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Commentaries on **Sovereignty, the WTO and Changing Fundamentals of International Law**

by John H. Jackson

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Sovereignty is certainly the cornerstone 'par excellence' of modern international law, as well as more widely, of the contemporary international political order. There is no doubt, however, that the principle of sovereignty has been facing major challenges since the 1940s and even more since the 1990s. The foundations of the international legal system, as it has been generally accepted for centuries, have been thoroughly shaken. The international scene is more diverse. States retain a pre-eminent role, but they no longer have an absolute monopoly of interest articulation and action on the international scene. International organizations increase in number every day and are involved in an ever-larger number of activities. Non-state actors, as numerous and different as they are, have become holders of rights and obligations under international law. In many fields, non-state actors are important players in designing and implementing policies.

John Jackson's latest opus offers us a thrilling overview of the changes that have taken place with respect to the concepts of sovereignty and cooperation. This is done through the prism of international economic law, and more specially of WTO law, considered as 'the central illustration of legal jurisprudential developments influenced by phenomena of our contemporary world' (p. 19). Complexity has been introduced through the globalization of markets, communications and transports. Reactions and responses to this phenomenon have to be provided. Institutions and rules are evolving. The issue is whether these institutions and rules address all the new needs, and, if not, what should be their profile.

Reading John Jackson's book gives one the impression of entering into the mindset of a world-renowned expert who has traveled the world of international law for a long time. The reader is progressively introduced to the diverse actors, norms and institutions, and is told about the changes as well as their drawbacks. The book 'focuses primarily on what might be thought of as the core of sovereignty – 'the monopoly of power' – dimension' (p. 59). John Jackson's viewpoint is that this concept has been replaced by the one of 'sovereignty-modern', involving departures from the traditional sovereignty concepts (p. 77). He tests this departure in what he considers to be the real world, i.e. the WTO. The journey starts with the birth of GATT and the conundrums

that surrounded its entry into force, with an assessment of its increased legal and institutional maturation, and the establishment of WTO in 1995. He emphasizes the capacity of the organization to adapt itself; the negotiations on the accession of China are an example. The organization's pragmatism is also underlined. Jackson describes all this with refinement, as an experienced analyst, without acknowledging however his key role in influencing the negotiations in the Uruguay Round in the direction of the creation of the WTO as institutional framework.[1]

Jurisprudential developments are carefully analyzed. The role played by the dispute-settlement system and its contribution to the clarification, not to say the development of GATT/WTO law, is a crucial feature of the WTO, referred to by John Jackson through the dichotomy 'law making/law applying' (p. 228). Indeed, there is considerable difficulty in practice in confining a judiciary-type dispute settlement body's role to that of the 'mere' articulation of the law, of avoiding the progressive development, if not creation, of the law. The relevance of this question is highlighted by the fact that it arises in the context of a legal order in which one is increasingly seeing the emergence of discrete areas of the law, each requiring reconciliation with the other. The decisions of the WTO Appellate Body with respect, for example, to the relationship between trade and the environment and the role and place of amicus briefs in the dispute settlement procedure, all suggest the need for a forum to solve such public policy issues. Relying on the Shrimp–Turtle case,[2] Jackson stresses – correctly – 'the idea that non trade-policies must be considered in connection with trade policies of the WTO' (p. 189). The core of environmental policies has to be integrated into the WTO policies, at least by means of interpretation. This decision of the Appellate Body in particular has highlighted the need to address WTO law within the broader framework of the international legal system. Jackson expresses his belief that WTO law is part of international law and this brings him to consider that non trade-policies should be taken into account by the WTO. However, the WTO Appellate Body may have gone as far as it can. There are limits to what it can do. Its contribution should be put against a political background in which the sovereign states through the competent political organs of the WTO are not really playing their proper role. There is a risk of political stalemate and constitutional disorder. Jackson addresses these issues in a somewhat indirect manner, when he states that 'indeed the relative success of the DS system, when compared sometimes with the apparent paralysis of the diplomatic/political side of the WTO, has led to some concerns that this power imbalance could be detrimental to the systemic longevity of the WTO and the trade institutions' (p. 207). It would have been interesting to hear in a clearer manner the call of John Jackson for more concern about this constitutional challenge to the WTO.

John Jackson shows strong interest for the concept of the 'responsibility to protect' as framed by the International Commission on Intervention and State Sovereignty (ICISS)[3] as a means for departing from the norm of non-interference in situations of

1 On that role, see Debra Steger, 'The World Trade Organization: A new Constitution for the Trading System', in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Trade Law*, Essays in Honour of John H. Jackson, The Hague: Kluwer, 2000, pp. 135–153.

2 *US – Imports Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, adopted 6 November 1998.

3 *The Responsibility to Protect*, International Development Research Centre, Canada, 2001.

grave and massive violations of human rights. He does however not go down the path of applying it to situations of grave economic disturbances (although they might cause grave breaches of human rights). It might have been worth exploring the role the international community, through the WTO and international financing institutions (IFIs), would be able to play in case of grave deficiency of a State in assuming its responsibility to protect its population. One may ask what the 'responsibility to protect' would actually entail at the economic level. This would be interesting to explore in relation to the requirements for compliance with human rights. Another issue is to determine what should be the attitude of WTO and other economic organizations towards a 'failed state'? Isn't it time that the WTO co-operates with the UN, specially the Security Council, in times of peace making and peace building? The recently established UN Peace Building Commission would be a good institutional starter for such collaboration, as is already the case with the Bretton Woods institutions.

Rather John Jackson takes the road towards 'sovereignty-modern', which he defines as sovereignty 'in slices' (p. 217). According to him, there is a need for 'a disaggregated analysis' (p. 260) of the concept of sovereignty in the context of new power allocations between the international level, the regional level, the nation-state level, a sub-federal unit or even a city level. The issue of power allocation turns around the crucial twofold dialectic, increased cooperation versus subsidiarity, and global membership versus uniformity of economic systems. Jackson calls for 'measures that can appropriately reconcile, or at least balance, the competing goals of desirable coordination and competition, while providing "policy space" to individual national economic (and cultural) systems, possibly through rule structures which also engage "variable geometry"' (p. 233). Is the WTO appropriately equipped to make this happen?

There is a need to speak of complementarity to respond to the challenges of a globalized and interdependent world. This complementarity could be implemented in two directions: on the one hand, it implies 'externalizing' the regulation of some of the 'trade and …' issues outside the WTO; on the other hand, it calls also for 'internalizing', within the WTO, regulatory approaches which have been negotiated in other fora. As said earlier, the case law of WTO Appellate Body has laid the foundations for such an approach. Some WTO agreements contain explicit references to international norms and standards adopted in other fora. Time is ripe for speaking in stronger terms of mutual supportiveness and mutual coherence between the *corpus juris* of the WTO and other sets of norms and standards. The WTO should not be considered omnipotent and is in need of partnership.

Here the issue of the relationship of the WTO with other international organizations comes to the fore. Institutional cooperation is necessary, but which type of cooperation? The report of the WTO Eminent persons' group, to which John Jackson belonged,[4] has stressed the challenge of better cooperation. Obviously this is not only the WTO's task, but that of all concerned institutions. Sovereignty is intrinsically linked to this institutional framework and its exercise depends heavily on its proper functioning. Jackson's firm belief in international institutions goes hand-in-hand with respect for 'good governance' principles and standards. The latter remains an open field for

4 J. Jackson was appointed in June 2003 by the WTO Director-General, Dr S. Panitchpakdi, to the WTO Consultative Board, composed of eight eminent persons, and chaired by Peter Sutherland.

prospective thinking, specially in light of multi-level allocation of power scheme and the need for checks and balances. Its development would contribute to structure the 'constitutional approach' as advocated by Jackson.

In sum, one cannot but admire the wisdom ('sagesse') of Jackson as one of founding fathers of the GATT/WTO law discipline, as an insider who played an important role in the building of the WTO and as an eminent expert who has taken the measure of evolving political, economic and legal challenges the WTO has to cope with. A wisdom that one would like to continue to benefit from, while engaging with Jackson in an even more direct manner.