



JOHN H.
JACKSON

THE JURISPRUDENCE OF
GATT
& THE
WTO

*Insights on Treaty Law and
Economic Relations*

The Jurisprudence of GATT and the WTO

Insights on treaty law and economic relations

John H. Jackson



PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York NY 10011-4211, USA
10 Stamford Road, Oakleigh, VIC 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2000
Reprinted 2000 (twice)

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Times 10/12pt [vN]

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

Jackson, John Howard, 1932–
The jurisprudence of GATT and the WTO/John H. Jackson.

p. cm.

Includes index.

ISBN 0 521 62056 2 (hardback)

1. General Agreement on Tariffs and Trade (Organization) 2. World Trade
Organization. 3. Tariff—Law and legislation. 4. Foreign trade regulation.

I. Title.

K4602.21999a

341.7'54—dc21 99-24202 CIP

ISBN 0 521 62056 2 hardback

Preface

In some ways it is a pleasure to be able to publish a selected portion of one's scholarly production. Partly this book responds to requests from various persons to make some of these articles more accessible through a collection such as this. Over several decades, some of these works were published in journals or volumes which are not as readily available in some libraries of the world as might be desired. Also, this book brings together a number of works on related topics to provide 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 subject matters.

However, the task of producing this volume proved much more difficult than anticipated. Primarily this was due to the difficulty of selection from an extensive list, which even when pared severely resulted in too much material for a reasonable volume. Thus, this volume can in no way be considered as a complete representation of my work. The initial selection criteria focused on works which were as relevant to scholars and policy-makers today as they were when first published. But even that list proved far too long, so other criteria had to be used to influence the final selection. An author's pride in the works he produced became an obstacle to overcome, and works which seemed sometimes too focused on relatively narrow issues (even though still relevant) were subject to exclusion, as were works which were relatively accessible to the likely audience having appeared in journals which would be most likely to be found in relevant libraries around the world. No attempt was made to make this volume a "complete" account of the subject matter in the sense of an embracing logical outline. Readers will need to address this author's books for such approach, and the selection for presentation here avoided material published in books which are separately available.

But as is often the case with scholarship developed over a period of time, some innovative and relatively unique ideas get expressed in shorter published works that do not necessarily fit into the scheme of a larger book manuscript. These thoughts thus also motivated some of the selection decisions made for this volume. A brief select bibliography of my work is

included at the end of this volume to lead interested readers to other material of mine, while also including in such bibliography all the works excerpted in this volume.

For the most part the works included in whole or in part speak for themselves. I have not tried to change or update these texts, which are reproduced as near to those as originally published as feasible (except for omissions which are noted with ellipses). The references in the footnotes have been updated to ensure consistency throughout the volume.

The book is logically divided into six parts. Each work presented or excerpted is a chapter for this book, no matter how short, and these chapters are grouped under the six parts according to subject matter that ties them together. I have written a short introduction for each part, to explain how the articles interrelate, and in some cases to provide some current background information to help the reader understand the particular chapters grouped under a part.

Part I is an introduction and overview designed to set the stage or context for the subject of international economic law. This text is drawn from a relatively recent article of mine, as described at the outset of Part I.

Part II contains subject matter about the General Agreement on Tariffs and Trade (GATT, predecessor to the WTO) and the peculiar origin of GATT which shaped its history so deeply.

Part III presents several articles on particular trade policy fundamentals. This part could obviously be much longer, but a reader interested in other trade policy issues will need to address various chapters in several of my books.

Part IV then collects several articles about the dispute settlement system, both under GATT and now under the WTO Agreement and texts. These procedures are in many ways the central legal feature of these institutions. No attempt is made here to give the details of the procedure or to cover all features both under GATT and under the WTO. Rather, the articles here probe certain fundamental jurisprudential issues relating to those procedures.

Part V turns to a broader context, and particularly deals with the relationship of international economic law (including the GATT and the WTO) to the laws and constitutions of nation-states. Again, the approach is to probe certain fundamental policy and jurisprudence issues, while not trying to explain the details of the national laws.

Finally, Part VI draws some conclusions and perspectives, partly in the context of the completion of the Uruguay Round of trade negotiations and the creation of the World Trade Organization, perhaps the supreme accomplishment of the Uruguay Round.

Acknowledgments

The author wishes to acknowledge the extraordinary and efficient efforts of Mr. William Naugle, the Faculty Manuscript Assistant for the Georgetown University Law Center. The diligence and efforts of Mr. Naugle, and the entire faculty support staff, were clearly an essential prerequisite for the completion of this manuscript. The author also wishes to acknowledge and thank the following publishers for granting permission to use the articles or portions of articles comprising this collection of work: Blackwell Publishers, the Institute for International Economics, the *Journal of World Trade*, Kluwer Law International, *Law & Policy in International Business* of the Georgetown University Law Center, the American Society of International Law, the British Institute of International and Comparative Law, the Michigan Law Review Association, and the *Washington & Lee Law Review* of the Washington & Lee University School of Law.

Chapter 1 is based on John H. Jackson, "Global Economics and International Economic Law" (1998) 1 *Journal of International Economic Law* 1–23.

Chapter 2 is based on John H. Jackson, "The Puzzle of GATT: Legal Aspects of a Surprising Institution" (1967) 1 *Journal of World Trade Law* 2, 131–161. I wish to acknowledge the assistance of the University of California School of Law, Berkeley (where I was Professor of Law until the summer of 1966), in providing resources and leave time for conducting research on the law of GATT. I also wish to acknowledge the cooperation of various members of the GATT Secretariat in Geneva, Switzerland, as well as members of various delegations there.

Chapter 3 is based on John H. Jackson, "The Birth of the GATT–MTN System: A Constitutional Appraisal" (1980) 12 *Law and Policy in International Business* 21–58. During 1978–1979, I was legal consultant to the US Senate Finance Committee on matters relating to the implementation of the Multilateral Trade Negotiations Agreements. Substantial portions of this article were drawn from a report I made to the Senate Finance Committee.

Chapter 4 is based on John H. Jackson, "GATT Machinery and the Tokyo Round Agreements" in William R. Cline (ed.), *Trade Policy in the 1980s* (Institute for International Economics, Washington, DC, 1983), chapter 5.

Chapter 5 is based on John H. Jackson, "Equality and Discrimination in International Economic Law: The General Agreement on Tariffs and Trade" in *The British Yearbook of World Affairs* 1983 (London Institute of World Affairs, 1983), 224–239.

Chapter 6 is based on John H. Jackson, "Consistency of Export-Restraint Arrangements with the GATT" (1988) 11 *World Economy* 4, 485–500. The author wishes to acknowledge the able assistance of Thijs Alexander and Ross Denton, both postgraduate students in law, from the Netherlands and the United Kingdom, at the University of Michigan during 1987–1988.

Chapter 7 is based on John H. Jackson, "Perspectives on Countervailing Duties" (1990) 21 *Law and Policy in International Business* 739–756.

Chapter 8 is based on John H. Jackson, "Regional Trade Blocs and the GATT" (1993) 16 *World Economy* 2, 121–130. The original article was partially adapted from a paper delivered at a conference in Buenos Aires, Argentina, July 1992. Comments from an anonymous referee are gratefully acknowledged.

Chapter 9 is based on John H. Jackson, "The Jurisprudence of International Trade: The DISC Case in GATT" (1978) 72 *American Journal of International Law* 747–781.

Chapter 10 is based on John H. Jackson, "The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections" in Niels Blokker and Sam Muller (eds.), *Towards More Effective Supervision by International Organization: Essays in Honour of Henry G. Schermers* (Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1994).

Chapter 11 is based on Steven P. Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 *American Journal of International Law* 2, 193–213. This article was originally adapted from a chapter prepared for a symposium book edited by Professor Ulrich Petersmann, as part of a project by the International Trade Committee of the International Law Association.

Chapter 12 is based on John H. Jackson, "The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation" (1997) 91 *American Journal of International Law* 1, 60–64.

Chapter 13 is based on John H. Jackson, "Dispute Settlement and the WTO: Emerging Problems" (1998) 1 *Journal of International Economic Law* 3, 329–351. This article was a revision and extension of a manuscript first presented at the WTO conference in Geneva on April 30, 1998, commemorating the fiftieth anniversary year of the GATT.

Chapter 14 is based on John H. Jackson, "The General Agreement on Tariffs and Trade in United States Domestic Law" (1967) 66 *Michigan Law Review* 249–316. I am indebted to Walter Hollis, Legal Advisor's Office, United States State Department, who generously read the manuscript of this article and made a number of useful suggestions. I am also indebted to members of the GATT Secretariat in Geneva for assisting my general research into GATT for this article.

Chapter 15 is based on John H. Jackson, "United States–EEC Trade Relations: Constitutional Problems of Economic Interdependence" (1979) 16 *Common Market Law Review* 453–478. During 1975–1976 I was a Rockefeller Research Fellow, residing in Brussels, Belgium, for the purpose of observing the legal affairs of the European Economic Community related to external relations, and I wish to express my appreciation to the Rockefeller Foundation for that assistance.

Chapter 16 is based on John H. Jackson, "Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States" (1984) 82 *Michigan Law Review* 1570–1587. A preliminary and summary version of this article was presented by invitation at a panel chaired by Professor Robert Baldwin of the University of Wisconsin, at the annual meeting of the American Economic Association in San Francisco, December 27, 1983.

Chapter 17 is based on John H. Jackson, "United States" in Francis G. Jacobs and Shelley Roberts (United Kingdom National Committee of Comparative Law) (eds.), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987), chapter 8. I wish to acknowledge the able assistance of Mr. P. Van den Bossche, a graduate student in the law from Belgium, in the preparation of this paper and the documentary support of its text.

Chapter 18 is based on John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86 *American Journal of International Law* 2, 310–340. I was General Counsel for the Office of the US Trade Representative in the mid-1970s. Some of the arguments and reflections in this article are derived from this and similar experience. I would like to express gratitude for the counsel and advice on various drafts of this article from Professors William Davey, Francis Jacobs, Richard Lauwaars, Meinhard Hilf, Marc Maresceau, Mitsuo Matsushita, Henry Schermers, Eric Stein, and Pieter van Dijk. In addition, I would like to express my gratitude for information received from Carlos Bernal of Mexico; Thomas Cottier of the Government of Switzerland; Professor Yuji Iwasawa of Osaka City University, Japan; Professor Autar K. Koul of the University of Delhi, India; and Matthew Schaefer (regarding Australia). I would also like to recognize the able research assistance of Yves Renouf and Daniel Nelson, students at the University of Michigan Law School.

Chapter 19 is based on John H. Jackson, "The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results" (1997) 36 *Columbia Journal of Transnational Law* 157–188.

Chapter 20 is based on John H. Jackson, "The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?" (1995) *The World Economy* 11.

Chapter 21 is based on John H. Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?" (1992) 49 *Washington and Lee Law Review* 4, 1227–1278.

Chapter 22 is based on John H. Jackson, "Global Economics and International Economic Law" (1998) 1 *Journal of International Economic Law* 1–23.

Abbreviations

DSB	Dispute Settlement Body
DSU	Understanding on the Settlement of Disputes
FCN	friendship, commerce and navigation treaty
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICITO	Interim Commission for the International Trade Organization
IEL	international economic law
ITC	International Trade Commission
ITO	International Trade Organization
MFN	most favored nation
MTA	multilateral trade agreements
MTN	multilateral trade negotiations
MTO	multilateral trade organization
NAFTA	North American Free Trade Agreement
NTB	nontariff barrier
PPA	Protocol of Provisional Application
SII	Structural Impediments Initiative
TPRM	Trade Policy Review Mechanism
TRIPS	trade-related intellectual property
VER	voluntary export arrangements
VRA	voluntary restraint agreements (or arrangements)
WTO	World Trade Organization

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Part I

A view of the landscape

An essay of mine written for the first issue of a new *Journal of International Economic Law* sets out the context of this subject matter and develops some of the policy objectives which influence this subject. The first part of this essay neatly summarizes my views which would introduce this volume. The last part of this essay, by contrast, neatly summarizes some of my current views about the ongoing direction of the world trading system and the WTO. This last part thus provides a nice ending to this volume, and readers will find that at the end of Part VI, so that this single essay becomes the “bookends” to this endeavor.

1 Global economics and international economic law

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 favorable to principles of market 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 governmental mismanagement and sometimes corruption; worries about the power of nongovernment 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

* This chapter is based on John H. Jackson, “Global Economics and International Economic Law” (1998) 1 *Journal of International Economic Law* 1–23.

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 fulfillment 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-neighbor 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.”¹ But another astute economic writer has noted: “All economics is international.”² 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 empirical data on which to make judgments.³ 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

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

² Peter F. Drucker, “Trade Lessons from the World Economy” (1994) *Foreign Affairs* 99.

³ See, for example, the 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.

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 fulfill the NAFTA international obligations. This was true for the NAFTA investor protection rules, and also in relation to environment and labor standards.⁴ World Trade Organization provisions, perhaps particularly those in the intellectual property agreement⁵ which require governments to fulfill certain standards regarding their court systems, and also some of the detailed agreements relating to services (especially financial services or telecommunications),⁶ 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 4⁷ 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 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.”

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

⁵ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature April 15, 1994, Marrakesh, Morocco, 33 ILM 1140–1272 (1994) (hereinafter WTO). See WTO Annex 1C, “Agreement on Trade-Related Aspects of Intellectual Property Rights.”

⁶ WTO, Annex 1C (TRIPS) and 1B (Services).

⁷ Parts 4, 5, and 6 of this article are at the end of this volume in chapter 22.