

From the Board: How Much Democracy Can Economic Integration Bear?

It appears to have become very difficult to conclude and approve trade agreements. Perhaps one can trace this current situation all the way back to the ‘battle in Seattle’ – the demonstrations against the World Trade Organization (WTO) during its 1999 Ministerial Conference. But, for the WTO, things did eventually calm down. The organization commenced its own campaign to include civil society, if not in the negotiation and committee meetings, at least in its policy forums and its document transparency. The Appellate Body rulings in some key environmental cases certainly also helped. Notably, the reversal of the panel on GATT Article III in *EC-Asbestos*, and GATT Article XX in *US-Shrimps*, provided clear signals that neither the violation nor exception phases of a WTO case were going to be as rigidly applied as they were in the GATT-1947.

Events of this last year tell us that it is now regional trade agreements that are in turn to take the serious heat. And they are, in Europe starting with the Netherlands referendum rejecting the EU-Ukraine DCFTA agreement in April of 2016; then the European Union (EU) Brexit referendum vote in June; followed by the Belgian regional parliament’s rejection of the EU-Canada (CETA) agreement in October. Last but certainly not least, in the US presidential campaign, both leading candidates opposed the Trans-Pacific Partnership (TPP) and the President-elect has since declared that it will be taken off the table ‘day one’ upon his inauguration in January of 2017. The TPP has twelve country signatories and took seven years of negotiation. The assortment of objections to these agreements apply in different measures in the body politics of the EU and United States, but cumulatively include, as a short list: anti-immigration, anti-Brussels, anti-large corporations, anti-trade with ‘corrupt’ governments, to deeper ties in eastern Europe or Asia, to investor-state dispute settlement procedures, to regulatory cooperation and as always, the ‘race to the bottom’ for labour and environmental rules. One should add a strong and angry dose in the public perception that trade agreements (read globalization) are the cause of income inequality, a world where middle class workers no longer have job security, and those with jobs have stagnant wages. ‘Nafta free trade stole our jobs/EU free movement stole our jobs.’ Take your pick.

One normally associates open markets with functioning democratic institutions, in which economic actors, including employees, benefit from law making process that are participatory and transparent. For trade agreements in particular, we also know that in the EU and the United States, a balance has been realized over time between the openness perceived as necessary to create legitimate outcomes and the more private needs of governments and their negotiators to make their offers and concessions beyond the microscope of twenty-four-hour news cycles. Once agreements are initialled, another balance point has evolved and settled between the role of parliaments in approving agreements, and the need for government to not reopen and amend provisions post negotiations. For the EU, this was finally realized in full by the 2009 Lisbon Treaty granting the EU Parliament the power to approve or disapprove a concluded EU trade agreement. The EU Parliament is of course, a body directly elected by the citizens of the EU. Similar, in the United States, if Congress votes to install a period for fast-track approval, then Congress itself has made the decision that it will not amend a concluded trade agreement, but rather also vote it up or down, in or out.

For most of us, this all seemed to be a reasonable way for democratic institutions to move along, as they are called upon to do by the processes of globalization, to facilitate what is in the national economic interest, and to attempt to regulate what is not. Yet, neither the concluded CETA, the Ukraine DCFTA, nor the TPP have appeared to be able to be placed before the responsible parliamentary bodies entrusted to vote them. 'What happened' that these balance points are now so suspect and illegitimate to the same publics that have – by and large – been the beneficiaries of open markets (and their rules) in the post WWII international economic legal order?

Far be it from the skill set of this editorialist to critique the relative merits and demerits of globalization, or to analyse the economic causes of job displacement and stagnant wages. Other than to say this: how our institutions address the daunting challenge of jobs that are not going to return for the next generation, and how to address those former workers that have already been left behind, is a national governmental policy challenge that our political systems and our leaders have largely – if not completely – failed. The same thing can be said of the fears of economic immigration and the influx of uninvited aliens. This is not to belittle how massive these challenges are. Rather, the point is made that while these problems have risen, it has become the too easy course for too many leaders to blame international trade and open markets for them, and too easy for the public to accept the very simple but very fallacious solution, i.e. 'blame the outsiders'. Democratic processes and institutions can retreat to populism. Even those that are the most direct beneficiaries of globalization and international trade can be cowered.

Whether one chooses to think that the issues are either too large to be adequately addressed by national policies, or that leaders are just too unable to bring effective policies forward, it follows either way that we could be in for long wait before the citizenry considers that international trade agreements are once again favourable to their interests, and that their governments should be in any way pursuing new trade agreements.¹ So, if this is for now the end of the liberal world order as we know it, then what do proponents of international economic integration do in the meantime?

Consider this distinct possibility: batten down the hatches, circle the wagons, and prepare to hunker down! The short era of ‘mega regional’ trade agreements may well be over in both the EU and the United States, and any prospective agreements that are undertaken may not, ‘go boldly where none have gone before’.² This means that one must be prepared to work with what is already there and where enhancements may be possible, to step incrementally and within structures that are already set. For the EU, a first prescription seems clear enough: either strip out anything in a concluding agreement that has a hint of ‘mixity’ in favour of Member State competence or defend the demarcation of EU exclusive competence for any mixed agreement that does requires member involvement. This is to simply defend the common commercial policy as prescribed by the EU treaty and as will be clarified by any forthcoming CJEU ruling as to its scope.³ This is not the time for a tentative EU common commercial policy. We do not know whether the United States is leaving the world stage or not, and despite the phenomenal growth of China as a world trader, it is yet a relatively smaller market.⁴ There are still only two large markets in this world, and the EU is one of them.

Likewise, for the referendum countries, where even the exercise of parliamentary participation has been bypassed. It was arguably not a validation of democratic processes that voted for Brexit and against the EU – Ukraine agreement, but rather more an abrogation of national democratic institutions and processes. This clearly calls for rule changes that require minimum turnouts or minimum passing thresholds to be validated. Or better yet, for avoiding referendums in the first place. The outcome of the US election also speaks to Brexit and the mass of uncertainty it has generated. Despite the leave campaign’s post Brexit claims of an exciting new era of

¹ Robert Kagan, *Trump Marks the End of America as the World’s ‘Indispensable Nation’*, Fin. Times (19 Nov. 2016) (online edition).

² Reportedly, The Transatlantic Trade and Partnership Agreement (TTIP) is for now, ‘in the freezer’.

³ And suggesting that EU trade agreements concluded without the consent of the EU Parliament may themselves be unlawful in the EU Constitutional order. P.J. Kuijper, *Post-CETA: How We Got There and How to Go On*, ACELG <https://acelg.blogactiv.eu/2016/10/28/>.

⁴ China’s share of global GDP is 15%. The EU and United States together account for 47% of global GDP. Martin Wolf, *Donald Trump Faces the Reality of World Trade*, Fin. Times (22 Nov. 2016) (online edition).

independent UK trade policy, this may be not really be a very smart time to leave the EU customs union. The devil you know may be better than the one you do not.

As for the incremental steps, perhaps a reference to the WTO is in final order. We have begun to see the outlines of a WTO administrative legal order and the possibilities emerging for secondary rulemaking in the WTO committees. We have also seen that tailored agreements can be approved by the Members. The implementation of the Trade Facilitation Agreement, the expansion of the Information Technology Agreement, and progress in the Environmental Goods Agreement, all suggest that motion – maybe not earthshattering events – but motion nonetheless, remains possible.

JHM

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