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JOHN JACKSON AND THE FOUNDING OF THE WORLD TRADE ORGANIZATION: EMPIRICISM, THEORY AND INSTITUTIONAL IMAGINATION

*Joel P. Trachtman**

I. INTRODUCTION

I was pleased and honored to be invited to join in this volume in honor of John Jackson. However, I write not because my personal tribute will add much to those of the many strong voices included here. Rather, I wish to recount the tribute that *the world* has paid to John Jackson.

Most other legal scholars simultaneously envy and disdain the world of practice. We envy the ability of practitioners to reify their ideas—to change the world.¹ We disdain the world of practice because it usually does not heed our advice, or operate in accordance with our theories. But the world can pay no greater tribute to a legal scholar than to adopt his or her ideas sooner or later. The international trade community has frequently adopted Jackson's recommendations. I will focus in this brief essay on the most remarkable of these tributes bestowed on Jackson, the 1995 establishment of the WTO in substantially the form that Jackson recommended in 1990. Perhaps the formation of the WTO, on the cusp of the 21st century and the third millennium, will be regarded in the future as an act of great historical significance. Jackson was present at the creation, and in fact, he was one of the creators.

I recount this story not only to honor Jackson, but also to help describe a path for other scholars to emulate. Jackson has succeeded in establishing a dauntless empirical black letter foundation on which he has been able to build a superstructure of prescription. This brief essay asks how he links his empiricism to his prescription. In order to form a context and basis for this story, I first will provide a vignette of John Jackson as a colleague, an assessment of John Jackson as a black letter scholar, and a critique of John Jackson as a theorist.

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1. *But see* JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1936) ("Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.").

A. John Jackson as a Colleague

Because he established the field of international economic law, Jackson is an *eminence grise* of the highest order in that field. One might expect that such a scholar could be unapproachable at best, and predatory of upstart competitors at worst. Instead, Jackson is both accessible and helpful; in fact, he exemplifies the best characteristics of a scholar: modesty, curiosity, collegiality and honesty. He seems eager to learn of new developments, and to understand new theoretical approaches. He is willing to encounter and engage new approaches.

My first meeting with Jackson is probably typical of the junior scholar's experience. In the early 1990s, I attended an American Bar Association meeting at which Jackson spoke. It took place in a very large ballroom. I would not have been bold enough to introduce myself to Jackson, but I asked a question from the floor and was required to state my name. Jackson answered the question. At the end of the panel presentation, I was preparing to leave, too shy to approach the dais to introduce myself to the leading scholar in my field. As I packed my briefcase, Jackson (having heard me state my name) bounded to my table, introduced himself, kindly complimented me on one of the first papers I published, and engaged me in discussion of the topic. Perhaps he has forgotten the incident, which for him has no doubt been repeated many times with other beginning scholars. But this generous act gave me new confidence in my research, and in my ability to approach and engage in discourse with top scholars. I believe it helped me to take risks in my subsequent scholarship I might otherwise have eschewed.

Jackson organized the leading professional organization in international economic law, the International Economic Law Group of the American Society of International Law. I was not involved in the creation of this group, but I have been involved with it during the past ten years, and have found it a fine community of scholars. Jackson has led in developing the discipline of international economic law and has recently founded a fine, and much-needed, journal in this field. His nurturing of the field has not been simply an event of significance to the professionals and scholars who identify themselves with the field, but has helped all of us to explore and understand relationships among issues that had earlier been thought separate, as well as linkages between international economic law and coordinate studies in politics and economics.

B. *John Jackson as a Black Letter Scholar*

I have little to add to what everyone knows about John Jackson as a scholar of black letter trade law. He has dominated the doctrine of international trade law, methodically and accurately covering all of its contours, nooks and crannies, and doing so in varying forms and levels of specificity.

For the legal scholar, doctrine is a major component of empiricism.² Recorded doctrine allows us to test hypotheses generated by our theories. The other major component of empiricism, explored by the "Brandeis briefs" and by law and economics, is the empirical analysis of the actual effects of law, as opposed to the Langdellian focus on cases. For the legal scholar aspiring to social science, empiricism is the foundational *sine qua non*. And yet, empiricism alone is no longer sufficient. Theory is needed to let us know which facts to observe, and to let us assess the importance of the facts.

C. *John Jackson as a Theorist*

Yet, Jackson is not well known as a theorist, although he has contributed several seemingly useful ways of thinking about international economic law. One way establishes a dyad between power-oriented and rule-oriented decision-making in international economic affairs.³ A second, the "interface theory," examines the challenges to international trade law that result from the different domestic economic systems, business structures, and legal systems.⁴ Both of these "theories" contain insights aplenty, but are they really theories? Jackson, like most legal scholars, is not an economist, political scientist, or other purported social scientist.

These are not theories in the social scientific sense: they do not lead us to refutable hypotheses that we may then test through empirical analysis. Jackson reverses the process: he first brings to bear his powerful empiricism, then develops a "theory" to explain a curious pattern, or to suggest how we might plausibly understand a particular phenomenon. This inductive approach is neither improper nor inefficient: we know

2. As Langdell put it, "The Library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist." HARVARD LAW SCHOOL ASSOCIATION, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917, 97 (1918).

3. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 109-111 (2d ed. 1997); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 49-54 (1990) [hereinafter, RESTRUCTURING]; John H. Jackson, "Managing Economic Interdependence"—An Overview, 24 LAW & POL'Y INT'L BUS. 1025 (1993).

4. See JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 668-72; 1140-42 (3d ed. 1995)

what the concerns are, and the number of relevant instances is relatively small. Therefore, at least in the areas with which Jackson is concerned, *ex ante* theorizing may be unnecessary, and in some circumstances may be a conceit, or even more dangerously, a substitute for empirical verification. On the other hand, Jackson's work may be viewed as meta-theory: observation and analysis that strives to produce theory that may be operationalized in future.

II. JOHN JACKSON'S INFLUENCE ON THE STRUCTURE OF THE WTO: RESTRUCTURING THE GATT SYSTEM

A. *Black Letter Empiricism*

In his 1990 monograph, *Restructuring the GATT System*,⁵ Jackson sets out a critique and a prescription for institutional reform of the GATT: he provides the reasons for, and the design of, the WTO. Jackson puts aside the particular trade concessions being negotiated in the Uruguay Round, in favor of "longer-term" and "more fundamental" issues of institutional and, he dared to say, constitutional, structure. Just as only Nixon could have "opened" China, only someone so pragmatic and so immersed in the doctrine, politics, and day-to-day mechanics of the GATT could open up the idea that what was needed was "constitutional."⁶

Jackson is on ground that he has trod well and carefully here, examining the (unfortunately named) "birth defects" of the GATT itself, as well as the stillborn International Trade Organization (ITO), the third of the Bretton Woods triplets. He lays bare the GATT's institutional problems in decision-making, amendment, balkanization by side agreements, dispute resolution, and secretariat services.⁷ Jackson is a modernist: "To a large degree, the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach."⁸ Here, Jackson betrays his idealism, his hopes for greater rule-orientation. Yet he is elsewhere consumed with the modesty of empiricism, describing with

5. RESTRUCTURING, *supra* note 3.

6. Jackson is still bashful of the term "constitutional." In his 1998 book, Jackson states that "[t]he term 'constitution' is obviously here being used in a broad sense, not confined just to one or several documents or even to writing, but referring generally to the practices as well as to documents that define the structure of a particular system of governing rules." JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 129, n. 1 (1998).

7. See RESTRUCTURING, *supra* note 3, at 45-47.

8. *Id.* at 52.

impeccable realism the rules as they actually operate, warts and all.⁹ Thus, he vacillates between the positive and the normative, unsure of his right to normativity, yet confident that his positive work qualifies him to engage in critique and prescription.

The 1990 book, *Restructuring the GATT System*, based on thirty years of observation and analysis, formed the basis for Jackson's advice to the government of Canada regarding institutional issues in the Uruguay Round.¹⁰ Jackson explicitly takes a "problem-solving" approach.¹¹ However, he leaps from addressing specific problems to a more comprehensive, forward-looking and "fundamental" approach. He explicitly models his initiative on the work of the Spinelli Commission proposing a constitution for the European Community and on the work of the American Law Institute.

Jackson's first intuition is that the charter of the new organization must be simple and discrete, "focused on the institutional and procedural issues, largely leaving substantive rules and obligations to other treaty instruments such as the GATT which would be served and 'sheltered' by the broader organization."¹² This intuition is the result of a combination of vision and modesty. Jackson sees the need for an overarching organization, but recognizes the lack of political support for a complex organization that requires more extensive substantive rules and locks them in place. Jackson names the "World Trade Organization" and specifies that it would function to support not just the GATT but also, *inter alia*, an agreement on services and an agreement on intellectual property. Jackson then outlines the WTO charter, covering the fundamental topics actually agreed four years later.

With respect to the central issue of dispute resolution, Jackson calls for the unified procedure (allowing limited cross-retaliation) actually implemented, but does not in his 1990 work anticipate the most revolutionary change actually made: the move to a "negative consensus" system that requires adoption of panel reports (and Appellate Body reports), unless there is a consensus *not* to do so. This has been hailed as the most important institutional change made during the Uruguay Round. Why did Jackson fail to predict such an important change? This change came to all commentators as a surprise, although many

9. See David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7 (1994).

10. See ERNEST H. PREEG, *TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM* 113 (1995).

11. *Restructuring*, *supra* note 3, at 91.

12. *Id.* at 94.

international economic law scholars (myself included¹³) have sought to apply their theoretical perspectives to explain the change *ex post facto*. One reason, perhaps, that Jackson did not recommend or predict this change (although he certainly commented on the problem it addresses) is that there is an open question as to how defective the former system of “positive consensus” was. As Professor Hudec has concluded,

The record of positive results in almost nine out of ten cases has obviously been high enough to induce governments to use the dispute settlement system extensively, and to invest considerable political capital in trying to strengthen it further. At the same time, however, the failure rate of 12 percent has served as a vivid warning that it is a new and primitive legal order, one that is still some distance away from being able to impose its order on all major problems.¹⁴

Further, there is an open question as to whether the change to negative consensus is actually an improvement over the former system: in making WTO law more enforceable—more binding—we have also made it more rigid. There are those of us who wonder whether politics should always or increasingly give way to law.

B. Theoretical Substructure and Institutional Imagination

Jackson’s theoretical substructure is not explicit in *Restructuring the GATT System*. His implicit approach is pragmatic problem solving. This involves juxtaposing problems with plausible solutions. Perhaps the solutions are based on Jackson’s wide experience, giving rise to accurate intuitions. Many of us would be persuaded because we are aware of the daunting knowledge base and powerful judgment that Jackson brings to bear to these problems. Yet, others might prefer a more explicit framework, which would allow them to check on the comparative institutional analysis done, and to examine the extent to which the solution might raise other issues. As with natural sciences, we wish to have results that we can duplicate and thereby verify in our own laboratories, derived according to an agreed “scientific” method.

In some of Jackson’s more recent work, he flirts with new institutional economics,¹⁵ and I would applaud the reference to a more explicit

13. See Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NORTHW. J. INT’L L. & BUS. 470, 549–55 (1997).

14. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 286 (1993).

15. See JACKSON, *supra* note 6

and evolved theoretical and methodological framework that allows the contextualization of Jackson's empirical base, insight and judgment. However, Jackson's experience makes clear that the *sine qua non* of institutional imagination is doctrinal information. We cannot come new to a field and pretend to know how to address its legal problems; rather, the spark of imagination must fall on the carefully laid tinder of doctrinal knowledge and analysis in order to provide any institutional illumination.

III. CONCLUSION

Jackson has established his preeminent position by focusing on doctrine, and by dominating the black letter of trade law. Not only does he dominate the legal doctrine, but also keeps a sensitive finger to the pulse of international trade politics. Is it sufficient for those who wish to emulate his success, in academia and in policy circles, to do the same? I would answer that it is not. For our colleagues and the policy community today demand more formal analysis and presentation. Economists and other social scientists have demonstrated how lawyers may use the tools of social science; in fact they have begun addressing issues heretofore left to lawyers, with stimulating results.¹⁶ Economics, political science, and law are not simply separate disciplines, speaking at cross-purposes. Rather, we begin to see emerging an integrated social science, for which legal analysis is both a tool and a component. Jackson shows that lawyers can join in, add value, and sometimes lead, but only by taking advantage of the kind of detailed doctrinal knowledge that John Jackson demonstrates, while also engaging, and sometimes using, the theoretical and methodological sophistication of the other social scientists.

16. See Joel P. Trachtman, Book Review: THE WTO AS AN INTERNATIONAL ORGANIZATION (Anne O. Krueger, ed. 1998), 92 AM. J. INT'L L. 598 (1998).