GLOBAL TRADE LAW SERIES

DEFERENCE TO THE LEGISLATURE IN WTO CHALLENGES TO LEGISLATION

Daniel Lovric

Wolters Kluwer
Law & Business

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AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3145-4

Printed in Great Britain.

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Global Trade Law Series

VOLUME 26

This Book is dedicated to my parents
Ivan Lovric and Irja Lovric.

List of Abbreviations

ALOP	Appropriate level of protection
Anti-Dumping Agreement	*Agreement on the Implementation of Art. VI GATT* 33 ILM 1144 (1994)
API	*Agreement on Pre-shipment Inspection* 33 ILM 1144 (1994)
ATC	*Agreement on Textiles and Clothing* 33 ILM 1144 (1994)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Bundesverfassungsgerichtentscheidung (judgment of the German Federal Constitutional Court)
DSB	Dispute Settlement Body of the WTO
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes* 1869 UNTS 401; 33 ILM 1226 (1994)
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
ECtHR	European Court of Human Rights
Enabling Clause	*Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, GATT Document L/4903, 28 November 1979, BISD 26S/203
EU	European Union
GATT	*General Agreement on Tariffs and Trade 1994* 1867 UNTS 187; 33 ILM 1153 (1994)

GATS	*General Agreement on Trade in Services* 33 ILM 1167 (1994)
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
ITC	International Trade Commission of the US
ITLOS	International Tribunal for the Law of the Sea
Licensing Agreement	*Agreement on Import Licensing Procedures* 33 ILM 1144 (1994)
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-favoured-nation
NAFTA	*North American Free Trade Agreement* 32 ILM 605 (1993)
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
SCM Agreement	*Agreement on Subsidies and Countervailing Measures* 33 ILM 1125 (1994)
SPB	Policies Regarding the Conduct of Five-year ('Sunset') Reviews of Antidumping and Countervailing Duty Orders, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998), p. 18871.
SPS	Sanitary and Phytosanitary
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*, 1867 UNTS 493; 33 ILM 1153 (1994)
TBT Agreement	*Agreement on Technical Barriers to Trade* 33 ILM 1144 (1994)
TRIMS	*Agreement on Trade-Related Investment Measures*, 1868 UNTS 186; 33 ILM 1125 (1994)
TRIPS	*Agreement on Trade Related Aspects of Intellectual Property Rights* 1869 UNTS 299; 33 ILM 1197 (1994)
UN	United Nations
VCLT	*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331; 8 ILM 679 (1969)
USTR	United States Trade Representative
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*, 15 Apr. 1994, 33 ILM 1144 (1994)

Preface

This book deals with the way in which international courts deal with challenges to domestic legislation, with a particular focus on the World Trade Organization (WTO). The aim of the book is to describe the current actual practice of WTO tribunals in this area. Such a description could be important for future work on setting a normative basis for such practice.

This book examines the case law of the WTO. The WTO is a natural reference point for analysing international challenges to legislation. It is the only global institution that regularly hears challenges to legislation in a judicial manner. Of course, other international courts (in particular the European Court of Human Rights) also hear challenges to legislation, and the book makes frequent reference to their decisions.

A study of international challenges to legislation indicates how far international tribunals have deferred to the opinions of domestic parliaments. This is a critical issue for the future development of international law. International tribunals need to have a clear idea of how far they have deferred to domestic parliaments in the course of their past legal analysis – this will aid them, and aid those parliaments, in setting levels of deference in the future.

In the past, international deference to the domestic legislature was procedural in nature, revealed in restrictions on jurisdiction and remedy. Now deference has moved on to substantive issues, focusing on the way legislation is characterized against relevant international obligations. Thus there is a shift from procedural to substantive deference in international challenges to legislation. This shift is revealed in the nature of legislative characterization by international tribunals. This shift has not been examined in depth previously, which, given the importance of the topic, is a surprising omission.

A good way of examining this deference is to look at three kinds of characterization by international tribunals; factor characterization, proportionality

characterization and certainty characterization. Proportionality characterization involves familiar issues of effectiveness, optimality and balance, while factor characterization involves the weighing and balancing of legislation's legal and practical operation, its legislative purpose, and external standards. WTO case law in these areas reveals a careful and differentiated degree of deference to the domestic legislature, although there are a number of outlying cases that show a markedly intrusive approach. The third type of characterization – certainty characterization – is relatively rare in domestic constitutional law, but is a common feature of international challenges to legislation. It involves determining the certainty with which domestic legislation operates consistently with international obligations. WTO case law about certainty characterization represents a fairly intrusive approach, and thus represents a relatively low level of deference.

This book represents my personal views only.

Acknowledgements

Thank you to:

Professor Hilary Charlesworth, for her encouragement in helping me complete the thesis that formed the basis of this book.
Professor Philip Kunig, for making it possible for me to study for a semester at the Free University in Berlin.

Thank you to everyone working with Kluwer, for helping to improve this book.

Thank you Christiane for supporting me, and for encouraging me to start this project in the first place.

Prelude: A Brief History of International Challenges to Legislation

International challenges to legislation can trace their heritage at least as far back as the nineteenth century. The earliest signs are apparent in the activities of the first modern arbitral tribunals, following on from the Jay Treaty.[1]

An interesting question is why international challenges to legislation did not make an earlier appearance. The answer seems to be twofold; before the nineteenth century, there was probably not enough legislation to stimulate disputes, and there was certainly not a developed system of international adjudication. Far back in history, before the establishment of sovereign States, there was no regulatory legislation as such. What legislation there was tended to be ad hoc responses to particular problems, rather than comprehensive regulation along the lines of modern legislative schemes. In the feudal system, public power was distributed in such a way that there was limited scope for regulation by statutes. However, in the beginnings of the modern age, legislation began to play a more important role. International arbitration, in contrast, enjoyed some popularity in the Middle Ages.[2] Still, there was little scope for it to be applied to what scarce legislation existed. With the development of the modern state, increasing amounts of public regulation were achieved by statutes. Only at the end of the eighteenth century did the first modern codifications of the civil law world appear. The statutes of the common law world remained a sideline to the main business of the common law until quite recently. However, by the nineteenth century, legislation had become a central element of government in all major developed States.

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1. Treaty of Amity, Commerce and Navigation (1794), Martens R2, vol. 5, 640.
2. W. Grewe, *The Epochs of International Law*, trans. M. Byers (Berlin & New York: Walter de Gruyter, 2000), Ch. 3.

Coinciding with the increasing importance of legislation was an increased interest in international arbitration. The Jay Treaty[3] between Britain and the United States is considered 'the historical landmark from which the trend which was to lead to the establishment of a true international judicial system is usually dated'.[4] Interestingly, the Jay Treaty arbitrations included a legislation-related issue. The Second Jay Commission dealt with claims by British creditors for compensation for losses suffered as a result of US State legislation. That legislation released US debtors from British debts if the amounts of the debts were paid into the State treasury. The disputes were eventually resolved by a special treaty in 1802, under which the United States paid a bulk sum to cover the 'confiscated debts'.[5]

Following the relative success of the Jay Treaty, international arbitration began to take off in the nineteenth century.[6] This coincided with the increasing importance of domestic legislation. Inevitably, international disputes connected to domestic legislation began to arise. The famous *Caroline* dispute (1840)[7] was resolved by the enactment of the US Habeas Corpus Act of 1842, which was intended to prevent the recurrence of the problem.[8] The CSS (Confederate States ship) *Alabama* Claims Arbitration (1870–1871) also touched on legislative matters, as Britain claimed that its domestic legislation prevented it from complying with relevant international obligations.[9] A number of international disputes over legislation are also recorded for the early years of the twentieth century. A dispute between the United States and Japan in 1906 over California's discriminatory education policies was resolved by changes to Californian legislation.[10] Better known is the Panama Canal Tolls dispute. In 1913, Britain claimed that a US statute regulating tolls on the Panama Canal was incompatible with the Hay-Pauncefoot Treaty.[11] The dispute played out through exchanges of diplomatic correspondence and was noted in the *American Journal of International Law* of

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3. Treaty of Amity, Commerce and Navigation (1794), Martens R2, vol. 5, 640. See H. Schlochauer, 'Jay Treaty', in *Encyclopedia of Public International Law*, ed. R. Bernhardt, vol. 3 (Amsterdam: Elsevier, 1997), 1140, 4–7.
4. Zafrulla Khan, *ICJ Yearbook* (1971–1972), 130, quoted in Schlochauer, above n. 3, 6.
5. Schlochauer, above n. 3, 6.
6. Grewe, above n. 2, Ch. 6.
7. Moore, *Digest of International Law*, vol. 6 (1906), 30.
8. Noted in D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), 128.
9. This claim failed, as would be expected under the modern principle that a State cannot plead its domestic law as a defence to an international claim. See R. Jennings & A. Watts (eds), *Oppenheim's International Law*, 9th edn (Essex: Longman's, 1992), 84; S. Bhuiyan, *National Law in WTO Law* (New York: Cambridge University Press, 2007), 34.
10. As noted by the International Law Commission, 'Draft Articles and Commentaries on Responsibility of States for Internationally Wrongful Acts', *Report of the International Law Commission*, 53rd session, Doc. A/56/10 (2001), Commentary to Art. 32, para. 3.
11. *Panama Canal Tolls* case, Hackworth, *Digest*, vol. 6, 59; see also R. Ago, 'Sixth Report on State Responsibility', Doc. A/CN.4/302, in *Yearbook of the International Law Commission*, vol. 2, Part 1 (1977), 16, para. 34.

the day.[12] The dispute was eventually settled when the United States agreed to amend the relevant legislation.

These developments in State practices were accompanied by some deeper academic thinking about the relationship between international obligations and domestic legislation. Most notably, in 1899, the prominent German scholar Triepel wrote extensively about this relationship.[13] He distinguished between so-called internationally relevant domestic law and other law (internationally irrelevant domestic law). The basis of this distinction was as follows:

> Internationally relevant domestic law is all public law, the introduction or maintenance of which indicates the exercise of an international law authority or the fulfilment or violation of an international law duty of the State.[14]

From this distinction, Triepel built up a series of sub-classifications:[15]

(1) Internationally relevant domestic law was divided between domestic law in violation of international law and domestic law consistent with international law.
(2) Domestic law consistent with international law was further divided into domestic law allowed by international law and domestic law required by international law.
(3) Domestic law required by international law was further divided into directly ordered law and internationally necessary law. Directly ordered law is domestic law that international law expressly requires to be in existence (e.g., when a treaty expressly requires a particular kind of domestic legislation to be in place). Internationally necessary law is domestic law that is not expressly required by international law, but is nevertheless necessary to achieve the result required by international law (e.g., when a treaty requires the protection of aliens, but the only way to achieve this is to enact domestic legislation).[16]

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12. Editorial Comment, 'The Panama Canal Act', AJIL 6 (1912): 978; J. Latane, 'Panama Canal Act and the British Protest', AJIL 7 (1913): 17.
13. H. Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899). Writing in the context of the recently unified Germany, Triepel was concerned to rebut the argument that public international law (rather than domestic German law) regulated relationships between the German *Länder* (States) and the German federal entity. *Völkerrecht und Landesrecht* became a landmark in the evolution of the dualist theory of international and domestic law.
14. Triepel, above n. 13, 272.
15. *Ibid.*, 272, 299.
16. Triepel wrote that:

> [Internationally necessary law] is indeed established in consideration of an international duty, but it is a duty which in itself leads to something other than the formation of this legal rule. The State establishes the law here, because, if it did not do so, it would not, *under domestic law*, be in a position to fulfil an international duty, for example a duty to punish . . . thus, the legislator is moved to act not by *international law*, but by *domestic law*. In directly ordered law, the act that the State was ordered to perform by international law consisted in creating law; here the State puts itself in a position, with regard to *its own* law,

Although international lawyers have not taken up Triepel's terminology, his work has influenced all subsequent thought on this topic and has a continuing relevance for modern challenges to legislation. The timing of Triepel's work was excellent, as the following years showed a gradual growth in such challenges.

The period 1920–1939 saw the first regular trickle of cases involving challenges to legislation and an increased interest in the issue by States. In 1930, the Preparatory Committee of the Conference for the Codification of International Law (under the auspices of the League of Nations) raised in a general fashion the issue of legislation as breaching international obligations. The Committee asked a number of States to answer the following questions:

> Does the State become responsible in the following circumstances:
>
> Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?[17]

These questions were not answered in any authoritative way.[18] However, several States gave considered responses, suggesting that the responsibility of the State

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and through the new law, to perform an act ordered by international law. In the former case, the fact of not legislating or of repealing the law was itself already contrary to the law; in this case, the breach of the law results from the fact that the State has not performed the act which the law authorizes it to perform, or that it has performed the act which the State authorizes it not to perform.

Ibid., 299; cited in Ago, above n. 11, 14, at fn. 58. The translation is that given by Ago, with some minor changes.

The two kinds of 'domestic law required by international law' are the most puzzling of Triepel's concepts, but perhaps also the most rewarding for modern international lawyers. The critical question in many challenges to legislation is whether particular legislative provisions are truly *required* to meet international obligations, or are merely one of a range of measures available to a State in meeting its international obligations. The answer to this question is fairly easy in the case of directly ordered law, as the relevant international obligation will expressly set out the need for the legislation. However, such international obligations are fairly rare. The question of whether domestic legislation is internationally *necessary* law is thus of great practical importance. In setting this question, Triepel identified two factors of importance in challenges to legislation: first, the nature of what the international obligation requires, and second, the effect of the domestic legal system on the operation of domestic legislation. The second factor is of particular importance to modern international lawyers. It implies that the effect of the domestic legal system on domestic legislation needs to be considered on the international legal plane. As we will see in Ch. 8, these issues are central to what I call 'certainty characterization' of legislation.

17. League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference Drawn up by the Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners, Doc. C.75.M.69. 1929.V, 25, quoted in Ago, above n. 11, 6.

18. According to the International Law Commission's Special Rapporteur on State Responsibility at the time, the answers given to the question 'were bound to be influenced on this point by the rather superficial manner in which the question was drafted'; Ago, above n. 11, 15, para. 33. In any case, the resulting Codification Conference at the Hague in 1930 'ended in almost

in such cases would depend on the nature of the international obligations concerned.[19] In other words, the questions would have to be answered on a case-by-case basis.

Arbitral tribunals made a number of important decisions around this time. In the *Norwegian Shipowners* case (1922),[20] the tribunal dealt with US legislation requisitioning shipping-related material during World War I. The tribunal held that it could not entirely disregard the content of the legislation, but rejected the US argument that its reasoning should be governed by US statute law.[21] In the *Mariposa* case (1933),[22] the US-Panama General Claims Commission emphasized the value of an international court waiting for domestic implementation of legislation before resolving a challenge to the legislation.[23] It argued that judicial resolution of disputes should be deferred when possible, so as to give diplomats the maximum chance to resolve the issue by negotiation.

More important than arbitral tribunals in this period, however, was the activity of the Permanent Court of International Justice (PCIJ). This was the first major standing international court, and it had a wide jurisdiction (for the times) over specific and general international law issues. The PCIJ's activity concentrated on the international law relationships in Europe arising out of the post-war division of Europe.[24] Within that framework, it decided a number of cases concerning domestic legislation.[25] Of particular importance was the *Danzig Legislative*

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unmitigated failure'; R. Jennings, 'What Is International Law and How Do We Know It When We See It?', reproduced in M. Koskenniemi (ed.), *Sources of International Law* (Aldershot: Ashgate Publishing Company, 2000), 66.

19. Ago, above n. 11, 15, para. 33.
20. *Norwegian Shipowners (Norway/USA)*, UNRIAA, vol. I, 307 (1922), reproduced in part in L. Green, *International Law through the Cases* (Toronto: Carswell, 1978), 3.
21. Green, *ibid.*, 5. (The Tribunal quoted Lammasch, *Die Rechtskraft internationale Schiedssprüche* (1913), 37.) This argument arose from the wording of the Special Agreement setting up the Tribunal, which provided that 'The Tribunal shall examine and decide the aforesaid claims in accordance with the principles of law and equity.' The Tribunal interpreted the phrase 'the principles of law and equity' as referring to international law. The Tribunal concluded that there was nothing in the legislation that was contrary to international law, in the special circumstances concerned.
22. 6 RIAA 338, 341; see also Ago, above n. 11, 17, para. 35.
23. The Commission held as follows:

> The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy marketability of private property, render it valueless, and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.

United Nations, *Reports of International Arbitral Awards*, vol. VI. (United Nations Publication, Sales No. 1955.V.3), 340–341 (quoted in Ago, above n. 11, 17, para. 35).

24. H. Meyer, *The World Court in Action: Judging among the Nations* (New York, Oxford: Rowman & Littlefield Publishers, 2002).
25. For example: *German Settlers in Poland* (1923) P.C.I.J., Series B, No. 6; *Acquisition of Polish Nationality* (1923) P.C.I.J., Series B, No. 7; *Nationality Decrees Issued in Tunis and Morocco*

Decrees case, which Lauterpacht called 'the first instance of international judicial review of a national enactment in the sphere of fundamental human rights'.[26]

Following World War II, the PCIJ was replaced by the International Court of Justice (ICJ). In contrast to the PCIJ, the ICJ has heard only a limited number of challenges to legislation.[27] This can be explained by a number of factors. The greater number and diversity of litigating States (as compared to the PCIJ) may have removed a degree of political consensus that allowed such challenges to proceed. Furthermore, many disputes involving challenges to legislation – particularly in the fields of human rights and international trade – are not heard by the ICJ, but are heard by specialist tribunals instead. We will come back to these tribunals shortly, after examining some significant developments in the way international lawyers have viewed challenges to legislation since World War II.

International lawyers began to look more deeply at challenges to legislation when the International Law Commission embarked on its project on State responsibility for internationally wrongful acts.[28] Inevitably, the Commission's project touched on the issue of consistency between domestic legislation and public international law. In 1977, the second Special Rapporteur for the project, Ago, published his study of the subject.[29] Ago proposed a basic framework for looking at State responsibility for domestic legislation, based on the nature of the relevant international obligation. He wrote that:

> [T]he existence of two kinds of international obligations may be noted. In carrying out some of them, the State may employ only certain specific means; in carrying out others, it can choose from among a variety of means.[30]

Ago called the first kind of obligation an obligation of conduct, and the second kind an obligation of result.[31] The conduct/result distinction could readily be

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(1923) P.C.I.J., Ser. B., No. 4; *S.S. Wimbledon* (1923) P.C.I.J., Series A, No. 1; *Factory at Chorzów* (1928) P.C.I.J., Series A, No. 17; *Lotus* (1927) P.C.I.J., Series A, No. 10; *Free Zones of Upper Savoy and the District of Gex* (1932) P.C.I.J., Series A/B, No. 46; *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) P.C.I.J., Ser. A./B., No. 65; *Minority Schools in Albania* (1935) P.C.I.J., Ser. A./B., No. 64; *Phosphates in Morocco* (1938) P.C.I.J., Series A/B, No. 74.

26. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) P.C.I.J., Ser. A./B., No. 65. See H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1934 (reprinted 1982)), 107, at fn. 50.
27. Examples include *Rights of Nationals of the United States of America in Morocco* (1952) ICJ Reports 176 (concerning a particular application of a general statute) and *Application of the Convention of 1902 Governing the Guardianship of Infants* (1958) ICJ Reports 55. See also Bhuiyan, above n. 9, 128.
28. See International Law Commission, above n. 10.
29. Ago, above n. 11.
30. Ago, above n. 11, 4, para. 4.
31. To support this idea, Ago cited Triepel's distinction between directly ordered law and internationally necessary law, as well as the writings of the Italian lawyers Anzilotti and Donati (Ago, above n. 11, 4, para. 4, fn. 3). Ago had also put this idea many years before, in his pre-war Hague lectures (R. Ago, 'Le delit international', *Recueil des Cours* 68 (1939): 508).