

The Jurisprudence of GATT & WTO. Insights of Treaty Law and Economic Relations

Libros John H. Jackson
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Having been called by the academic world a true pioneer of international trade law, John H. Jackson is known today as one of the leading academic experts on GATT and WTO law. Although this would have been enough to recommend this book, it would not have been fair to our readers, especially because of its real value.

This time we have before us a selection of Jackson's scholarly production, considered some authors as a lifelong testimony because of the writer's of strict chronological insights, into topics of the evolving GATT and WTO law, at the time the events took place, and equally as a testament of his experience and ability, his prolific and continuing contribution to scholarship of international law, and his appreciation of the systematic issues involved in the evolution of GATT and now of WTO. Therefore, we believe this book constitutes unavoidable reading material to for all those who would like to learn more about these important international institutions and their undeniable impact on world trade.

The author's contribution in this book is bringing together his most important essays and articles published over four decades, the largest sample of his vast output in this area. The articles have

been selected by the author himself for their continuing timeliness and relevance to contemporary issues in international trade, and give us a real insight regarding treaty law and economic relations over the last four decades. An important aspect of this vast selection is the possibility of having access to updated material, which up to now had not been available to the common reader.

The above explains why the book is excellent material for academic researchers, government officials or practising lawyers, for getting more acquainted with the law and policy framework of the GATT / WTO trading system and its underlying institutional checks and balances. By bringing together a number of papers on related topics, the book provides us with more convenient access and therefore a better opportunity to detect general trends running through them, as well as to compare a single author's approaches to various subjects matters. Without any doubt, the book is a contribution to understanding the main technical problems raised by international economic regulation.

Following the author's structure we shall explore the main aspects of the six thematic parts which are strictly interrelated, going from the origin of GATT, to the Uruguay round of trade negotiations and finally to the present WTO.

Part I, entitled "A view of the landscape" is an overview of the starting point of international economic law, and develops some of the policy objectives underlying the subject. The first part of the article describes the author's point of view former and, towards the end of the essay, he states his current views regarding the current direction of the world trading system and WTO. As he puts it, this part provides a real and anticipated "bookend" of the whole work. This will certainly be more understandable to the reader when he comes to the end of part VI.

Chapter 1 of part II, entitled "The GATT and its troubled origins", detailed articles about the General Agreement on Tariffs and Trade (GATT), starting from a description of its very unusual and peculiar birth in 1947 and 1948, which deeply shaped its history, along with the unfortunate story of the failure to establish an International Trade Organisation, a subject discussed by the author in several other writings.

Continuing with this issue in chapter 2, Jackson gives us a brief introduction to that particularly case.

Continuing along the same line, chapters 3 and 4 deal with the

results of the Tokyo Round of negotiations, which was the seventh major negotiating round under GATT held from 1973 to 1979. Both chapters are very interesting because the author examines the main questions, at the time, that is, the direction of the trading system, in particular how the focus shifted from the reduction of tariffs to the perplexing problems of nontariff barriers, which were becoming increasingly important. The author correctly states that GATT's "birth defects" were becoming increasingly troublesome, especially in connection with the settlement of disputes procedures on one hand, and the relationship with the legal structure of GATT and the difficulty of amending its rules, on the other. According to Jackson, the Tokyo Round proved to be an approach to negotiate a series of so called "side agreements," each of which was optional and addressed a particular set of trade barriers. Finally, at the eighth round of trade negotiations under GATT, the Uruguay Round, a reaction to problems emerging in the Tokyo Round is observable, *inter alia*, a massive revision of trade rules with the development of a totally new agreement to replace the GATT and requiring almost all of the new text to be accepted by all adherents, what the author calls a "single package" approach. Additionally, the author explains how the Uruguay Round established a new organization, the World Trade Organization (WTO), whose mission was to overcome most of GATT's birth defects. All this meant a giant step of dispute settlement rules towards "rule orientation".

Part III, entitled by the author "Trade policy fundamentals", reveals how Jackson turned from his "constitutional" or "institutional" point of view of the world trade system to some of the substantive trade policies of that system. The author writes only four chapters, including parts of four articles dealing with four different but fundamental trade policy issues, namely MFN or "Most Favored Nation" rules, voluntary restraint arrangements, subsidies and countervailing duties, and finally he compares "regionalism" by with "multilateralism." These issues were selected by the writer not only because of their relevance to the international trade system, but because in some instances they deal specifically with more detailed and policy discussions than other parts of his writings, or elaborate on certain policy analyses in ways not commonly expressed by other authors.

In the first of these chapters, chapter 5, Jackson explores the policy basis for the MFN principle, which is often described as the

core of GATT rules and thus of the trade system, led by the question why should MFN or the rule against discriminating between different countries be so central? The article discusses different relevant issues in support of policies such as lowering transaction costs, avoiding trade distortions, and generally reducing the probability of trade tensions among nations. He also notes that the MFN norm, is open to important criticism, and also examines exceptions to the norm. According to the author the Uruguay Round a text follow this principle and indeed extends it to trade in services, and to trade-related intellectual property rules, although in slightly different manners.

A very interesting issue, discussed in chapter 6, is the analysis of the question of “voluntary export arrangements,” often called VERs or VRAs (voluntary restraint agreements or arrangements). These tempting devices have been extensively used by governments, often informally and secretly. The basic structure is for an importing country to indicate “distress” due to exports from another country, and for the latter to come to some arrangement to limit the amount of its exports to the importing country, possibly to avoid perceived potential worse treatment of its exports. According to the author, the legal questions here are somewhat intricate and it is not easy to answer which VERs are “legal” and which are not. The result of the Uruguay Round offers a very important text about “safeguards” which includes the obligation to avoid using VERs or VRAs, with some exceptions. Nevertheless, there are still ways to engage in VERs, for instance providing the equivalent as a “settlement” of an antidumping or countervailing duty action.

In chapter 7, Jackson examines some of the policies of countervailing duties as a response to subsidies enjoyed by goods exported by the subsidizing country, which as we know, is generally one of the most perplexing and complex issues of trade policy. This relatively brief article deals almost exclusively with countervailing duties, and argues that they may have a positive effect on trading nations in inhibiting them from using subsidies in a ways that distort market forces affecting trade, and thus reducing world welfare. The Uruguay Round extensively revised the subsidy and countervailing duty rules of world trade and provided a new conceptual framework for dealing with these problems, so later

developments will have to be monitored in order to check how these new rules work out.

Finally, in chapter 8, the author examines the general problem of “regionalism”, because GATT, and now the WTO, has always been confronted with the tug-of-war between of MFN and multilateralism on one hand, and the policies leading to an exception, on the other. Jackson examines, in a broad systemic context, some of the policies on each side of this conflict, noting *inter alia* that some relevant policies are not “economic” policies, but rather more “political” or “good governance” policies. He indicates that in recent years the world has seen a strong regionalist development, with the establishment of a series of new regional institutions and treaty frameworks, such as NAFTA (North American Free Trade Agreement), Mercosur (Mercado Común del Sur) - APEC (Asia Pacific Economic Cooperation Forum), etc. The WTO working group has inventoried well over 100 regional arrangements, and some feel that these severely threaten in the both principles of multilateralism embodied in the WTO and GATT.

Part IV is entitled “Dispute settlement procedures”, which without any doubt constitute the central and most important feature of both GATT and WTO. Obviously, these are vital to most of the questions one could ask connection with international economic law. The GATT dispute procedure evolved from minimal treaty clauses, hampered by the “birth defects” of GATT, into a remarkably sophisticated institution which greatly influenced the relative effectiveness of the implementation of GATT treaty clauses. In this part of the book the author gathered five excerpts from as many articles, dealing with various aspects and perspectives of these dispute settlement processes.

Chapter 9 examines one of the most complex cases ever dealt with according to GATT dispute procedures, abridged by the author for obvious reasons. He discusses some of the most intricate details of the DISC (Domestic International Sales Corporation) case, which allow some perspectives and judgments regarding the dispute procedures generally. The article reflects the rather critical vision of the author regarding the logic and findings of the panel, in spite of the fact that it was unusually composed by five individuals rather than three, including nongovernmental experts. Although a 1982 decision of the Council of the GATT Contracting Parties decided to “adopt” the panel report as to US practices while rejecting those relating to

US counter-claims against Belgium, France, and the Netherlands, the case has not disappeared completely.

Since the GATT dispute procedures developed by trial and error, it became a practice to have panels report their findings to the GATT Council for their approval or adoption of other decisions. A number of questions then gradually began to appear regarding the legal force or meaning of the Council action or lack of action.

In Chapter 10, the author takes up these questions and discusses some of the possible judgments about questions of legal relevance in the context of GATT. The WTO procedures managed to improve the dispute procedures of the world trading system, but unfortunately left open some of these “legal relevance” questions, which have perplexed scholars and political/diplomatic leaders and caused them to give diametrically opposed views.

Chapter 12 also turns to the topic of chapter 10, this time in the context of the WTO. The author outlines his arguments as to why the findings of a panel or the results of an appeal procedure (under WTO procedures, the adoption is virtually automatic) imposes an international law obligation on the party concerned to carry out the recommendations of the panel or appellate report.

Chapter 11 turns to another fundamental question of the new WTO trade system, which involves to what extent the dispute settlement procedures in the WTO context should defer to judgments of nation-States in their regulatory decisions about economic activities, crossing national borders and their legal compatibility with WTO rules. This issue also exists at the nation-State level, often with regard to the judicial review of regulatory decisions, and this issue was a strongly contested negotiating issue during the Uruguay Round. Jointly with a co-author, Professor Steven Croley, the author discusses the principles which should affect international dispute panel judgments and their relationship with national-level decisions.

Finally, chapter 13 steps back from details about the dispute settlement process and looks at it from a “constitutional” standpoint, in the sense that it explores its role in the institutional structure of WTO and what might be some systemic constraints on that role. Again, some topics can draw on analogies from nation-state domestic legal structures, posing questions as to how far can dispute bodies reach into domains that might be called law-making rather

than law-applying, for instance how “judicially activist” should the panels be.

Part V, entitled “GATT, international treaties, and national laws and constitutions” is an attempt to give GATT its right place, since analyzing the context of an international treaty is an essential part of its “jurisprudence” and therefore, the knowledge of the context is necessary for a well-founded understanding of the operation and effectiveness of the treaty. GATT and WTO are certainly not exceptions to this rule, and indeed the inter-relationship of these treaties and other ancillary and associated instruments with the domestic legislation of many nation-states is even more important, given that these treaties often deal closely with national government powers and actions. A matter of fact, some international obligations of the WTO/GATT system provide constraints on national “sovereign activity” which even over the last decades would have been surprising, if not improper. The “sovereignty” argument is quite often heard in connection with policy considerations about this system, particularly at times when new treaty obligations are being developed and submitted to national government institutions for approval. The author collected six articles or excerpts which combine a various aspects of the relationship of GATT and WTO instruments with national legal procedures and constitutions. Some of the articles are devoted to a broader context of treaty-making in a modern “globalized” world, and take up issues of treaty law which apply to all treaties, although noting the particular poignancy of such issues in the context of economic affairs.

Part VI, entitled “The Uruguay Round and beyond: perspectives and conclusions” represents the final part of this book and includes several articles that briefly review the results of the 1986-1994 Uruguay Round of trade negotiations, and point to new issues and to the future. Chapter 20 reviews the remarkable new institution created by the Uruguay Round, namely the WTO. The following chapter probes some fundamental issues of what so far has been the most important policy challenge to the GATT and the WTO, namely environmental policies. Forced to abstains from a deeper discussion of a number of issues, in chapter 21 the author chose to focus more specifically on one particular problem, that of the relationship of environmental policies with the WTO system. In conclusion, the author refers to a recent article wherein he examines the problems WTO is bound to face in the future.

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In summary, we can say that this book, with its knowledgeable and friendly style is a highly recommendable acquisition for many libraries, and constitutes an essential addition to the literature on international economic law.

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