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Academic Foresights

Global Trade Law

How do you analyze the present state of Global Trade Law?

A poster boy for world *governance*, global trade law depicts a picture of a fairly well-oiled if extremely complex and imperfect machine assiduously employed, buzzing with activity undergirding institutions and prodding further global trade harmonization. Jagdish Bhagwati evoked the image of the “spaghetti bowl” as a metaphor for the state of global trade: The long noodles represent concurrent commitments of states to be bound by multiple, partly overlapping, trade agreements and membership in trade organisations and groupings. To public international law (as presumably to any legal system) - which is in a perpetual search for consistency and coherence - the ensuing discontinuities and fragmentations criss-crossing a world replete with trade agreements and likely to further proliferate are a matter of concern.

To be sure, global trade law consists not of global *trade* law alone. For once, investment represents the reverse side of the trade coin, both inter-connected and, in fact, indivisible since many trade agreements stipulate investment terms, and the many investment agreements, along with the trade agreements, form a pivotal part, even a pillar, of the universe of international economic law. Secondly, the trade regime consists of one out of three interconnected economic regimes which include the monetary and fiscal ones. In practice, global trade law-making (multilateral, regional, bilateral); the enforcement of global trade law, which requires incorporation into domestic law and domestic compliance with international law (1); and global trade law adjudication (which varies from court litigation to arbitration at international public and private fora, and at domestic instances) are not an isolated ship travelling an outer-space called global economy. Whilst separate from the monetary and fiscal branches of the global economy, global trade and law exert considerable influence on them. Thirdly but not lastly, are the so-called “trade plus” issues, which have been gradually permeating the domain of trade law. These include labour, the environment, the relationship between trade and commerce (2), and briefly, a wide selection of human rights issues. The ensuing pressures have been enormous. They range from the current European Union’s economic crisis and its political implications seeing societies pitched against each other with racist under- (even over-) tones; the Chinese government’s global shopping binge of foreign assets, including arable land

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contributing to the displacement of local populations; corporate mining operations threatening to inflict irreversible environmental damage and destroy local communities (and human dignity) as most recently exhibited in the brutal altercations during a miners' strike in South Africa, to mention a few. All this points to the next phase of development in global trade law, namely of rules poised to tackle the *governability* of global trade in a world already equipped with economic governance structures and processes.

In your opinion, how will the situation likely evolve over the next five years?

By governability, I mean the likelihood that the various modes of governance (3), as laid out in legal regimes and institutions, will indeed perform what and how they were set to perform; and that where gaps remain outstanding, they will be supplemented by laws bolstering the coherence and consistency of global trade law, and furthering a just global trade conforming to the World Trade Organisation's (WTO) mission statement: "[T]o open trade for the benefit of all". (4)

Governability depends on various requirements or suggested solutions. Institution-building has been the focal point especially since the mid-20th century. During the turn of the century, compliance became a concern as various approaches to, and modes of, compliance were discussed by experts of public international law. Over the past decade, calls for compliance and accountability epitomized the concern with governability, reflected, for instance, in the development of the UN "Protect, Respect and Remedy" policy framework and the guiding principles on business (5) and human rights (6), designed to "tighten the noose" around certain aspects associated with global trade. More recently, two new discourses have been evolving, one regarding the international responsibility of international organisations; the other - informal international law making.

The Draft Articles on the Responsibility of International Organizations (RIO) (7), consists of rules applicable to the commission of internationally wrongful act attributable to an international organization (severally or jointly with a state or "other entities") (8). Although what the drafter had in mind were largely instances related to peace operations, RIO rules apply to international organisations in general hence might engage also international trade organisations as well as international organisations the activities of which do, or may, impact trade matters.

Elsewhere (9), I challenged the argument that the WTO is "simply" member-driven hence devoid of executive governing functions, hence *sui generis*. This, I maintain, is untenable. Although the WTO may in all likelihood only most rarely be found in breach of an international obligation, it is nonetheless – as any international organization – well placed within, and governed by, the international responsibility regime. So far, the WTO has been comfortable with discharging its accountability

“duties” by way of revisiting objectives, particularly those corresponding to the UN Millennium targets. In doing so, the organisation has expanded its “legal order”, concurrently increased its scope of influence, and ultimately - its responsibility. Being the paramount global trade organization representing (and upholding) the global trade legal regime, I expect the question of the international responsibility of the WTO to eventually be tackled by law-makers. Since change within the organization has been longwinded, this development may be getting under way later than within the next 5 years.

The other discourse relevant to governability concerns “informality” in international law making. Branching out of the accountability discourse, it could possibly stake out a space for itself within the public international law discussion. Informality has generally been considered a necessary condition for the effective operation and performance of international organisations. Correspondingly, concomitant accountability concerns have propelled the establishment and action of inspection panels, for instance, in the two international financial institutions (World Bank Group and International Monetary Fund).

How to define informality is tricky. Informality may arise in the relationship between an international organisation and external (non-member) stakeholder; it may be intra-institutional and inter-institutional; pertain to the character of the specific governance functions at stake, whether rule enforcing (executive), rule-making, or rule adjudicating; and be exhibited also in a meagre number of rules, or their laxity, as they apply to different types of subject matters (general or sector/issue specific). In the WTO, where decision (law)-making has been fairly non-transparent, intra-institutional informality, for instance, takes place in the relations among the members of the organisation or its different functional branches. Almost a decade ago, Pascal Lamy noted that “[t]here is no way to structure and steer discussions amongst 146 members in a manner conducive to consensus” (10). Indeed, so informal is the negotiation process that it has been characterised as “untidy” (11) and devoid of “any clear agreed criteria or rules regarding agenda-setting” (12), complex and subject to the power disparity separating the strong from the weak (developing) member states, and manifest in the two parallel streams of negotiation – the informal small group forum and the large formal setting open to all members (13). For the WTO, the informality of its processes, especially the Heads of Delegation (HODs), has proven an efficient and effective instrument necessary to secure agreement among members, and which along with the parallel formal procedures, achieved “an appropriate balance” (14).

At present, there is more fuzziness than clarity to the notion of informality (15). However, I expect that the next five years will show whether “informality” is bent to develop into a term distinct from “soft law”, diplomacy, and other descriptors, or be abandoned and fall into oblivion.

What are the structural long-term perspectives?

At the outset of this piece, I identified *governability* as a pivotal challenge to the development of global trade law. I further argued that the international responsibility of international organisations may be triggered in association with practices of informality. At a certain point, where the disadvantages surpass the benefits of informality, the fine line distinguishing accountability from responsibility will be crossed. Applied to the specific case of the WTO, the potential cementing of corresponding (to accountability and responsibility) legal doctrines might trigger revisions to the organisation's informal institutional modes of operation and brokerage politics, hence come to govern certain aspects of global trade law.

It is not without reason that Pascal Lamy submitted: "The decision-making [in the WTO] needs to be revamped" (16). At present, the WTO constitutive law (consisting of the international agreements making up, and associated with, the organisation) does not provide for internal rules addressing accountability (or responsibility) in matters organizational mode of operation (which are therefore "informal"). Devising an adjudication body to hear member-state as well as third party complaints against the organization; setting up of a special indemnity budget; ironing out substantive legal issues such as the relationship between primary and secondary rules; and examining the propensity of distinct WTO bodies and processes to prove more, or less, immune to international responsibility, are subjects for consideration as a new regime of international responsibility for international organisations is taking shape.

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Notes:

- (1) Often referred to as transnational law for reasons which are beyond the scope of this piece.
- (2) Where the boundaries between the public and private are often blurred.
- (3) Inter- and trans-national, the latter involving state and non-state actor relationships.
- (4) http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm, retrieved 12 November 2012.
- (5) Note, not trade *per se* and very much within the trade plus arena, especially corporate social responsibility and the public-private divide.
- (6) The so-called "Ruggie Reports", <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>, retrieved 12 November 2012.
- (7) International Law Commission, Draft Articles on the Responsibility of International Organizations, May 30, 2011, United Nations, A/66/10, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf, retrieved 12 November 2012.
- (8) "International organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities". Article 2(a), *ibid.*, p.2.
- (9) "From Theory to Practice - Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN" with Cedric Ryngaert, *German Law Journal*, 13 (5) 2012.
- (10) Statement by Pascal Lamy at the press conference closing the World Trade Organisation's 5th Ministerial Conference in Geneva, 14 September 2002, European Press Release, No.

5th Ministerial Conference in Cancun, 14 September 2003, European Press Release, No. 57/03, September 15, 2003, <http://www.eurunion.org/news/press/2003/2003057.htm>, retrieved 2 December 2011.

- (11) Albin, Cecilia. "Using Negotiation to Promote Legitimacy", *International Affairs*, 84 (4), 2008, p. 761.
- (12) *Id.*
- (13) *Id.*, pp. 761-762. Meanwhile, Albin notes, the WTO has made some progress in mitigating the recurrence of informal practices.
- (14) WTO. "'HODs' and Other Bodies: The Need for Informality", http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm, undated, retrieved 14 November 2012.
- (15) See the October 2012 blog discussion in *Opinio Juris*, <http://opiniojuris.org/2012/10/16/book-discussion-informal-international-lawmaking/>, retrieved 14 November 2012.
- (16) Statement by Pascal Lamy at the press conference closing the World Trade Organisation's 5th Ministerial Conference in Cancun, 14 September 2003, European Press Release, No. 57/03, September 15, 2003, <http://www.eurunion.org/news/press/2003/2003057.htm>, retrieved 2 December 2011.

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