

## REFLECTIONS ON THE THREE DECADES OF INTERNATIONAL TRADE AND INVESTMENT LAW- AND BEYOND

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SUMMARY: I. *Introduction.* II. *What happened to the trade and investment structures immediately after world war ii?* III. *From diplomacy to law- the wto.* IV. *Why has the WTO had limited succes?* V. *Shift in economic and political power.* VI. *A geographic solution.*

### I. INTRODUCTION

In the field of international trade and investment law over the last 30 years, the most outstanding event has been the establishment of the World Trade Organisation (WTO) in 1995. This new legal institution is Janus-like in that it is the actualisation of the last piece of the wartime architecture of the Bretton Woods deliberations. The recent accession of Russia to the WTO membership now means that 97% of world trade is now regulated by the WTO. Bretton Woods also produced the International Bank for Reconstruction and Development (now the World Bank) and the International Monetary Fund (IMF). These three institutions together, as regulators of international commerce, were designed to avoid the policy errors of the first half of the twentieth century, to fortify the chances of avoiding global conflicts or World Wars, and to develop a new jurisprudence of international commercial law. The United Nations at the same time would ensure a new public international law of peace, as well as outlawing war. The WTO can look back over 50 years of incremental development, and forward to a new and expanding field of legal influence through regulation. The second half of the twentieth century, however, modified these expectations dramatically.

The business of the WTO is trade law and practice, not investment. The second half of the 20<sup>th</sup> century saw a huge increase in the volume of

investment, especially foreign investment in the territory of a sovereign state not that of the investor. Although investment law is a product of domestic law and treaty, as is trade law, the lack of a global institution has meant that there are still no globally agreed rules, and especially that there are no minimum standards. There are significant institutions that have major if partial influence, such as the World Bank and its offshoots, the Convention on the Settlement of Disputes between Investors and host Governments (ICSID), but these do not have the compelling force of WTO membership, and their activities have been even more contentious.

What is interesting is the way in which the institutions created to meet a particular need or objective, have managed to survive and reinvent themselves, even when the need has been fully met. This is particularly true of the IMF and the World Bank, but the WTO itself is the product of survival and reinvention.

Built into the structure of these institutions, there is in every case, a peculiar basis of a blend of law and economic or political theory. Beyond that intrinsic ideology, the last 30 years and the 30 years before that have seen a massive change in external circumstances affecting trade and investment. These challenge the fundamental assumptions that underlay the creation of WTO and the different expectations that exist of investment law and regimes. Looking into the future, what is it that we can expect at the global level of the law of trade and investment? The lawyer's answer, perhaps a limited one, is to say that maybe the answer to the future lies in the past.

## II. WHAT HAPPENED TO THE TRADE AND INVESTMENT STRUCTURES IMMEDIATELY AFTER WORLD WAR II?

First, the rapid emergence of the cold war between the superpowers of the United States (US) and the Union of Soviet Socialist Republics (USSR) destroyed the alliance that was going to underpin the International Trade Organisation (ITO). The ITO, the third institution of the Bretton Woods triumvirate, was designed to regulate the whole field of international commerce, including trade, investment, insurance, taxation, and other financial transactions. What was left was the General Agreement on Tariffs and Trade (GATT) made by 23 nations in 1947 to secure their multilaterally negotiated tariff concessions in the interim until the ITO came into being.

Secondly, the former colonies of the States on both sides of World War II (WWII), demanded and obtained independence through armed conflict or agreement or imperial collapse or withdrawal, beginning with peace ne-

gotiations after WWII and continuing until the end of the century. This unplanned and unexpected series of events seriously disturbed the balance of trade that had existed in the colonial era. It also changed the patterns of resourcing and investment from the pre-war imperial models, aided by the need to pay for the costs of the war. The mood of anti-colonialism which accompanied these changes is still a potent force of suspicion and distrust in international commercial law. Developing and least developed States are now majority stakeholders in all international institutions. This has led to a new jurisprudence quite different from pre-war views.

This last third development is still of uncertain scope. It is the modification of the older international law of peace on the powers of nation States in relation to their own citizens, their own resources, and the persons and property of foreigners within their territory. Whereas it had been the case for several centuries that treaties made by States were binding, these had for the most part, in times of peace, been enabling rather than restrictive. These treaties increased in number from the middle of the nineteenth century with industrialisation and the expansion of imperial trade, frequently conducted by sea. However, the emergence of human rights law, on a global scale, was the beginning of a reorientation, with the result that States were constricted in the exercise of their powers in their own territories by external agreements. The fields of environmental law and labour law were also enlarged internationally. Minimum international standards and procedures were agreed in public health. These were necessitated and accelerated by the increased mobility of persons, and by scientific developments which meant that drugs could alleviate or eliminate diseases that had previously been tolerated. The Black Death that had scourged Europe in medieval times now had twentieth century counterparts that were of global significance.

All these things impacted on international commerce. What had been the province of international diplomacy now became subject to international legal processes.

### III. FROM DIPLOMACY TO LAW- THE WTO

The agreements reached to constitute the WTO and its organs and powers are in the form of treaties agreed by each Member as a single undertaking. The WTO constructs the regulatory regime consisting of rules of law governing the conduct of Member States in measures relating to international trade in goods, in services, and in intellectual property rights. It supplies a dispute resolution regime based on arbitration and consulta-

tions, and it has an effective mechanism for enforcement. In this respect, it is unique. It also provides a surveillance mechanism for Member States to see whether they are operating in accordance with their legal obligations. This is a mixture of confession and avoidance, and of exhortation, and occasionally praise.

The rules relating to regulation of trade in goods were built up over 50 years through institutional interpretation of its own rules, the results of disputes between Members, occasional codification, and a joint decision to accept a favourable regime of special and differential treatment for developing countries. This regime established global standards, but gave developing countries time to adopt these standards without undue harm to their economic and social fabric.

The constant objective was the liberalisation of international trade.

This was to be achieved by eliminating trade restrictions on the import of goods, by dealing with trade from every Member state without discrimination both internally and at the borders. The GATT also continued with its original objective of providing a forum for multilateral negotiations for reductions of tariffs. It embodied the economic theory of comparative advantage in its opposition to trade embargoes and quotas, as well as the toleration of tariffs as a transparent instrument but only a temporary one. The validity of the objective was beyond question.

The WTO extended regulation to trade in services as well as goods through the General Agreement on Trade in Services (GATS). This is a novel and open ended concept, and reflects the increasing wealth that now comes from cross-border services delivery as well as from cross-border trade in goods. The instrument is also an interesting development, because the scope of regulation can be increased by a series of protocols to embrace new areas of services not previously agreed. Furthermore, it coincided with an increasing period of privatisation of previously delivered services from government, as well as the sharp decline if not collapse of socialism.

Because the GATS covers the delivery of services by nationals, including corporations, of one Member state in the territory of another Member State, it creates an interesting relationship with investment as opposed to trade. There is no global regulation of investment. The WTO has no powers in this field of law, except where it is directly linked to trade. There are no globally agreed minimum standards, despite the fact that there is a great number of treaties that now regulate cross-border investment as between States, either bilaterally or regionally. There is only one global body for investment dispute resolution, the ICSID, the product of a World Bank initiative in the 1950s. There are many ad hoc arbitrations of investment

disputes. This is a process described by some as the privatisation of public international law, with decisions made by unelected and unaccountable private citizens, enforceable through a network of treaties. It is very controversial whether this can produce a coherent global body of the law relating to investment. Had the ITO come into existence as planned, investment would have been part of its remit.

The scope of coverage of the GATS is determined by the agreement of WTO members in negotiations. It expressly does not cover services delivered by or on behalf of government. But otherwise it is entirely up for decisions by States, and there is a great variance in the range of areas agreed.

The GATS does establish a principle of transparency as a universal obligation. So any measure, whether a law, regulation or policy that affects trade in services, must be published in an accessible form and forum. In addition, and this is a sleeper issue, even where the services are not included in those agreed, each State must ensure that its system of regulation of services is no more restrictive than necessary. The judgment about necessity is not left to the Member State alone.

The last major WTO agreement is Trade Related Intellectual Property Rights (TRIPS). This differs from GATT and GATS, in that it creates minimum international obligations in protecting IP rights, in addition to those arising out of the series of IP Conventions going back to the 19<sup>th</sup> century. This is not aimed at liberalising trade, but at protecting intellectual and industrial property rights. It was largely negotiated by developed countries with little input from developing countries. It is the most contentious part of the WTO.

#### IV. WHY HAS THE WTO HAD LIMITED SUCCESS?

One might have thought that this logical and negotiated structure would develop to tackle and eliminate problems arising from trade. But it has been buffeted by a number of internal and external pressures which have prevented the WTO from reaching its fulfilment. Considering these issues is ironic, given that, since the accession of Russia to membership of the WTO finally accomplished in 2012, 97% of world trade is regulated by WTO procedures. Russia is also the last of the G20 nations to become a member of the WTO.

The first is timing. What was contemplated in the Uruguay Round negotiations was not trade conducted by electronic means, or telecommunications of the sophistication of the present. The impact of the internet on

trade puts a strain on many of the carefully negotiated agreements, as it has in many areas of international transactions. The rules were not designed to deal with this kind of trade, and the impact on crossborder trade in services in particular is substantial. What always made tariffs an effective and attractive tool of regulation was the existence of a physical territorial border where tariffs could be charged. In the WTO dispute of US Gambling, the US realised all too late that it had entered into an obligation to permit cross border electronic gambling without discrimination, in circumstances where it had power to deal with domestic gambling enterprises in accordance solely with domestic law and policy.

The second change is the loss of persuasive power of the belief in the Washington consensus. This belief that liberalisation of trade was an intrinsic part of achieving democracy was the political counterpart of comparative advantage in terms of WTO ideology. It underlies the whole Trade Policy Review mechanism, because that provided the score card that member states were supposed to meet.

The third aspect is loss of sovereignty. It has always been conceded by States that treaties represented a diminution of sovereignty, but entering into treaties was always a voluntary process, at least in times of peace. The WTO treaties do not merely set up rights and obligations, but also create a complex and organic structure that is not within the control of any member state. Withdrawal is always possible, but is unlikely to occur. So decisions that would normally be within the constitutional power of any State are constrained in ways that would not perhaps have been foreseen. In particular, judgments of State in relation to the health and welfare of their citizens are no longer merely discretionary within political and practical limits but, if restrictive of trade, must be justified by acceptable scientific research. Again this is a matter of necessity.

## V. SHIFT IN ECONOMIC AND POLITICAL POWER

The processes of international trade have dealt with many examples of unequal power. There has been the dominance of economic power held successively in the 20<sup>th</sup> century by the UK, the US, and now it is argued that China and India will succeed to this mantle. Since the 1960s, there have been multinational corporations of immense economic power, greater than many nation States. Probably some 75% of world trade is handled by such corporations.

However, in the gap left in relation to investment law, these players have been dominant for most of the 20<sup>th</sup> century. Because there are no global standards, and the law is negotiated ad hoc, economic power has created a consensus that the object of investment law is protection of the investor. Where that investment is cross-border, then it is protection against a host state and its policies. The latest addition to the ranks of the powerful is the sovereign wealth fund investor. This pits one state against another, and tests out the strength of any system of treaties. The absence of any mitigation through a balance of interests is not there in the treaties. Curiously the other impetus for rethinking the objective of investment law is that many developing countries, fear of which previously caused a call for protection are now investors in their own right seeking protection.

Finally, one needs to consider the demonstrated loss of power of states to show political will to create new solutions to the risks that affect international trade and investment, arising from the global financial crisis of the last few years. This is seen in the failure of the G20, the most powerful economies in the world, to agree to effect solutions to the current situations of sovereign debt. It is an interesting contrast to look to the similar crises of the 80s and 90s, where there was no lack of leadership in suggesting solutions.

The other conspicuous failure of political will is in relation to the failure of the Doha Round of negotiations to agree new trade concessions and amendment of some constitutional aspects of the WTO which have not been effective or acceptable in practice since 1995, or which could not be finally determined during the Uruguay Round. The great challenge facing the WTO is how it deals with a membership that is now largely organised into regional trading blocs rather than single national membership. Those trading blocs are not only extending the WTO rules on trade, but moving into investment activities as well, an impetus largely fuelled by the failure of political will to make changes to the WTO in operation. The result is that much of the convergence reached in the WTO agreements is dissipated by the effect of bilateral and regional trading and investment agreements, leading to the spaghetti or noodle bowl effect of the current law. However much one may like pasta, and however much lawyers earn in fees for advice, this is hardly an acceptable situation.

## VI. A GEOGRAPHIC SOLUTION

It may be that the answer lies in moving the problems to a new locale. If the central point of location is the presently the north Atlantic ocean,

what happens if we change this to the Pacific and Indian oceans, and the weight of economic and political power moves out of Europe and North America to China, India, South America and Africa. Alliances such as the BRICS (Brazil, Russia, India, China and South Africa) may begin and finish with different needs, views and objectives. New trade and investment agreements, such as the proposed enlargement of the membership of the Trans-Pacific Partnership, may have a similar effect, or they may just be the last hurrah of the present regime.