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ON THE CONSTITUTION OF JOHN H. JACKSON

*Ernst-Ulrich Petersmann**

Thanks to the wisdom of the Appellate Body of the World Trade Organization (“WTO”), the Oxford English Dictionary has been cited in almost every appellate report since 1995 and is emerging as one of the leading sources for the interpretation of WTO law. It is only fitting, therefore, to begin this tribute to John—as the most authoritative academic author on the General Agreement on Tariffs and Trade (“GATT”), WTO and international economic law over now three decades since the publication of his *World Trade and the Law of GATT*¹ (still widely referred to as “GATT bible” all over the world)—with a reference to this Oxford source of WTO wisdom. The term “constitution” can be used, according to the Oxford Dictionary, not only for the principles governing a polity or other organization, but also for the structure and condition of a person. This contribution begins with a brief reflection on the constitution of John Jackson as a friend, followed by a few thoughts on John’s written work on national and international constitutional law and policy. The analysis confirms what we all know: the liberal and cosmopolitan personalities and ethics of John and his wife Joan, are inseparably interwoven with his constitutional concept of how to improve law and policy for the benefit of the citizens; and John’s intellectual curiosity, energy and commitment to improving the effectiveness of rules and policies promise ongoing “constitutional dialogues” in the years to come among John and his many friends and legal disciples all over the world.

* * *

I came across the books and other publications of John Jackson in the 1970s when, as research fellow at the Heidelberg Max-Planck-Institute for International and Comparative Public Law, I published articles on “The New Law of North-South Trade” and a contribution to the International Encyclopedia of Comparative Law on “International Governmental Trade Organizations—GATT and UNCTAD.” John’s classic

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

treatise on *World Trade and the Law of GATT* clearly differed from the writings of all other scholars about international trade law and policy in several respects:

- the analysis was unprecedented as regards his comprehensive empirical approach taking into account all relevant GATT documents and analyzing in great detail all relevant GATT practices; for more than thirty years, John's writings have remained characterized by his microscopic interest also in legal details and by his first-hand information, based on his close personal contacts to GATT and WTO staff members and trade policy-makers in the United States, the European Community and many other countries;
- unlike the ivory-towered "legalism" of many international lawyers, and the no less abstract "economism" of many economists, John's writings are truly interdisciplinary and policy-oriented: there is probably no other international law professor who has so visibly influenced the law and practice of a worldwide organization over more than three decades as John Jackson;
- John's work also differed from other books on GATT by his emphasis on a "rule-oriented" rather than "power-oriented" approach to international relations;
- even though John's practical experience as legal counsel in the U.S. Trade Representative's (then, U.S. Special Representative for Trade) Office, and his admiration of the U.S. constitutional system, are reflected in many of his analyses, he has carried out—probably more than any other international economic lawyer—numerous comparative legal analyses of the constitutional systems and trade legislation of other GATT and WTO member countries;
- perhaps most importantly, John's work goes beyond the traditional "statist conceptions" of classical international lawyers and applies a citizen-oriented "constitutional approach," taking into account the needs of traders, producers, investors, and consumers, as well as the need for democratic legitimacy and constitutional checks of international rules and organizations.

John's 1969 treatise on GATT law ends with a far-sighted chapter on "The Constitutional Structure of a Possible International Trade Institution," culminating in the following conclusion:

The perpetual puzzle and the expensive struggle of international economic institutions is to try to sift out the "wheat from the chaff," i.e. to give measured scope for legitimate national policy goals while preventing use of these goals to promote particular interests at the expense of the greater common welfare. An additional function of the international institutions is that of any government unit—to allow a society of persons or nations to organize in such a way as to enable its members to pursue common goals without being defeated by competing antisocial conduct of members of the group. . . . What is needed in an institution . . . is the structure and machinery to enable man as efficiently as possible to pursue the "sifting" function mentioned above as well as the pursuit of common goals. . . . In the long run, it may well be the *machinery* that is most important (i.e. the procedures), rather than the existence of any one or another specific rule of trade conduct.²

Reading these lines, in the late 1970s, influenced not only the choice of the subject and of its constitutional and comparative law approach for my "habilitation book," *Constitutional Functions and Constitutional Problems of International Economic Law—Foreign Trade Law and Policy in the United States, Switzerland and the EC*. It also contributed to my acceptance of an offer, in 1980, to start working inside "the machinery" of the GATT Secretariat as the first legal officer ever employed by the GATT (which formally established a "legal office" only in 1983). In 1981, I met John for the first time personally at Geneva on the occasion of his annual visit to the GATT Secretariat. One of the first pieces of advice I received personally from John was on the use of computers used in the GATT Secretariat—he mastered the "GATT machinery" in all respects, including its most technical details. By coincidence, the Jackson family had rented an apartment in the same building where we lived, and my wife Dorothee had already met John's wife when Joan looked desperately for help to explain the jointly used washing machine. The following evening was the first in a long series of joyful evening invitations by the Jackson family in Geneva and, in later years, also in Ann Arbor. Dinners and discussions at the Jackson family remain unforgettable due to the same personal features that characterize John's writings: sincere sympathy and curiosity for all details of human

2. JACKSON, *supra* note 1, at 788.

life; frank and prudent balancing of all arguments; focus on principles and their ethical foundations; and practical concern for alleviating social problems.

* * *

One of several academic conferences organized jointly by Meinhard Hilf, John Jackson, and myself was on "National Constitutions and International Economic Law." John contributed, *inter alia*, some "summary reflections" on "agreed propositions," "fundamental differences in approaches," and "proposals."³ He identified the following five agreed assumptions:

First, the "strong link between international law and national constitutional systems, which must be understood in order to understand the international economic system as it evolves today and in the future."⁴

Second, the objective of making more effective the policies and basic goal of the international trade system "to liberalize trade on the whole to take advantage of the economic theories of comparative advantage and economies of scale."⁵

Third, that many of the obstacles to trade liberalization exist within national political and legal structures that affect transnational economic law and policy, in particular various interest groups and 'rent-seekers' which "often have an influence in excess of their proportionate share of the economies or national political systems."⁶

Fourth, that the dynamic evolution of international trade law towards greater world interdependence among nations and among economic systems entails "progressively developing higher levels of detail of international regulation."⁷

Fifth, that "the international trade system must be 'rule oriented' as opposed to 'power-oriented;'" our conference discussions focused on "how to make the rules more effective . . . in the face

3. John H. Jackson, *National Constitutions, Transnational Economic Policy and International Economic Law: Some Summary Reflections*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 569-576 (M. Hilf & E.U. Petersmann eds., 1993).

4. JACKSON, *supra* note 3, at 570.

5. *Id.* at 571.

6. *Id.*

7. *Id.*

of the domestic interest groups, or 'rent seekers' who have sought to reduce trade liberalization so as to enhance their own economic profits, rents and positions."⁸

John also identified three "fundamental differences in approaches to international law":

- International law in Europe seems to be much more important than it is in many parts of the world, particularly in the United States. This is partly a result of many centuries of development in Europe, with many small countries who must interact with each other under a framework of international law rules.⁹
- Many Europeans are trained in civil law thinking, which in broad brush might be characterized as "top-down thinking" about legal propositions. In addition, Europeans tend to have a somewhat different view about the role of elites, particularly in international affairs, perhaps giving greater deference to the activity of elite participants than might be the case, for example in the United States.¹⁰
- For most people from the U.S., there is considerable faith in the U.S. Constitution and the stability of the political system, a faith which many people from the U.S. do not share when it comes to international law and international institutions. To some extent, international law is viewed as peripheral, and even dangerous, with a potential for interfering with some of the finer aspects of the U.S. constitutional legal system. . . those from the U.S. . . . tend to be somewhat more skeptical about the value of international law becoming effective in domestic law systems. In addition, certain aspects of the U.S. constitutional history allow those from the U.S. to be somewhat more skeptical about easily amending a constitution, or introducing into a constitution a protection of economic rights as compared to human rights.¹¹

The remainder of John's "summary reflections" focused on his worries and viewpoints on some of the constitutional proposals that have remained controversial in academic conferences and political negotia-

8. *Id.* at 572.

9. *Id.* at 573.

10. *Id.*

11. *Id.* at 573, 574.

tions in regional and worldwide organizations like the WTO. John focused on the following two constitutional concerns.

First, as regards the proposal of national and international constitutional guarantees of freedom of trade across frontiers: “there is a worry that such an approach is essentially undemocratic,” “may not suit democratic constituencies over a long period of time,” and may be too favorable to special interests “compared to the broader needs of the nation;” moreover, an amendment of the U.S. Constitution to this effect would be politically impractical in the foreseeable future; the alternative approach of a reciprocal international free trade agreement “would not ensure constitutionalization of the treaty norm, since in the U.S. later-in-time statutes would prevail,” and international treaty norms are implemented in different ways in different countries.¹²

Second, concerning the “constitutional functions” of international guarantees of freedom of trade for protecting private freedom across frontiers: John views “international law as instrumental,” and prefers to downplay “a view that international law somehow has an inherent status higher than national constitutions or national political processes.” John shares “a fair amount of skepticism about international law, since in many cases its effectiveness leaves much to be desired;” he thinks:

it is better to avoid the rigidity of constitutional measures to reinforce trading goals, and also the rigidity of constitutional structures which provide for direct application of international treaty norms as well as a higher status for those norms in the legal system . . . international treaty norms might well be designed so that they would be sufficiently attractive to national-level political constituencies for national legal systems to provide the “act of transformation” to incorporate the treaty norm in those systems, albeit subject to later alteration if the norms prove to be not optimal.¹³

* * *

John’s “summary reflections” are an admirable illustration of his analytical sharpness and prudent balancing of arguments, avoiding extreme positions. It is no less characteristic for John that he has continued to reconsider and probe these constitutional arguments in many of his subsequent writings. As a result,

12. *Id.* at 575.

13. *Id.* at 576.

- some of the above-mentioned “agreed assumptions” have been defined more generally, such as that “understanding an international legal system necessitates understanding the relationship of national and political systems to that international system;”¹⁴
- the policy considerations relating to the legal status and effects of international treaties in domestic law have been explored in a very systematic and comprehensive manner “on the basis of empirical and pragmatic considerations,”¹⁵ leading to the “basic conclusion . . . that there are sound policy reasons for a national legal system with typical democratic institutions to avoid the combination of direct domestic law application of treaties and higher status for those treaty norms than later-enacted statutory law;”¹⁶ and
- the functional interrelationships between national constitutional procedures and the “domestic law status” of international treaties have been defined more precisely, based on John’s insight that the above-mentioned “conclusion depends greatly on the relative degree to which constitution drafters trust international institutions and treaty-making processes compared with national institutions and legislative processes.”¹⁷

A central premise in John’s constitutional thinking remains his view, already emphasized in the above-mentioned concluding sentence of his 1969 “GATT bible” that procedures may be more important than any one or another specific rule.¹⁸ John has explained this position with many convincing examples. For instance,

if a constitutional treaty-making procedure does not provide for ‘democratic participation’ such as parliamentary approval, it would not be surprising to find reluctance to have the treaty affect domestic law until a parliament has acted (as we see in England and some Commonwealth countries). The parliamentary act can be the act of transformation, and its requirement as part of the domestic lawmaking system can substitute in part for

14. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 311 (1992).

15. Jackson, *supra* note 14, at 312 *et seq.*

16. *Id.* at 313.

17. *Id.*

18. *See* Jackson, *supra* note 1, at 788.

the direct participation in treaty making of parliaments in other constitutional systems.¹⁹

Since the U.S. Constitution gives the power to make treaties to the U.S. President “with the advice and consent of the Senate,”²⁰ it seems only logical from this perspective that John Jackson agrees with the U.S. court practice to give priority to Congressional legislation over conflicting international treaty rules, and that he approves of the U.S. legislative practice to conclude and implement international agreements by congressional acts. Concern for the due process guarantees in U.S. constitutional law is another procedural argument mentioned by John against direct application of vague international treaty rules by domestic courts.²¹

The focus on procedures and due process as sources of legitimacy, and the view that “justice” makes sense only among individuals but not among states, have a long tradition in Anglo-American legal doctrine.²² Even though the related positivist view that law-making procedures deserve allegiance irrespective of the substance of the rules was strongly rejected in the U.S. Declaration of Independence and by the founding fathers of the U.S. Constitution, the *statist* and process-oriented conception of international law remains the dominant paradigm in Anglo-American legal doctrine. Even in domestic U.S. constitutional law, the unique experience of more than 200 years of liberal constitutional democracy in the United States seems to have prompted most U.S. constitutional lawyers to neglect the primary concern of the founding fathers of the U.S. Constitution, and also of many post-war constitutions in Europe, that parliamentary assemblies may become the most dangerous branch of government unless they are adequately constitutionally restrained. Notwithstanding the founding fathers’ rejection of the British Parliament’s claim to “parliamentary sovereignty,” and their conception of the U.S. Constitution as a constitutionally limited democracy, the U.S. Congress seems to assert almost unlimited powers in the foreign policy area.²³ U.S. courts have supported this trend from “constitutional democracy” towards “parliamentary democracy” by means of judicial

19. Jackson, *supra* note 14, at 316.

20. U.S. CONST. Art. 2 § 2.

21. *Id.* at 324.

22. See e.g., THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 19 (1990) (arguing that the legitimacy of international rules depends on “right process” rather than on theories of justice); cf. FRANCK, *supra*, at 208–46.

23. See e.g., E.U. PETERSMANN, *Limited Government and Unlimited Trade Policy Powers? Why Effective Judicial Review and a Liberal Constitution Depend on Individual Rights*, in Hilf & Petersmann, *supra* note 3, 537–61; E.U. PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* 293–313 (1991).

“political question” doctrines, “act of state” doctrines, “non self-executing treaty”-theories, and “later-in-time”-rules, all designed to justify judicial self-restraint *vis-à-vis* congressional powers, notably in the foreign policy area. In the trade policy area, this has culminated in the long-standing U.S. jurisprudence that “when the people granted Congress the power ‘to regulate Commerce with foreign Nations’ . . . they thereupon relinquished at least whatever right they, as individuals, may have had to insist upon the importation of any product.”²⁴ Yet: Is such an authoritarian “Hobbesian interpretation” of the constitutional contract, which treats citizens as mere objects of paternalistic government, really consistent with the constitutional concept of a government with limited powers required to “secure the blessings of liberty to” the people of the United States?²⁵

* * *

“Can two walk together, except they be agreed?”²⁶ I am deeply grateful to John Jackson that, over the past eighteen years, he invited me to accompany him so often, not only on walks around the lake of Geneva but also in numerous private discussions and public conferences. We are in agreement on numerous constitutional problems, such as the need for scrutinizing international law rules from a constitutional perspective and possibly refuse compliance with them (as it was done in the jurisprudence of American and German courts) if their application might entail violations of human rights or of other principles of constitutional law. Fortunately, John has been generous enough to walk along with me and continue our discussions even when we obviously disagreed. John may have done so because he perceived process (such as walking and discussing) as more important than substance. I tend to emphasize, apart from *due process*, also the Kantian *moral imperative* that political discussions and governmental processes derive democratic legitimacy from maximizing the freedom and other equal rights of the citizens. In order to further progress in our common search for a rule-governed international order that constitutionally protects individual freedom and peaceful cooperation across frontiers, I conclude this tribute with a number of questions that may stimulate further discussions on our future walks through the parks of Geneva or the Swiss mountains, regardless of whether we agree or disagree:

24. *Arjay Associates, Inc. v. Bush*, 891 F.2d 894 (1989).

25. U.S. CONST., Preamble (1789).

26. *Amos* 3:3.

- Does constitutional democracy really require the supremacy of laws over treaties, or their equal status so that the later in time will prevail? Should, in a globally integrated world where respect for the rights of U.S. citizens abroad depends upon respect for international law, Article VI of the U.S. Constitution (“Treaties . . . shall be the supreme Law of the Land”) not be construed in the sense that all the branches of government—including the U.S. Congress—have to respect international treaties provided they have been ratified in accordance with the Constitution? If the treaty-making power is exercised in a democratic manner, and international guarantees of freedom and non-discrimination serve “constitutional functions” for protecting freedom and non-discrimination also for the benefit of U.S. citizens in transnational relations: Is John’s preference for preserving “the option to breach the treaty”²⁷ not neglecting the “Janus problem” of foreign policy powers—*i.e.*, the fact that foreign policy discretion to discriminate among today’s 200 sovereign states entails also 200 possibilities of discriminating among *domestic citizens* trading with these countries?
- What lessons are to be drawn from the historical experience that peaceful cooperation, since the end of World War II, among the now forty member states of the Council of Europe was essentially achieved through the supra-national constitutional law of the EC and the European Convention of Human Rights? Do U.S. international lawyers offer any alternative “constitutional strategy” for effectively promoting human rights, rule of law and peace in international relations? Since the EC Treaty, and amendments of its “treaty constitution,” were ratified in EC member states by means of constitutional law-making procedures: Do these constitutional and democratic checks on the treaty-making process not offer democratic legitimacy to the jurisprudence of EC and national courts to recognize the direct effect, legal primacy, and “direct applicability” of precise and unconditional EC guarantees of freedom and non-discrimination for the benefit of EC citizens? Does the judi-

27. Jackson, *supra* note 14, at 325. See also the concept of “efficient breach” used by J. Jackson and A.O. Sykes in JOHN H. JACKSON & ALAN O. SYKES, IMPLEMENTING THE URUGUAY ROUND 463 (1997).

cial protection, for instance by the EC Court of Justice and the European Court of Human Rights, of internationally agreed freedoms, duly ratified by national parliaments, not also serve “democratic functions” for protecting citizens against the centuries-old tradition of discriminatory foreign policy measures?

- Are there not dangerous constitutional risks of John’s preference for legislative freedom to “transform” international treaty obligations into domestic legislation? Which other constitutional instruments, apart from strict respect for international treaties ratified by national parliaments, can ensure international rule of law and protect citizens against the risk that foreign policy discretion will be abused by powerful interest groups and “rent-seekers” (including periodically elected members of parliament) for discriminating also among *domestic citizens* (e.g., depending upon the country origin of their imports, or the country destination of their exports)? How to overcome the international “prisoner’s dilemma” that perceived short-term gains from nationalist “Smoot-Hawley legislation” may trigger international retaliation and reduce the welfare of all citizens?

* * *

The philosopher Kant once said that, just as it is unlikely that people will stop breathing so as to avoid dirty air, it is unlikely that they will cease philosophizing in view of “the love which the reasonable being has for the supreme ends of human reason.” It is also unlikely that John and myself will stop discussing the constitutional challenges of modern global integration on our future walks along the lake of Geneva. John may not consider himself a philosopher, and certainly not one in the Kantian tradition. Yet, John’s pragmatism seems to be rooted also in the Kantian belief that “out of the crooked timber of humanity no straight thing can ever be made.” Today’s international postwar constitution resembles “crooked timber” that has grown slowly over more than fifty years, “like a tree capable of growth and expansion within its natural limits” (as it was said by Lord Sankey about the Canadian Constitution). From previous walks, I recall how much John enjoys watching the trees in the beautiful parks around the GATT and WTO headquarters at Geneva, just as he enjoys observing, analyzing and influencing the

evolution of the worldwide “WTO constitution.”²⁸ On occasions like the annual night-time fireworks at Geneva—which I watched the first time back in 1981 together with John, Joan and their three daughters at the lakeside close to the GATT building—John’s self-disciplined and hard-working habits may become very relaxed and he might agree even with the romantic Kantian observation: “Two things fill the mind with ever new and increasing wonder and awe, the more often and the more seriously reflection concentrates upon them: the starry heaven above me and the moral law within me.” Yet, reconciling the moral law with the laws of nature so as to promote national and international constitutional order for the benefit of the citizens is likely to remain the primary pre-occupation of John in the years to come. For this challenging task, and for John’s and Joan’s joint pursuit of happiness, I wish them both all the best and many happy returns to Geneva.

28. See generally JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998).