

HERSCH LAUTERPACHT MEMORIAL LECTURES

Sovereignty, the WTO, and Changing Fundamentals of International Law

JOHN H. JACKSON



CAMBRIDGE

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PART I

Challenges to Fundamental Assumptions of International Law

Introduction: international law and international economic law in the interdependent world of the twenty-first century

I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it is a good thing that the sun comes up every morning. It does more good than harm. But even if I didn't much care for the dawn, there isn't much I could do about it. I didn't start globalization, I can't stop it – except at a huge cost to human development – and I'm not going to waste time trying. All I want to think about is how I can get the best out of this new system, and cushion the worst, for the most people.

Thomas L. Friedman, *The Lexus and the Olive Tree*¹

1.1 A time of challenge and changing assumptions

The last decade of the twentieth century and the first of the twenty-first century may not be the most challenging period for the generally accepted assumptions of international law, but this period will certainly rank high on any such list. The growing depth, speed of change, and adjustment required by “globalization,” accompanied by striking changes in government institutions, a remarkable increase in nongovernment activity and advocacy, an intense emphasis on market economic ideas, and a backlash against them, have all chipped away at the relatively fragile (perhaps already crumbling) theoretical foundations of the international legal system as it has been generally accepted for centuries.

The goal of this book, based partly on a series of lectures invited by and delivered at Cambridge University in 2002,² is to explore the legal “constitution” and practice of the World Trade Organization (WTO) in the context of international law generally, and as a major “case study” example of that general international law and its particular context of international economic law. It is obvious to most observers of these

subjects that the WTO, as surely the most intricate and profound legal component of international economic law, is linked in profound ways to general international law. Thus, it is not surprising that the WTO legal framework, and the slightly more general framework of international economic law, cannot escape the many challenges and other conceptual problems about international law which are currently the subject of great academic and official government debate in many parts of the world. These debates are manifested in the recent meetings of major international law societies such as the American Society of International Law (ASIL) and its counterparts in other countries,³ as well as in important governmental documents, reports, and activities, not the least of which include the wealth of writings, speeches, and other communications relating to the cosmic geopolitical controversies of the post-September 11, 2001, years at the United Nations and elsewhere.⁴ Questions being discussed include the legitimacy of many basic international law norms (especially those of customary international law), and the structure, efficacy, and creditability of important international institutions.

It is no surprise that international economic law (IEL), and the WTO in particular, is enmeshed in these broader issues of international law, but also that the subject of IEL, and its currently most important example, have practices and experiences that are extremely relevant to discussions in the broader context. Discussions probe the role of “sovereignty” concepts in the many tensions arising in the application of international norms which impinge, sometimes deeply, on nation-state government actions and responsibilities. These discussions also engage deep jurisprudential issues about the appropriate role of international juridical systems (such as the WTO dispute settlement procedures). Also subject to critical and disputed attention are issues of institutional structures, decision making, voting, criteria for membership, and obligation to perform the results of dispute resolution procedures. Many contemporary circumstances cast doubt on international legal “axioms,” such as the role of the Vienna Convention on the Law of Treaties.

These criticisms and concerns have been increasing for some decades, but appear to be more acutely relevant now, in both affirmative and negative senses, than they were during many other periods of recent history. The methodology of this book is to describe and analyze these criticisms and concerns, often expressed by many innovative and thoughtful minds,⁵ with reflections from this author based on academic, government, and

private sector experiences, and with particular reference to the practice and experience of international economic law.

The lessons to be learned from this material have implications relevant to many other areas of international law and its actual application in the affairs of the world and its widely varied societies.

It is not this author's claim that the thinking and concerns about international law are only recent, or that they are more acute now than they have been at any other time. History and other careful scholarship show various periods of momentous impact on international law by currents of thought,⁶ some instigated by colossal events such as World War II. But in a less cataclysmic way, though nevertheless likely to be equally profound, current world trends of recent decades have required the traditional institutions and patterns of thinking about general international law to confront concepts and opinions about those institutions and thoughts which have been stimulated or caused by such activity of the real world, and by thoughtful but often divergent reflections of participants and observers.⁷

Consider, for example, the decade and a half of transition from the twentieth century to the twenty-first century, roughly 1989 to 2002. On November 9, 1989, the Berlin Wall came down, ushering in several years of astonishing events resulting in a fundamental makeover of eastern Europe. A sense of optimism was widespread, with visions of economic benefits from the "peace dividend" dancing in people's heads. The United Nations faced challenges of localized turbulence, partly caused by the revision of the east European map. But in 1991 the United Nations faced and conquered an overt act of aggression perpetrated by Iraq. International law, with the United Nations as its protector, has seldom looked better. The United States, as the sole remaining superpower, seemed a welcome complement to the strengthening of world law and institutions, with NATO providing the military backbone. Europe was continuing a path towards greater unity,⁸ expanding its horizons partly to accommodate the remade map.

In economic matters, equally momentous events and optimism were prevalent. The largest trade negotiation ever held (GATT (General Agreement on Tariffs and Trade) Uruguay Round (UR)), was winding to its April 1994 close, fostered by the United States and the European Community. The UR results were nothing short of astonishing, extraordinarily fulfilling most of its agenda set at the 1986 Punta del Este launching conference. The results in some respects exceeded the original agenda, with the establishment of a new international organization – the World Trade

Organization – to take over in 1995 from the troubled GATT (1948–94). In a sense the new WTO completed the triad of institutions contemplated by the 1944 Bretton Woods Conference.⁹

Equally remarkable were the fundamental reforms made in the dispute settlement procedures which had evolved in GATT. Central to these reforms was compulsory jurisdiction over all disputes arising under the UR “covered agreements,” a totally new and unique Appellate Body and process, and virtually automatic adoption by the WTO of the dispute settlement reports, with not only an international law obligation to comply, but also a series of possible temporary “compensatory” measures designed the better to induce such compliance.¹⁰

In this context also, international law (or international economic law) seemed ascendant and strongly reinforced by the rule-oriented procedures set forth in the UR treaty.

Throughout this period, and indeed throughout the last half century, the world has changed in ways that required new approaches and greater abilities to adjust. As the twentieth century drew to a close, trouble began to cast longer shadows. The forces of globalization and interdependence posed increasing challenges to traditional concepts of nation-state actors in international affairs. International law, both in its general sense and the economic context, was profoundly tested.

Horribly brutal events in Somalia, Kosovo, and Rwanda posed further challenges to international law and institutions. Many commentators described these and other situations as failures of the United Nations (and its members). On the economic front, the Asian financial crisis of 1997–98 tested the capacities of the Bretton Woods financial institutions. The WTO found itself the target of strident and even violent criticism, as most poignantly demonstrated in Seattle in December 1999. World trade and other economic developments towards greater international interdependence demanded that societies and citizens adjust more quickly. These circumstances were seen to create greater risks to citizens and their lifestyle expectations, and this induced a sense of fear. With forces operating in the world beyond the control of any one national government, political leaders felt frustrated by their inability to deliver remedies to their constituents.

Soon after the turn of the millennium came the disaster of September 11, 2001. It was as if the 1989 fall of the Berlin Wall, and the 2001 fall of New York’s twin towers, were allegorical bookends to a transition period portending momentous changes in the world as it was previously understood, and in the expectations of both leaders and constituents about what was to come.

Law at any level of government or human institution will forever be affected by the “facts on the ground,” namely the circumstances of the societies or institutions which both desperately need legal norms and legal institutions, but also feel constrained by them when they seem out of date or otherwise unable to cope with changing “facts on the ground.” So it is no surprise that international law and institutions would be so challenged also.

It is one purpose of this book to explore many of these challenges, not with the unachievable ambition of “solving” or completely meeting them, but rather with the desire to set forth ways to think about them, which hopefully could lead in time to constructive solutions. In short, this book is more about queries than theories.

This opening chapter will next (in section 1.2) describe the current circumstances or situation “landscape,” which positions international law and with which such law must cope in order to be relevant and useful. Section 1.3 will briefly describe the implications for international law caused by the circumstances and situation, and outline some themes about these implications which will repeatedly occur and be addressed throughout this book. Finally, section 1.4 will describe the logical structure for this book – its “road map” to guide the reader’s thinking and understanding of this book’s goals. “Road map” is an appropriate term, because the logic of this book’s structure is a bit intricate, reflecting the complexity of the subjects concerned and their many varied relationships.

Of course, many of the considerations and thoughts dealt with in this purposely short book can only be presented in brief, “tip of the iceberg” form. The literature relevant to a number of the subjects found in this book is extraordinarily voluminous, with literally thousands of book titles available.¹¹ This book will not extensively catalogue or appraise this literature. Instead, it will endeavor to outline some of the key issues of “jurisprudence and constitution” related to the fundamental concepts of international law and international economic law. Many of the subjects so treated could each easily be the subject of an entire book (and some are, including books by this author).¹² The goal here is to focus on the broad landscape of the many issues, and how these issues interrelate to each other, both in logic and in fact. In that sense, the “road map” analogy is apt here also. It is this author’s hope that the reader will benefit from this approach and from the framework for thinking about the many issues and their relationships put forward. A limited number of footnotes will assist the reader to pursue more deeply many of the subjects indicated.

1.2 Facts on the ground: the world situation landscape – change, interdependence, globalization, adjustment

Every explanation of change in legal structures as part of societal institutions requires at least some appreciation of the exogenous facts which condition, constrain, and motivate institutional change. With reference to the topic of this book – fundamental change in international law – it will be obvious to most readers that the changes legal systems currently face are enormous, whether compared with previous decades or with previous centuries. A brief inventory of some of these changes which are most relevant to this book's topic is therefore necessary for laying the groundwork for discussion of the changing fundamentals of international law.¹

A complete inventory of such change could be very extensive, and will not be attempted here. But a few salient facts and conditions can easily be identified. To some extent, most of these circumstances can be understood within the broad and often ambiguous term "globalization."² It is a word indeed so ambiguous as to often lead to overuse and some misuse. Nevertheless, most persons know at least generally what is meant by the term. Not only does it often generate thought about broad, sometimes theoretical, and occasionally distant relationships and events, but the term can also evoke worries and fears as well as pleasurable thoughts closely relevant to the lives of individuals. "Globalization" can be blamed for economic distress such as job loss or insecurity, or credited with greater variety and stimulus for fuller lives because of increased economic efficiencies or cultural opportunities. The term clearly connotes conditions of interdependence in world economic and political relationships, which means that events or circumstances in one part of the world can have remarkably large and often swift effects in other distant parts of the world.

Likewise, these circumstances can force individuals and their association groups, including economic enterprises, to change strategies and thought processes which sometimes have gainfully guided their behavior over long periods of time. For individuals and their families who have been fortunate to enjoy a satisfying and relaxed lifestyle, these forced changes can be traumatic indeed. In some cases, expertise developed by individuals over a considerable portion of their lifetime is rendered relatively useless by such change, a situation bound to be challenging for governments and other social institutions. Leaders discover frustration in not being able to affect economic and social conditions in ways demanded by their constituents, and even sometimes find themselves made redundant by the rapidly shifting parameters of their lives.

In some contexts and some discussions the term globalization has been used to embrace two or more different concepts. On the one hand it refers to exogenous forces in the world over which humans and their institutions have little influence or effect. On the other hand it refers to directions of political and economic policies and institutions which are in some views misdirected and could be countered by appropriate human political, economic, or legal action. This would perhaps be termed "endogenous." To this author it seems that both definitions can be justified, but clarification is needed to indicate which meaning is utilized. Unfortunately the same word has these two meanings, or even a third, which would be to embrace both concepts. Even if exogenous, of course, globalization could be side-tracked by certain types of world events such as war, terror, or natural disasters.

Some observers feel that the inevitability of global forces has been over-emphasized.³ It is argued that various human endeavors including government action can actually affect and maybe counter globalization and its development, for better or worse. It seems true that governments (and markets) can in theory have important effects of this type, but it is also true that governments and human efforts can do harm. Furthermore, constraints of law, constitutions, markets, and culture (*inter alia*) may prevent governments and other human institutions from achieving effects which could be appropriate and advisable, even when they are in theory possible. Consequently, it seems that there are some aspects of globalization which are clearly exogenous (technology changes over the last half century, for example), and that other aspects may not be so fixed in theory, but in practice operate to impose great constraints on what can effectually be changed in the trends of "globalization." The problem then becomes not how to reverse globalization, or any part of it, but how to cope with it through policies which can capture the benefits of globalization while offsetting or ameliorating effects which are harmful to individuals or their families (or to world peace). The many concerns about globalization which motivate strident and even violent movements of opposition and protest, or which (as recently manifested in the European negative referenda votes) cause important political results clearly are linked to the downside potential of globalization as well as (and perhaps even more significantly) to widespread fears of those downside potentials. This clearly poses challenges which governments and other human institutions face in the current world of "globalization" in its broad and multifaceted meanings.

Despite the complexity and chameleon characteristics of globalization and its many subsidiary forms, certain concrete factors can almost always be considered on any list of causes. At least three of these factors are

primarily a result of technological changes over the last century, but especially during the last half century. A number of other factors which can then also be discussed are to a large extent derivative from the core three technological changes mentioned below.

Some writers have expressed the view that “globalization,” meaning relatively free movement across national borders and over long distances in the world of persons, goods, money, services, and ideas, is now no greater than at other periods such as the time at the end of the nineteenth century and the earliest decades of the twentieth century.⁴ Certainly there have been such periods of importance in commerce and migration, but the argument here is that due to new technological and other factors, the world we face today is orders of magnitude different, with a vast difference in kind, and not just degree, from that of a century ago. What are these factors? They include changes in transport, communication, and weapons. These and other changes are often seen as beyond the effective control of any government, and often require responses that cannot be effective when undertaken only by individual nation-states.⁵

Transport has dramatically changed because of technologies that have vastly reduced both the time and cost of moving goods (and some services) throughout the world. Today, the consumer in many societies (especially those that do not unduly restrain international commerce) has choices never before realized. Fresh foods of enormous variety are moved swiftly, often by huge freight airplanes, so that goods which cannot endure long journeys can reach eager buyers thousands of miles distant from the site of production.⁶ Other goods, such as high fashion items like women’s shoes, can be produced and moved to market before the fashions change. The cost of such transport is usually a much smaller percentage of the value of the items than was the case even several decades ago. Thus, whereas transport time and cost in 1900 was a substantial *natural* barrier to trade, giving some protection to the local producers against foreign competition, this protection is now often nonexistent.

Communication has also benefited from striking reductions in cost and time, due to technology changes hardly imagined a century ago. Ideas and even products (e.g. designs, advertisements, and documents) move at the speed of light between continents, often at a cost of mere pennies. A few keystrokes on a computer can move millions of dollars. Telephone calls from London to the United States are reputed to cost less than it costs to call from inner London to its suburbs, and the marginal cost of transcontinental telephone calls (not including the capital cost of the transmittal techniques) is often fractions of 1 cent.⁷ Of course, both of