectively 'correct' the problem.

In a number of cases, the optimum approach could be some kind of international, or global, response, but the institution concerned may be weak, or so fraught with the potential abuse that on a cost-benefit analysis you decide that you really cannot choose that institution for certain decisions. You may have to fall back on national governments for intervention, because of the dangers, or risks, of the international system. Sometimes the international system is so rigid because it is difficult to renegotiate a treaty, for example, that once a measure is in place it is virtually impossible to amend it. We have seen elements of that in the GATT, and maybe now in the WTO.

<sup>30</sup> See Alan Sykes 'Comparative Advantage and the Normative Economics of International Trade Policy' in this issue.

When we look at the international intervention, there are a series of different possibilities. There are also regional or unilateral possibilities, such as the nation-state acting through extraterritorial measures, or US section 301-type measures, of threatened sanctions, or threatened retaliation.

Thus we must turn to the question of institution building, i.e., ‘constitution-making’, at the international level. There are goals for the institutions that we might need and some of these goals are addressed, for example, in the WTO. It is not clear that the WTO is going to be able to succeed with respect to all these goals, however, but they deserve some thought.

One important goal is the concept of a rule-oriented system that provides the predictability and stability for the system for which many see a need for a variety of reasons, as we have already discussed.

However, there are other things to consider, such as whether an institutional structure recognizes and gives some deference to the real power configurations, so as to lead powerful governments to accept and implement the rules and decisions of the institution.

Other institutional goals include participation of citizenry. We are clearly moving beyond elites in the conduct of international policy. The environmentalists again have begun to teach us about the necessity of having more open and more accessible procedures.<sup>31</sup>

In addition, there is the need for checks and balances. We have to be cautious about what we do institutionally and internationally in the regulatory area because we do not want the system to get out of hand. Often there is some confidence in national governments, and thus some worry about the delegation of ‘sovereignty’. Perhaps there is a vestige of usefulness in the concept of ‘sovereignty’ when it is used to express the concept of checks and balances against too much concentration of power in an international institution.

In Part 6 of this article, this analysis is built on and certain alternative institutional approaches to designing the ‘International Economic Constitution’ explored.

## 5. EXISTING INTERNATIONAL ECONOMIC INSTITUTIONS: THE WORLD TRADE ORGANIZATION AND RULE ORIENTATION

The Bretton Woods Conference of 1944 established the charters for the World Bank (IBRD)<sup>32</sup> and the IMF. Participants at the 1944 conference recognized the need for a third institution for the subject of international trade, although they did not feel able at Bretton Woods to undertake a draft of that institution, partly because that conference was oriented toward monetary problems and was convened by and for the monetary authorities of the

<sup>31</sup> See, e.g., in this issue the article by Daniel Esty, *NGO’s at the World Trade Organization*.

<sup>32</sup> International Bank for Reconstruction and Development (IBRD).

participating states rather than the trade authorities. Consequently one of the first tasks of the new United Nations and its Economic and Social Council (ECOSOC) in 1946 was to launch preparations for an International Trade Organization (ITO). But, as is well known, the ITO Charter (of Havana 1948) never came into force, because the United States Congress would not approve it.<sup>33</sup> Instead, the GATT, which for reasons partly relating to the constitutional structure of the USA<sup>34</sup> had come into 'provisional force', filled the gap left by the ITO failure, and became *de facto* the major trade treaty and institution for international trade relations and diplomacy.

Despite this uneasy history and the 'birth defects' of the GATT,<sup>35</sup> these institutions played a remarkably successful role for almost 50 years. Yet during the eighth major trade negotiating round of the GATT, it became apparent that a new institutional structure would be necessary, and thus the WTO was born, coming into effect 1 January 1995.<sup>36</sup> In the short span of its new life, the WTO appears to be the prodigal child of the international trading system, already achieving a membership of more than 130 countries (with over 30 more negotiating for membership)<sup>37</sup> and over 105 dispute settlement procedures initiated under the new WTO rules for those procedures.

Significantly, it now seems clear that the WTO represents a further enhancement (compared to the GATT whose evolution was in this direction anyway)<sup>38</sup> in the direction of rule orientation. This is particularly demonstrated by the new WTO dispute settlement procedures.<sup>39</sup>

The full implications of the Uruguay Round (UR) Agreement and its new institutions are undoubtedly not fully understood yet by any government

<sup>33</sup> Susan A. Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (1996).

<sup>34</sup> John H. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law', 66 *Michigan L Rev* 249 (1967); see generally, John H. Jackson, *World Trade and the Law of GATT* (1969); John H. Jackson, William Davey and Alan O. Sykes, *International Economic Relations* (3rd edn, 1995).

<sup>35</sup> John H. Jackson, *The Uruguay Round and the Launch of the WTO – Significance and Challenges*, Chapter 1 of *American Bar Association Book on the Uruguay Round* (1996) reprinted from *World Trade Organization*.

<sup>36</sup> 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature 15 April 1994, Marrakesh, Morocco', 33 *ILM* 1140–272 (1994). See also H.R. Doc. No. 316, 103d Cong., 2d Sess., 1994).

<sup>37</sup> See WTO website at: <http://www.unicc.org/wto>. As of 22 October 1997, the WTO lists 132 members. Its 'State of Play' document on disputes lists 105 disputes.

<sup>38</sup> John H. Jackson, *The WTO Constitution and Jurisprudence* (forthcoming in 1998), see especially, section 4.2 on 'The GATT Dispute Settlement Procedure and its Evolution'.

<sup>39</sup> These are principally set forth in the Dispute Settlement Understanding (DSU), which is Annex 2 to the WTO 'Charter' in the Final Act of the Uruguay Round, above n. 37.

which has accepted them. In the USA during 1994 there was considerable discussion about the impact of the UR treaty and the WTO on ‘US Sovereignty’.<sup>40</sup> While the term ‘sovereignty’ has been much criticized as out of date and archaic, nevertheless, some of the issues in this ‘great debate’ are vital and contemporary. To a great extent these issues concern ‘allocation of power’ as between a nation-state and an international regulatory system. To name a few examples, there are questions whether a product safety standard should be controlled by an international body, or a nation-state government, or even by subfederal government units. There are also questions about how to apply certain well-established international policies such as ‘most favoured nation’ treatment (non-discrimination as between different nations) or ‘national treatment’ (non-discrimination as between domestic products or services and imported products or services). In addition there are questions about whether disputes about these and other issues should be resolved by an international body or not. In fact, a close analysis of sovereignty turns out to be very complex, and the subject can be ‘decomposed’ into dozens of more specific issues.

Clearly acceptance of any treaty in some sense reduces the freedom of scope of national government actions. At the very least, certain types of actions inconsistent with the treaty norms would give rise to an international law obligation, and the amount of constraint might then vary with the institutional mechanisms for enforcement, but also the national domestic government structure or political attitude towards international norms. Some sceptics might dismiss an international norm as ineffective and thus not constraining. But if a treaty norm were ‘self-executing’ or ‘directly applicable’ in a domestic legal system, it could have a greater constraining effect. Even without those effects, a treaty can have important domestic legal effects, such as influencing how domestic courts interpret domestic legislation. Beyond that, a treaty norm even without domestic legal effect can have weight in some domestic policy debates where some advocates will stress that positions contrary to their views would raise ‘serious international or treaty concerns’. Thus the ‘sovereignty objection’ can be seen to be directed more to the question where should a decision be made, and what influences on that decision should be permitted?

Related both to the ‘sovereignty’ question and to the promise of greater ‘rule orientation’, the new dispute settlement procedures (and now practice and developing jurisprudence) seem demonstrably tilted towards rule orientation. Indeed speeches by international and national leaders indicate this and point to it with pride and satisfaction. Although the text of the DSU

<sup>40</sup> John H. Jackson, ‘The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results’ in Jonathan Charney, Donald K. Anton and Mary Ellen O’Connell (eds), *Essays in Honor of Louis Henkin* (forthcoming in 1998), also in 36 *Colum J Transnational L* 15788 (1997).

has clauses that arguably go both ways, if you read the DSU through carefully and inventory the clauses that are relevant, you can easily come to the conclusion that the DSU opts for the rule-oriented procedure.<sup>41</sup>

The issue of a nation-state's participation in an international dispute settlement procedure poses sovereignty questions of a different sort from those of institutional structure. If a nation has consented to a treaty and the norms it contains, why should it object to an external process which could rule on the consistency of that nation's actions with the treaty norms? It might be argued that such objections manifest a lack of intent to follow the norms, sort of accepting the treaty with fingers crossed behind the back. Indeed, there may be some elements of this thinking in this context. However, it could also be suggested that a nervousness about international dispute procedures reflects a government's desire to have some flexibility to resist future strict conformity to norms in certain special circumstances, particularly circumstances that could pose great danger to the essential national objectives. This is sort of an 'escape clause' idea where a nation could accept norms with sincere intent to follow them except in the most severe and egregious cases of danger to the nation or to its political system. (Candidly though, it may also be noted that danger to the political fortunes of the ruling party in such a nation may take on great weight in these considerations.)

Apart from these 'escape clause' notions, however, there is an institutional concern that the dispute procedures may not be objective, may be subject to procedural irregularities, overreaching or may have other important defects that even other nations would recognize, but which are not redressed by the treaty or its institutional structure. This danger, either at the outset or developing at some later time, could legitimately constrain a nation's willingness to enter into stringent commitments to a dispute settlement procedure.

The major change in the DSU is the elimination of 'blocking' when the Dispute Settlement Body (DSB) considers the report. Since the report is deemed adopted unless there is a 'consensus' against adoption (the 'reverse consensus') and since the 'winning party' could always object, the adoption is considered to be virtually automatic. The *quid pro quo* for this automaticity, however, is the appeal which is now for the first time allowed. If an appeal is taken, then the report is not 'adopted'; instead an appellate

<sup>41</sup> See, e.g., DSU article 3, para. 2, which in part reads:

3.2 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

Also see the speech of King Hassan II for the host government of the April 1994 Marrakesh ministerial meeting to conclude the Uruguay Round, where he said:

By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over the temptations of unilateralism and the law of the jungle.

division of three individuals drawn from a permanent roster of seven individuals (with renewable four-year staggered terms)<sup>42</sup> considers the first level report, receives arguments from the parties, and writes its own report. This report is also sent to the DSB where the same ‘reverse consensus’ rule applies to adoption, again making it virtually certain to be adopted. It is this ‘automaticity’ that scares some diplomats and critics of the WTO system, although in many other international tribunals ‘automaticity’ in the sense of no opportunity to block a report, also exists.

How does all this fit the ‘sovereignty objections’? Again, it is abundantly clear that ‘sovereignty’ is not a unitary concept, but rather a series of particular considerations centred around the problem of allocation of power. Thus when objection is made to the USA accepting the WTO because of the WTO dispute settlement procedures, the specific (‘decomposed’) issues of that objection are substantially different from those regarding the problem of treaty norm application, or the institutional structure of decision-making. In addition, the sovereignty objection really could be a series of specific objections about the nature or details of the dispute procedure. These in turn must be considered in the aggregate (unless there were options which allowed a nation to accept some details but not others), and that aggregate weighed against the policy advantages of belonging. ‘Sovereignty’ thus is not a magical wand that one waives to ward off any ‘entanglement’ in the international system, but rather is a policy-weighting process.

## 6. FUTURE POLICY AND FUTURE SCHOLARSHIP

Where may all this discussion lead? Obviously the previous sections suggest many implications for future directions of the international institutions. While the explicit focus has been on the new WTO, many of the matters discussed can and often should apply to other international economic regulatory and institutional entities and subject matter, whether monetary organizations or environmental treaties, or numerous other contexts. And these matters obviously have implications for policy and scholarly attention.

To attempt a complete inventory or a complete landscape of the potential directions and problems for the future would be folly besides being inappropriate or unfeasible for this article. But a number of further matters can be mentioned for both policy consideration and scholarly attention. Among these would be attention to subjects logically building on the analyses developed in previous sections. One can, for example, mention some of the institutional questions and alternative possibilities needing exploration, partly summarizing matters discussed earlier in this article.

Assuming for the moment that a policy analysis of the various questions raised about appropriateness and difficulty of government market interven-

<sup>42</sup> Article 17 DSU.

tion suggests the necessity of taking international action or establishing some form of international co-operation, then it becomes necessary to explore a series of questions relating to the modalities of such international action or co-operation, including the possibility of designing institutions for that purpose.<sup>43</sup>

Clearly there are a number of different ways to approach the question of international effects on national markets. We can roughly inventory them under the subtopics of 'unilateral', 'bilateral', 'regional', and 'multilateral'. Running through all of these levels ('vertical analysis') are several general questions, such as:

- (1) Should co-operative approaches be basically voluntary, or should they be binding (under international law)? If binding, should there be sanctions?
- (2) Should the emphasis on co-operation be procedural, or relate more substantively to the rules being applied?
- (3) With respect to substantive rules, should the approach be that of national treatment (non-discrimination between domestic and imported goods), most favoured nation (non-discrimination among imported goods and exporting countries), or should there be some sort of minimum standards as the basis of a rule to apply?

In addition, one can explore several different 'principles of managing interdependence' that would influence the techniques of co-operation:

- (1) Harmonization, a system that gradually induces nations towards uniform approaches to a variety of economic regulations and structures. An example would be standardization of certain product specifications. Another example would be uniformity of procedures for applying countervailing duties or escape clause measures.
- (2) Reciprocity, a system of continuous 'trades' or 'swaps' of measures to liberalize (or restrict) trade. The GATT negotiations are in this mold.
- (3) Interface, which recognizes that different economic systems will always exist in the world and tries to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape clause mechanisms.

Obviously a mixture of all these techniques is the most likely to be acceptable, but that still leaves open the question of what is the appropriate mixture. For example, how much should the 'trade constitution' pressure nations to conform to some uniform 'harmonized' approaches, or is it better simply to establish buffering mechanisms that allow nations to preserve diversity but

<sup>43</sup> See John H. Jackson, 'Alternative Approaches for Implementing Competition Rules In International Economic Relations', *Aussenwirtschaft – Swiss Rev Int'l Econ Rel* No. 2/94, St Gallen, Switzerland 225 (1994).

try to avoid situations where one nation imposes burdens (economic or political) on other nations?

Closely connected to this previous point is an issue that may be loosely characterized as being similar to ‘federalism’. This is the issue of the appropriate allocation of decision-making authority at different levels of government which are discussed in Part 4.

In order to regulate international economies today, there is a very high probability that the international community will turn toward the formation and designing of a treaty-based multilateral institution which could enable it appropriately and efficiently to respond to the problems of such regulation. Thus it is particularly important to begin thinking about some of the key questions that should be considered in designing international institutions. A series of ‘lawyer-type questions’ then emerge, such as:

- (1) Questions of rule-making at the international level, and whether procedures adequately consider some of the scientific and moral concerns involved in the subjects that are linked to trade.
- (2) Questions of international dispute settlement procedures and to what extent they adequately consider opposing policy goals, or provide for appropriate advocacy from interested authorities and citizen groups.
- (3) Questions of whether the international procedures incorporate adequate democratic processes including transparency, and right to be heard.
- (4) Questions of the relation of international rules to domestic constitutional and other laws.
- (5) Questions about the operation and procedures of national constitutional bodies and how these promote or inhibit international co-operation.
- (6) Questions about the activity of interest groups, both those broadly oriented and those more oriented to specific interests or single issues, and how this activity relates to international institutions and procedures.
- (7) Questions concerning the problems of regulatory competition: governments seeking lower standards of regulation in order to attract economic activity to their societies (the ‘race to the bottom’, or ‘race to the top’, or in the USA the ‘Delaware Corporation’ problem).

These questions, which have perhaps become most apparent in the context of environment and competition policy, also relate to a long list of other potential policy areas that can cause clashes with international trade and other international economic policy goals. Such policy areas could certainly include:

- Labour standards
- Commodity agreements and regulation
- Product standards (food, pharmaceutical, safety of goods etc.)
- Insurance

- Banking and fiduciary institutions
- Investment protection
- Securities regulation and institutions
- Government procurement procedures and preferences
- Shipping and transport (including air transport)
- Intellectual property protection and regulation
- Taxation

To close, the reader can probably see that the reflections in this article are consistent with ideas of a 'pragmatist school' of international law scholarship.<sup>44</sup> The phrase 'normative realist' has also been used, suggesting that scholars should feel some responsibility for moving the subject forward despite the difficulty and limitation of resources, and despite the sometimes pessimistic viewpoint that mere 'realism' can engender.

Let us hope that this will be the case, and take comfort in the observable fact that many fine scholars, young and older, are now embarked on some of these endeavours as well as other endeavours reflecting other appropriate priorities, as a burgeoning literature relevant to the subject of this article bears witness. There is reason to be optimistic that the combination of such scholarship and sensible policy-maker attention to it, will assist in repeating and continuing the relative success of the achievements of international economic institutions during the last 50 years.

<sup>44</sup> See, e.g., David Kennedy, 'The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law', 10 *Am U J Int'l L Policy* 671 (1995).