

The following are extracts from two works of this author that are relevant background for some of the remarks that he will be making:

Item 1: Jackson, John H., "The Changing Fundamentals of International Law and Ten Years of the WTO," *Journal of International Economic Law* 8 (2005): 3-15.

Part I: The State of International Economic Law - 2005

The Changing Fundamentals of International Law and Ten Years of the WTO

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We can now look back over the decade just completed and reflect on the remarkable developments of this recent ten year period, both as to the subject of international economic law (IEL), and to reflect on the broader context of international law in which IEL must operate. Some have described this period as embracing developments which can be described as a "paradigm shift" of thinking about the fundamentals of international law, and if that description is accurate it must also suggest very great implications for the subject of IEL.² Several other articles in this *JIEL* issue, the first issue of the eighth year of *JIEL*'s existence, will also inform the reader about the "state of international law" and should be particularly noted.³

To establish the landscape for this essay however, a few words of history are useful. The international institutional developments of the immediate post World War II decade were extraordinary for their creativity, much of which related to economics. These developments included the World Bank, International Monetary Fund, GATT in lieu of a failed attempt to create an International Trade Organization, and many other international organizations as well as initiatives such as the Marshall plan. This creative period also included the establishment of the all important United Nations, and a number of other international organizations and major treaty developments regarding human rights, all of which were truly a paradigm shift for the subject of international law. These developments also amply demonstrated, as was much articulated at that time, the important links between economic affairs and

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² Readers interested in a more thorough discussion on this and sovereignty issues may wish to read John H. Jackson, *Sovereignty Modern: A New Approach to an Outdated Concept*, *AMERICAN JOURNAL OF INTERNATIONAL LAW* 97 (October 2003): 782-802.

³ See other articles in this issue. See also, Jackson, John H. *Global Economics and International Economic Law*. *JOURNAL OF INTERNATIONAL ECONOMIC LAW* (1998): 1-24.

efforts to prevent another world war.⁴ The world owes a debt of gratitude to the creators and originators of those institutional developments, which have contributed to the reasonable success in regard to the overridingly important goal of peace.

In the decades which followed, however, the world evolved, and in particular three technological developments began to fundamentally affect the existing institutions which in some respects were found deficient. These three technical innovations were the very large reduction in the cost and time required for communications, similar savings for transport, and third (unfortunately) the remarkable developments regarding the power, accuracy, and deliverability of weapons (including weapons of mass destruction.) Human institutions could not stand still in the light of these developments.

The communications and transport revolutions, as well as some other circumstances, created great advantages for world welfare but also risks such as the fast movement across borders of economic crises and the challenges to the ability of “sovereign” nation states acting alone to regulate or otherwise provide necessary conditions for delivery of better lives to their constituents. Non-governmental entities (good and bad) influenced national and international institutional endeavors to keep the peace, encourage good governance, and to appropriately harness “globalized” markets for the benefit of all mankind.

By the end of the 1960s, however, it was increasingly clear that the GATT, with its “birth defects,” was not an adequate institutional framework to carry out policies which had previously focused on reduction of tariffs (much successfully accomplished). The GATT then faced a multitude of complex “non tariff barriers” induced by pressures of domestic special interests to find relief from competition (and thus reap “monopoly rents” at the cost of consumers). Seven rounds of GATT negotiations between 1947 and 1979 had been remarkably successful, but pressures built for more elaborate changes to cope with the new market conditions (and failures), often requiring attention to independent national “domestic” measures which engaged important issues of “national sovereignty.”

The decade before the most recent one, that is 1986 through 1994, witnessed the largest and most complex negotiation of a world wide multilateral trade treaty since World War II and probably ever, resulting in a treaty of 26,000 pages. This was technically the eighth (and last) GATT trade negotiation “round” (called the Uruguay Round since it was launched at Punta del Este, Uruguay). This treaty for the first time extended the competence of the trade treaty system to the new subjects of services and

⁴ See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

intellectual property. It also overhauled the remarkable but flawed GATT system of dispute settlement procedures, and created the World Trade Organization (WTO), thus establishing (after 47 years of GATT “provisional application”) the first true world trade international organization which “completed” the triad of organizations contemplated by the Bretton Woods Conference of 1944.

With that picture of the landscape for the subject of this article, we can now turn to the specifics of IEL by noting that this most recent ten year period hosted the first ten years of the existence of the WTO. Later we will return to the broader context. The bare statistics of these first ten years of the WTO are impressive. On the political and diplomatic side, the WTO has now reached a membership of 148, including the all-important accession of mainland China in 2001. In addition 25 nations are waiting in line to complete negotiations for accession.⁵ When, as anticipated, Russia accedes to the WTO, all of the most important trading nations of the world, representing the overwhelmingly large percentage of world trade will be part of the WTO system. Clearly the WTO institution is attractive to many societies for various reasons.

But even more impressive in the minds of many observers is the operation of the WTO dispute settlement (DS) system. In the 10 years since the WTO’s inception, there have been 324 complaints filed in the DS system,⁶ representing a broad desire by WTO member states, including developing and least developing countries as well as the industrial and richer countries, to utilize this DS procedure presumably to their benefit. Smaller countries have achieved some remarkable successes in cases brought against large powerful members. About half of the complaints seem to be settled in the sense of never going on to a request for an actual panel. Compliance has been good, although there clearly are some important implementation problems, mostly due to actions (or non-actions) by the two major trade powers, the United States and the European Union.⁷

Approximately 114 of the WTO disputes thus far have resulted in adopted DS reports (approximately 87 first level Panel reports and approximately 56 Appellate Body reports),⁸ and these adopted reports comprise just under 25,000 pages of jurisprudence. This ten year record can be compared with other international juridical procedures, such as the International Court of Justice (ICJ), which, in the

⁵ World Trade Organization website: http://www.wto.org/english/thewto_e/acc_e/acc_e.htm, last visited 16 December 2004.

⁶ As of this writing, the last complaint filed was complaint 324, on December 9, 2004. See, World Trade Law.Net website: <http://www.worldtradelaw.net>, last visited 16 December 2004.

⁷ See in this issue, article by William J. Davey, *The WTO Dispute Settlement System: The First Decade*.

approximately 60 years of its existence, has published decisions in 210 Contentious Cases, and issued 25 Advisory Opinions.⁹

The WTO appellate procedure, introduced by the Uruguay Round Treaty, is unique in international law and international relations, and has proven sufficiently powerful as to create some concern about the procedure in various quarters. Complaints are heard that the system too much infringes upon the “sovereignty” of nation states. Nevertheless, the jurisprudence is impressive by any objective observation of other existing tribunals in the real world, national and international. One of the persistent themes of this jurisprudence is the “devilish detail” of balancing the values of nation-state sovereignty with the contemporary world need for cooperation and multilateral activity of nations and other participants in the globalized economy.¹⁰

The WTO system, however, is not without challenge and criticism (some of it severe, and some of it “physical” with street protests which are sometimes violent.) Clearly the WTO system is not perfect, and criticism can be grouped under several general headings, such as: 1) institutional structure and WTO governance; 2) impact on power allocation among various participants (such as government and non-government entities, rich and poor countries, producers and consumers, labor and human rights issues); 3) worries that the WTO is overreaching because it increasingly addresses issues of sovereign state *internal* regulation and governance; 4) worries that the WTO does not go far enough in addressing issues (including internal government issues) to redress important governmental distortions of world markets which distortions (such as agricultural export and domestic subsidies) particularly disadvantage poorer countries; 5) unmet challenges to the effectiveness of the WTO in accomplishing its mission, such as the proliferation of preferential (non-MFN) agreements like Free Trade Agreements (FTAs).

There is a vast literature already on most of these subjects, and of course (no surprise) different viewpoints which contradict each other and in some cases views expressed by sources on some subjects of WTO which contradict the logic of other views by the same sources on different subjects of the WTO. This essay cannot begin even to list all of these views, criticisms, and approvals, but a few illustrations can help make this outline somewhat more concrete:

8 World Trade Law.Net website: <http://www.worldtradelaw.net>, last visited 16 December 2004. See also in this JIEL issue, article by Kara Leitner and Simon Lester, *WTO Dispute Settlement 1995-2004: A Statistical Analysis*.

9 Website of the International Court of Justice, “List of Cases Brought Before the Court since 1946,” at <http://www.icj-cij.org/icjwww/idecisions.htm>, last visited 16 December 2004.

10 A prime example of this balancing tension can be seen in the *Shrimp-Turtle* case of the WTO: *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

1) Regarding institutional problems, it is observed that the WTO decision making and diplomatic activity sometimes seems incapable of taking needed action, and sometimes this is attributed to the “consensus” rule of decision making (by practice even applying in situations where the treaty may not strictly call for such rule.)¹¹ The consensus approach has important values, but sometimes seems unnecessarily paralyzing.¹² The problems which the WTO has had moving toward a new (WTO first or GATT system ninth) round of negotiation to attempt solutions for some burning problems (like some of those noted below) are possible examples of these institutional problems.¹³ Problems of decision-making during the 10 to 15 year intervals between negotiation rounds are even more disturbing.

In addition, although the WTO is much more transparent than the GATT was (particularly with the WTO’s extensive website and open documentation), nevertheless there exist activities that arguably are still insufficiently transparent, such as dispute settlement panel hearings, and certain other meetings which could be opened to more public observation.

2) Power allocation criticisms probably cannot be completely resolved, usually involve some compromise, and in fact are constantly evolving (as recent WTO ministerial meetings demonstrate.) The WTO (and other international organizations) can be examined to expose more clearly the impact of procedures on various interests, with a goal of achieving greater equity in the activities examined. Clearly more attention is needed for the remarkably expanding role of non-government participants in the economic and other international institutions.

3) Worries about WTO over-reaching tend to be most strongly expressed when certain interests find their desires thwarted by international norms or activity. The notion however, that there should be rigid, impenetrable competences reserved for the nation-states seems not to reflect the reality of needs for international cooperation in a globalized world.¹⁴ The GATT, for example, has always had norms (e.g., especially Article III) which reflect a policy judgment that domestic internal government measures should

¹¹ See in this JIEL issue, article by Claus-Dieter Ehlermann and Lothar Ehring, *Decision Making in the World Trade Organization*.

¹² See Jackson, John H. “The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited.” *Journal of International Economic Law* 4 (March 2001): 67-78.

¹³ The Ministerials at Seattle (1999), Doha (2001) and Cancun (2003) faced examples of these problems.

¹⁴ Jackson, *Sovereignty Modern*, AM J INT’L L , supra note 2.

be restrained by international cooperation when the latter is needed to prevent market distortions, or problems that arise in situations like the prisoner's dilemma.¹⁵

4) There are many calls for more active intervention by the international system to buttress better operation of markets. Some of these calls get expressed in complaints to the DS system, others in the diplomacy of developing new norms or modifying older norms. A long list of examples can be easily suggested, which would include subjects such as: export subsidies on cotton or sugar; delicate equity problems of the intellectual property agreement (TRIPS), especially regarding pharmaceuticals and health policies; phase out of textile quota systems as provided in the Uruguay Round treaty; anti-dumping measures; and food safety measures, which can be found to be based on protection of domestic industry sectors against foreign competition rather than truly based on scientific reasoning. Indeed the non-tariff barriers which governments use to manipulate these various goals number in the thousands, if not tens of thousands.¹⁶

5) There is increasing comment about challenges to the effectiveness of the WTO posed by other international endeavors such as the proliferation of preferential agreements. A recent World Bank report describes in elaborate detail the problems caused by these regional agreements, and another recent report of the WTO contains similar detail.¹⁷

The WTO and its agreements, however, are not the sole important international economic law institution and instruments. The preferential agreements can themselves be examined, and questions raised, about the advantages and disadvantages of those agreements (often based partly on important, and arguably valid, non-economic policies, such as human rights). But their impact on the broader world policies and institutional abilities to achieve world perspective goals must be evaluated. In addition there are many other important international economic institutional and normative activities such as those in the World Health Organization (with obvious and compelling world cooperation needs such as to meet the threat of spreading disease), the Food and Agriculture Organization, and the International Labor Organization.

¹⁵ See, e.g., Gregory L. White, et al, *The Farms Race*, THE WALL STREET JOURNAL, December 15, 2004, at A1.

¹⁶ See Jackson, John H. THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS. 2d ed. Cambridge: MIT Press, 1997, at 154. See also annual reports of US, EU, Japan, and other governments about such barriers, e.g, *The 2004 National Trade Estimate Report on Foreign Trade Barriers* (NTE) published by the office of the United States Trade Representative., available at <http://www.ustr.gov> , last visited 20 December 2004.

¹⁷ See, e.g., World Trade Organization, *World Trade Report 2003*, WTO Publications (2003); The International Bank for Reconstruction and Development-The World Bank, *Global Economic Prospects 2005* (2005).

Also notable is NAFTA, including Chapter 11 proceedings and arbitration procedures, especially those at ICSID.¹⁸

Perhaps, however, the most important current institutional development yet unfinished is the striking “constitutional development” of the European Union.¹⁹ Arguably, the possible success of this development would be the most important contribution to world peace and greater world and personal welfare of any institutional development since the post World War II “creative era.” This is partly because the twentieth century saw two disastrous “European Civil Wars,” so that the avoidance of another war, as well as the promotion of values including human rights and good governance in Europe, will benefit the whole world through direct, spill-over, and demonstration effects.

An overall appraisal and perception of international law developments in the last decade, however, must note the rather depressing events relating more to political and geopolitical/military issues than to economic trends as such. These clearly have a powerful effect on the economic picture, an effect that is most likely to have a much greater impact on world and national economics than do the international economic institutions themselves. This brief essay opened with some notice of the broader landscape on which international economic law must operate, and thus cannot end without some further exploration of the potential meaning for international economic law implicated by the unfolding events of the last decade and a half, as well as the perceptions which go with them.

It is remarkable to look back on the last fifteen years and think about the huge shifts in attitudes about international relations which have occurred. In 1989, one of the most significant events of the twentieth century occurred—the fall of the Berlin Wall. The fall of the wall ushered in a sequence of amazing events forming a major trend in geopolitical developments which culminated with the end of the “Cold War,” and thus, the end of the third major power struggle of that troubled century. This led to a wave of worldwide optimism about the future, with many peoples counting the advantages of the “peace dividend,” and turning their attention to economic development and the satisfactions attainable therein. But the 1989 event turned out to be merely one bookend of an era, an end that seems to have ended by the tragic catastrophe “bookend” of September 11, 2001, and its ensuing pessimism. The sweet dream was violently and obviously over, and the nightmares once again began to invade thought. Civilization, it

¹⁸ International Centre for Settlement of Investment Disputes

¹⁹ See, e.g., *The EU Constitution Database*, of The Federal Trust for Education & Research, at the University of Manchester: <http://les1.man.ac.uk/eurodatabase/>, last visited 16 December 2004.

turned out, seems yet to be fragile, and vulnerable to the many dark forces meandering the world on various nefarious errands, some of them never before considered.

This is the reality we face at the beginning of 2005, and reflection on the prior 10-year period reveals developing dark clouds of perplexing characteristics of societies and international discourse pointing towards deep and fundamental changes in the way many peoples and their leaders think about government and civil affairs. Of course, international law and its progeny international economic law, cannot escape these troubling reflections, and indeed perhaps more than any other sector of human institutions, the profundity of change of *international law* has been so extensive as to be worthy of the description “paradigm shift.” The basic concepts of international law have now to face great, and at times disturbing, challenges.

That is not to say that this is the first time the troubled waters of fundamental change concerning international law thinking are rising to a level we could call paradigm shift. As noted above, World War II and its immediate creative post-war period mentioned at the beginning of this essay, witnessed a deep and abiding “paradigm” shift in thinking about international law, including human rights changes in the concept of the “subject” of international law, and a degree of institutional “constitution making” probably never seen before. International law was central in many ways (despite many skeptics) to the six decades of the “good life” in many (but not all) parts of the world.

Today’s “paradigm shift” is not nearly as optimistic as the last. It is a struggle with international law concepts which seem no longer to work, in the face of non-governmental actors and frail international institutions. At the same time, a certain “reality check” questioning attitude towards international law and institutions seems to spread, while the forces of “globalization,” propelled by the technological advances noted above regarding communication, transport, and weaponry have frightening implications, which possibly demand more (rather than less) reliance on international legal norms. But what norms?

Further challenges to both general international norms and to international economic institutions and norms became more evident in the late 1990s. The difficulties in the Balkans, with the break-up of Yugoslavia, and the extreme violence perpetrated on many innocent civilians, including the mess in Kosovo, raised important questions about the limitations both on the concepts of sovereignty and about the institutional competencies of the United Nations and other organizations. The genocide in Rwanda also raised these questions, as did September 11, 2001, and the follow-up reaction in Afghanistan to depose the Taliban government. This, of course was followed by the Iraq difficulties and challenging

problems about appropriate UN Security Council action. Following these affairs there was also the Sudan crisis in Darfur and more allegations of UN incompetence. These events engendered a virtual “firestorm” of comment in the media, including hundreds of scholarly opinions. Some of these opinions were conflicting so as to confuse citizens and government officials alike.²⁰ To some extent therefore, the decade of 1995 through 2004 could be called the “accursed decade.”

Economic institutional affairs did not escape this turmoil, as manifested by the increase of anti-globalization protest, and the failure of the 1999 Seattle WTO Ministerial Conference. After success at the 2001 Doha Ministerial, there was quickly another failure at the Ministerial in Cancun, in September 2003. Likewise, the late 1990s witnessed the Asian Financial Crisis, and the problems for the Bretton Woods institutions to respond appropriately. The WTO ministerial failures increasingly appear to have been evidence of a significant shift in power within the WTO towards much greater weight for the developing world, led by countries such as Brazil, India, and China, which countries have shown considerable success in trade presence in the global economy, as well as (for some) a remarkably rapid increase in economic growth rates. Perhaps this is the *optimistic* view of the result of stress manifested by conference failures. In addition these various events of the past 10 years led to some serious soul searching by various international bodies, including an International Commission on Intervention and State Sovereignty, and a High-Level Panel on Threats, Challenges and Change, appointed by the UN Secretary General, which reported in December 2004 about needed United Nations institutional changes.²¹

It is possible, therefore to see certain common features of the stressful side of the last 10 years, both as to geopolitical/military relations and institutions, and for economic institutions. One major entrenched concept now seems significantly more challenged than before—the concept of sovereignty. Because of the centrality of the sovereignty concept to all the precepts of traditional international law, these challenges reach deep into the fundamental premises of such law (and therefore also demand reflection on these premises in the context of international economic law).²²

²⁰ See, e.g., a series of contrasting viewpoints about the legality of the March 2003 war in Iraq in: *Agora: Future Implications of the Iraq Conflict*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 553-642 (July 2003).

²¹ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT (International Development Research Centre, 2001); HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE REPORT, *A More Secure World: Our Shared Responsibility* (United Nations 2004).

²² See Jackson, *Sovereignty Modern*, AM J INT'L L, supra note 2

A considerable amount of literature deals with the issue of “sovereignty,” and the various concepts to which it might refer.²³ Most of this literature is very critical of the idea of “sovereignty” as it has generally been known. One eminent scholar has described the sovereignty concept as “organized hypocrisy.”²⁴ Some other authors have referred to it as being “of more value for purposes of oratory and persuasion than of science and law.”²⁵

Recognizing that almost no perceptive observer or practitioner is prepared to endorse the full import of the traditional Westphalian notion of sovereignty, what can be said in favor of modified or “evolving” sovereignty concepts?²⁶ Many, if not most, of the critics of the older sovereignty notions recognize, with varying degrees of support, some of the important and continuing contributions that the sovereignty concepts have made toward international discourse, stability, and peace.

One can easily see the logical connection between the sovereignty concepts and the foundations and sources of international law. If sovereignty implies that there is “no higher power” than the nation-state, then it is argued that no international law norm is valid unless the state has somehow “consented” to it. Of course, treaties (or “conventions”) almost always imply, in a broader sense, the “legitimate” consent of the nation-states that accepted them.²⁷ However, important questions arise in connection with many treaty details, such as when a treaty-based international institution sees its practice and “jurisprudence” evolve over time and the institution purports to obligate its members even though they opposed that evolution.²⁸ Likewise, treaty making by various “sovereign” entities can be seriously antidemocratic and otherwise flawed.²⁹ Furthermore, states which perpetuate or permit humanitarian horrors on their citizen or on other persons, pose huge moral and conceptual problems to the “state consent” theory of legitimizing international law norms.

²³ See, e.g., *Ibid.*

²⁴ STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999)

²⁵ MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* (1995), at 21 (quoting QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 277-78 (1968)).

²⁶ See GERALD KREIJEN ET AL., EDS., *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* (2002), at 282-83

²⁷ One classic exception may be the end-of-a-war treaty, at least in some circumstances. In addition, there are sticky problems in connection with state succession, including whether the colonial imposition of obligations carries over to a newly independent state.

²⁸ An example of an "evolutionary approach" can be seen in some of Professor Thomas Franck's writings, particularly, THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002), at 8, (noting the evolution of practice regarding the veto power under the UN Charter). See also *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 130 (adopted Nov. 6, 1998).

²⁹ E.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM J INT'L L 310 (1992).

Like treaties, the other major source of international law norms, “customary international law,” is theoretically based on the notion of consent, through the “practice of states” and “*opinio juris*.” For centuries, practitioners and scholars have debated the elements of customary international law. The ambiguities of these notions are obvious, and form part of a broader mosaic of criticism against the very existence of “customary international law norms.”³⁰

One approach is to suggest that when “sovereignty” is used in current policy debates, it actually refers to questions about the allocation of power; normally “government decision-making power.”³¹ That is, when someone argues that the United States should not accept a treaty because that treaty infringes upon U.S. sovereignty, what the person most often means is that he or she believes a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (U.S.) level, and not at the international level.³²

Another way to articulate this idea is to ask whether a certain governmental decision should be made in Geneva, Washington, D.C., Sacramento, Berkeley, or even a smaller sub-national or sub-federal unit of government. Or, when focusing on Europe, should a decision be taken in Geneva, Brussels, Berlin, Bavaria, Munich, or a smaller unit?

There is a series of factors that policymakers trying to develop an appropriate allocation of power must consider about international institutions, including: treaty rigidity (the difficulty of amending treaties); international organization governance in the decision-making processes, etc. The fiction of “sovereign equality of nations” and the problems of a one-nation, one-vote system are part of this picture.

International economic law obviously is affected by these needed “rethinkings.” Much has been written about “globalization.” Despite being an ambiguous term of controversial connotation, it is reasonably well understood to apply to the exogenous world circumstances of economic and other forces³³ that have developed in recent decades. These circumstances have led to new structures of production; they, in turn,

30 See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 816 (1997); Jack L. Goldsmith & Eric A. Posner, Understanding the Resemblance Between Modern and Traditional Customary International Law, 40 VA. J. INT'L L. 369 (2000); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

31 See Jackson, *Sovereignty Modern*, AM JINT'L L., supra note 2

32 The author previously articulated these concepts in JOHN H. JACKSON, THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (2000), at 369. "Power" is used here similarly to the phrase "effective" or "legitimate authority," although these terms could be subject to considerable additional discussion.

33 THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (1999).

have resulted in greatly enhanced (and sometimes dangerous) interdependence, which we can do little to remedy and which often renders the older concepts of “sovereignty” or “independence” fictional. Indeed, these circumstances, particularly those of communication techniques heretofore unknown, are seen as having dramatic effect on the way governments act internally. In addition, these circumstances often demand action that no single nation-state can satisfactorily carry out, and thus require some type of institutional “coordination” mechanism. In some of these circumstances, therefore, a powerful tension is generated between traditional core “sovereignty,” on the one hand, and international institutions, on the other hand. This tension is constantly apparent, and addressed in numerous situations, some of which are poignantly and elaborately verbalized in the work of international juridical institutions such as the dispute settlement system of the World Trade Organization mentioned above.³⁴

This in turn raises a number of more detailed (“devilish detail”) questions relevant to the WTO and its juridical (dispute settlement) system. What is the role of the Appellate Body? Are the traditional precepts of international law treaty interpretation as articulated in the Vienna Convention on the Law of Treaties adequate for the appropriate role and evolution of a treaty of large membership and fundamental institutional responsibilities? Are approaches which suggest great deference to individual nation state decisions and policies when treaty or other legal norms are ambiguous (or have gaps) appropriate. Or rather should a more “teleological” and “pragmatic” approach be necessary to render the institution more capable of accomplishing its assigned responsibilities? These and other issues demand greater attention and more thorough analysis, probably considerably beyond that which has so far been manifested by the activities of national governments and their political systems, or for that matter also beyond that manifested by scholarship and policy discourse of the “chattering classes.”

Thus, this ten year “look back” has a bittersweet characteristic. Basically, it demonstrates an almost desperate need for new ideas and much better analytical and disaggregated explorations of existing international law and international economic law concepts. One parcel of these concepts which needs considerable attention is the increasing importance of international juridical institutions, which seem to be developing a “sine qua non” role for international institutions. Older concepts, often resorting to nation-

³⁴ See, e.g., JACKSON, THE JURISPRUDENCE OF THE GATT AND THE WTO, supra note 32; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW & POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1997); JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS (4th ed. 2002), at, Ch. 7; John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998).

state sovereignty ideas³⁵ often run the risk of disabling the ability of some institutions to function effectively in carrying out their purposes.

Another development with tinges of optimism is the growing desire of nations to become part of international institutions which promise economic advantages. One example is the appeal of the European Union to nearby nations that have experienced oppression and damaging economic policies. Ten new members of the EU, and a varied roster of additional “hopeful candidates,” demonstrate the appeal. This appeal is strong enough to lead candidate societies to assume important obligations and changes regarding human rights, good governance, and democratic institutions.

Even the WTO, which has not been noticeably friendly to such linkages, has in fact induced some major internal governmental and economic institutional changes in acceding countries such as China. Likewise, many of the bilateral or “mini-lateral” preferential trade agreements contain clauses addressing “good governance” and market structure reforms. The drafts for a potential Free Trade Area of the Americas (FTAA),³⁶ which, as this is written, seems stalled, have some astonishing clauses linking membership and trade advantages to human rights, rule of law, and democracy. These tentative steps often seem, nevertheless, to move in the direction of recognition of “good governance” norms, which constrict traditional notions of “sovereignty” and could hold promise for greater linkages in the future.

Citizen attitudes also sometimes seem to lean in these more optimistic directions. An interesting recent survey of American attitudes, part of an ongoing series of carefully conducted studies by the Chicago Council on Foreign Relations, suggests that average citizens may have a better, or at least more intuitive, grasp of some of these viewpoints in their thoughts about international institutions.³⁷ The two following paragraphs suggest viewpoints that are perhaps surprising:

Yet strong majorities of the American public and leaders still believe the United States should take an active part in world affairs. Despite majority support among the American public for taking active steps to ensure no other country becomes a superpower, Americans strongly believe

³⁵ E.g., the absurdity in many modern concepts of the principle “*in dubio mitius*,” or certain applications of standards of review or deference toward nation-state determinations.

³⁶ *Free Trade Area of the Americas-Third Draft Agreement*, TAA.TNC/w/133/Rev.3, November 21, 2003, available at: http://www.ftaa-alca.org/FTAADraft03/Index_e.asp, last visited 20 December 2004.

³⁷ The Chicago Council on Foreign Relations, *Global Views 2004: American Public Opinion and Foreign Policy* (2004).

*that the United States should work together with other nations to solve international problems*³⁸.

*Leaders do not realize that the public favors participation in the International Criminal Court, the Kyoto agreement on global warming, and UN International peacekeeping forces. They are also not aware that the public favors accepting collective decisions within the UN and unfavorable WTO rulings as well as giving the UN the authority to tax such things as the international sale of arms and oil*³⁹.

This evidence, as well as polling at the time of the UN Security Council 2002 struggles over Iraq, suggest that there may be an important disconnect between officialdom (e.g., Washington, D.C.) and average, informed citizens.

In conclusion, it is interesting to note that one former Speaker of the U.S. House of Representatives, Tip O'Neill has written, "all politics is local."⁴⁰ In contrast, well known author and economist Peter Drucker has written, "all economics is international."⁴¹ This manifests an important tension which is perhaps systemic for democracies, and therefore represents serious problems for governments seeking to solve some of the problems mentioned in this article. But it also may imply opportunities for the future and betterment of international affairs as the world struggles to manage the dangers of the 21st century.

Item 2: Certain Extracts from the book just published (April 2006): John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*. Cambridge: Cambridge University Press, Forthcoming, 2006.

These extracts are several pages from the last chapter, Chapter 8, which is a summary overview of much of the book.

Chapter 8: Perspectives and Implications, Some Conclusions

- The evolution of GATT after the ITO failure, and the change of GATT into the WTO, manifested a sense of many nations that an institutional structure was needed for international trade discourse and disciplining constraints on national behavior. Pragmatic accommodation, good practical sense, and important leadership led a weak "birth defected" GATT to become an important part of the world's international economic institutional landscape.
- Full "sovereignty" was never a prerequisite for participation in GATT or the WTO.

³⁸ *Id.*, at 7.

³⁹ *Id.*, at 10.

⁴⁰ See Thomas P. O'Neill and Gary Hymel, *ALL POLITICS IS LOCAL* (New York Times Books, 1994).

⁴¹ Peter F. Drucker, *Trade Lessons from the World Economy*, *FOREIGN AFFAIRS*, Vol. 73, No. 1 (January/February 1994), at 99.

- Equality of nations seemed mandated by the GATT treaty text, but in fact the practice veered away from voting and its dilemmas, to a “consensus approach” to decision making developed by practice, and was carried more formally into the WTO, although such approach has a potential for impeding progress on a number of important issues.
- Consensus has important values, in promoting full participation and greater transparency all levels and types of participating nations in the institution.
- Problems of treaty rigidity clearly diminished the ability of GATT to evolve satisfactorily with the rapidly changing economic environment of the world.
- Rule orientation: The objectives of predictability & stability (reducing the risk premium of economic decisions of millions of entrepreneurs) are important, and lead to support for a rule oriented system, with dispute settlement procedures in a “juridical system.” Even without explicit treaty rules about this, the GATT DS system evolved and was accepted by the nation-state participants (contracting parties).
- Non-government entities (including individuals) are major beneficiaries of the international institutions, particularly in the context of economic subjects, as well as human rights. The practice and jurisprudence has begun to explicitly recognize this, and to reflect understanding of this principle. Important attention to questions about the role of NGOs is also needed, including careful consideration of better procedures for transparency and participation.
- Treaty interpretation becomes an important part of the system, and requires an important juridical approach. Questions are developing about whether the traditional “customary” international law approaches to treaty interpretation such as those embodied in the Vienna Convention of the Law of Treaties are adequate for use with treaties which have large membership and long duration and thus are more like “constitutions” than a simpler paradigm of bilateral or mini-lateral treaties.
- Some treaty interpretation concepts, such as in *dubio mitius* (which is not in the VCLT, but has been urged in some of the advocacy in the WTO), are absurd and destructive of purposes of institutions like the GATT and WTO. This treaty concept represents “consent theory gone amok,” and also evokes thoughts about criticism of the famous international law *Lotus Case*, as being “extreme positivism.”¹
- There is clearly an important conceptual and juridical relationship between international economic law and general international law. But the relationship is complex, and if misapplied could be destructive. Among the problems is the broad ambiguity of some international law norms, such as “good faith”. When juxtaposed with elaborate and reasonably precise sets of procedural norms such as found in parts of the WTO, a broad or ambiguous rule can offer dangerous latitude to a juridical institution.
- Good governance principles need to be applied to international institutions as well as to

nation-states. These principles include issues raised above such as transparency and participation, but also need to include checks and balances, and recognition of “subsidiarity” ideas of the importance of local accountability.

- The principle of non-interference in the domestic affairs of “sovereign” nations must be balanced with needed international norms to prevent internal government measures from causing harm to other nations, particularly with reference to economic measures which could seriously inhibit economic development and welfare progress.

¹ See Section 5.8, *supra*, at note 4 and discussion in the text.