BOOK REVIEWS

The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations, by John H. Jackson. Cambridge University Press, Cambridge, United Kingdom, 2000, ISBN 0-521-62056-2, xiii + 497 pp., incl. Index, USD 80.00/GBP 52.50.

It cannot be denied that the World Trade Organization (WTO), during its brief five-year existence, has kindled a new awareness of international economic law and international economic relations. Nowhere is this more evident than in the publishing world where international economic and trade law titles now take their place alongside other traditional public international law titles. And so it is with Cambridge University Press and *The Jurisprudence of GATT & the WTO* which launches its new series on international economic and trade law. This new publishing venture may be in response to some law schools that feel a pressing need to mount new courses and endow chairs in international trade law in order to spur young lawyers down the path of free trade. Or it may be in response to some private lawyers who are hopeful of representing their clients' trade interests in a vastly improved dispute settlement system. Or else, it may simply be in response to some sections of the international public and civil society organisations, seeking reassurances from WTO Member governments that legitimate non-commercial policies will be taken into account when devising new international trade rules.

Whatever the motivation of the potential readers of this book, they will have understood that there is a growing need to know about contemporary issues in international trade law and policy. It is therefore fitting that *The Jurisprudence of GATT & the WTO*, by John H. Jackson, should be the most recent addition to the burgeoning ranks of international trade law publications to grace our bookshelves. This is because John Jackson is the pre-eminent international economic law scholar of the last half-century and a doyen of the free trade school, in the liberal tradition.[1] With this new publication Jackson continues his broad, pluralistic, international, and above all, pragmatic approach to international economic law, which he established in his seminal work *World Trade and the Law of GATT* (1969) and which he has continued over four decades. That particular book marked Jackson's debut as a pioneer in the field and established a tradition which he continued in his later publications right up to the appearance of *The World Trading System: Law and Policy of International Economic Relations*, first published in 1989.

With *The World Trading System*, Jackson sought to break away from

1. For a survey of John Jackson's contribution to the subject of international economic law, *see* D. Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 American University Journal of International Law and Policy 671–716 (1995).

14 Leiden Journal of International Law 247–266 (2001)

some of his earlier writings, including a casebook co-authored with William Davey in the all-American academic tradition, *Legal Problems of International Economic Relations*, which laid strong emphasis on the national and international regulation of *transnational* economic relations. Instead Jackson continued the 'metropolitan tradition of legal process and transnationalism'[2] but attempted to anchor his work more fully in the mainstream of international law scholarship. His preoccupation with the 'trade constitution' stemmed from his earlier and enduring interest in constitutionalism and sovereignty. Yet his attention to the underlying issue of interdependence between substantive international law norms and compliance by national authorities, through a multiplicity of substantive and procedural laws and regulations, never lost sight of the *real politick* of international economic regulation during forty years of the cold war *era*. At the same time he pushed for a more international law approach to international economic relations.

For those readers who pick up the title, *The Jurisprudence of GATT & the WTO*, in the expectation that the subject matter of the book focuses on an enquiry into the philosophical and methodological foundations of international trade law, as epitomised by the General Agreement on Tariffs and Trade (GATT) and its institutional successor, the WTO, there may be disappointment. Instead, the book contains a selection of essays and articles previously published over a period of thirty years between 1967 and 1998. Some of the words and phrases in the sub-title – 'insights,' 'treaty law' and 'economic relations' – are a hint at the very personal selection of works that Jackson considers as representing his contribution to international law and policy scholarship.

The book is divided into six parts. Each part represents a theme under which one or more topics have been selected for inclusion, based on several criteria, as explained by Jackson in the Preface. The first criterion is that the selections are "as relevant to scholars and policymakers today as they were when first published." Jackson admits that the simple application of this criterion resulted in too long a list of works and so other criteria had to be used when making the final selection. The result is a collection of essays that focuses on broader issues and concentrates on making available articles, which have previously been less accessible to potential audiences. Most of the essays are republished in their original form, without changes and updates, although a few have been deliberately shortened and sections omitted. The references in the footnotes have been updated in order to provide some consistency between the different themes that run through the volume. Jackson also provides a short introduction to each part, explaining how the articles interrelate and occasionally providing additional background information to assist the reader in understanding how and why particular chapters have been grouped together. The main texts are accompanied by a select bibliography of the author's works

2. *Id.*, at 691.

that serves as a testimony to Jackson's contribution to modern international economic law scholarship.

Turning to the six themes and parts of the book, Part I is entitled "A view of the landscape" in which Jackson presents an overview of the global economy and the subject matter of international economic law as he sees it. The single essay, which is found in this Part I, Chapter 1, is taken from the first issue of a new *Journal of International Economic Law*, of which Jackson is the editor-in-chief. It is intended to contextualise the subject-matter and to establish the contours of policy objectives that influence international economic law. Jackson takes a broad canvas and paints what he sees as a 'global economic landscape' of interdependence, market economics, national governments, and the efficacy of international law rules in the context of economic behaviour. For him, international economic law (IEL), permits of two approaches: the transactional and the regulatory. Whereas the former is largely concerned with the economic activities that take place between private actors, the latter emphasises the role of government institutions at national, local, or international level. But Jackson, like all good painters allows the meaning of his landscape to be rendered differently, dependent upon the perspective of the viewer, in this instance characterised as the differing approaches of the academic and the policy maker. While clearly supporting the selection of research priorities from a theoretical standpoint, Jackson admits that the task may be burdened by empiricism, multidisciplinary approaches, the breadth of legal understanding required to relate IEL to general international law principles, as well as national constitutional and 'other law' issues. Ever the pragmatist, Jackson acknowledges that in some cases it might be better to shape 'policy research' preferences rather than theoretical ones because they may be 'useful for active users', i.e. the legal professional at large, whether governmental or private.

The theme of Part II is "The GATT and its troubled origins," in which our attention is focused on the historical antecedents of the WTO. This part is wholly retrospective. The first of the three essays in Chapter 2 dwells on the troubled origins of the GATT, including the failure of the International Trade Organization (ITO) to come into being, the continued existence of the GATT as a web of international treaty norms, the fundamental problems of decision-making and rule-making processes in which governments participate as contracting parties to a multilateral treaty régime, rather than as members of an international organisation, and the relative success of the GATT given its deficiencies.

The broader theme of the GATT's success in spite of its 'birth defects' is echoed in Jackson's next essay on the origins of the GATT multilateral trade negotiating (MTN) system to be found in Chapter 3. It is a survey of the constitutional and functional underpinnings of the GATT-MTN system, as exemplified by the 1973–1979 Tokyo Round. It serves to remind us that many of the institutional problems which be-set the quintessentially post-1945 regime of the GATT during this MTN (and which Jackson

noted in his 1980 article from which the excerpt is taken), are still relevant in the WTO context. The debacle of the Third WTO Ministerial Conference at Seattle in 1999 clearly demonstrates that the shortcomings of this fledgling international economic organisation rest with the institutional decision-making and rule-making processes that it inherited from its predecessor, the GATT.[3]

Some of the weaknesses that Jackson notes – the erosion of the GATT principle of non-discrimination through a multitude of exceptions, the rules on trade in agricultural goods, the plight of developing countries in the GATT and the increased resort to collusive safeguard practices, including voluntary export restraints (VERs), by governments and exporters in order to evade GATT disciplines – have only recently been addressed in the Uruguay Round MTN and some of them are still found wanting. The Tokyo Round MTN was the first substantive MTN to extend the jurisdictional competence of the GATT by disciplining non-tariff measures that distort trade flows. One measure of its success in achieving this was the extent to which national governments were prepared to implement the achievements of the Round at the domestic level. This leads Jackson both in this, and the third essay in Chapter 4 of Part II, to test the mechanism and constitutional structure of the GATT, as a focal point of international economic regulation, to which national governments turn for guidance in influencing national trade policymaking, rule formation, and the resolution of trade disputes between nations.

In Part III of the collection, Jackson turns his attention away from the constitutional and institutional aspects of the multilateral trading system towards the theme of "Trade Policy Fundamentals" in four essays on the most-favoured-nation (MFN) obligation, VERs, subsidies and countervailing measures, and the enigma of regionalism and multilateralism. His approach, as in *The World Trading System*, is to insist on "problems of 'policy' oriented around specific dilemmas or 'themes' of practical relevance."[4]

The first of the group of essays, in Chapter 5, is one of Jackson's classic pieces on the history and development of the principle of non-discrimination in the GATT, as evidenced by the norms of the MFN and national treatment obligations. Entitled "Equality and Discrimination in International Economic Law: The General Agreement on Tariffs and Trade," the essay was first published in the 1983 edition of *The British Yearbook of World Affairs*, edited by Georg Schwarzenberger who had himself written a similar piece, although broader in scope, a decade earlier in the same journal.[5] In his essay Jackson confines himself to a survey of

3 . R.M. MacLean, *The Lessons of Seattle and the Need for WTO Institutional Reform*, International Trade Law Review 1–5 (2000) (Opinion).
4 . Kennedy, *supra* note 1, at 683.
5 . G. Schwarzenberger, *Equality and Discrimination in International Economic Law*, British Yearbook of World Affairs 163–181 (1971).

the background and history as well as the legal and policy functions of the MFN obligation in the GATT, without reviewing the national treatment obligation. This omission detracts from the overall impact of the essay, particularly when one considers the growing importance of the principle of non-discrimination in other contemporary international economic *fora* such as the European Economic Community, all the Members of which were GATT contracting parties at the time, and the examination of the principle and its application by several GATT panels in the wake of the Tokyo Round.[6]

The second contribution, in Chapter 6, deals with the pernicious use of various forms of export-restraint arrangement under the former GATT, such as VERs, voluntary restraint agreements (VRAs) and orderly marketing arrangements (OMAs) in defiance of the so-called 'escape clause' of Article XIX GATT. Jackson conducts a legal analysis of the consistency of such arrangements, notably quantitative restraints and price controls, with key GATT obligations and their potential for justification under certain GATT exceptions.

The next essay, in Chapter 7, is a comment on Professor Diamond's economic analysis of the use of countervailing duties by the US Administration. Jackson takes issue with some of the more prevalent US policies on countervailing duties in response to the grant of subsidies in exporting countries. The entitlement and distortion models, which underpin many countervailing duty policies, are critically reviewed by Jackson who argues that countervail may have a constructive effect on some larger trading nations by inhibiting them from using trade-distorting measures and lowering world welfare but that this is not always proven.

In the fourth essay, contained in Chapter 8, Jackson returns to the point raised in his earlier coverage of the Article XXIV GATT exception for regional arrangements, that was taken up in his first essay on MFN, in Chapter 5. Once again Jackson dwells on the policy objectives behind regional arrangements before going on to relate the dismal experience with GATT rules and practice in managing such arrangements under Article XXIV and the Enabling Clause of 1979. Despite some of the suggestions for reform which Jackson made in this 1993 essay, for example the inclusion of specific rules requiring partners in such preferential regional arrangements to undertake the 'least trade restrictive' regulatory action possible, little has been achieved in the Uruguay Round *Understanding on*

6 . Some examples include the following GATT panel reports all of which dealt with aspects of the application of the national treatment obligation, as embodied in Article III GATT: Spain – Measures concerning domestic sale of soybean oil (Oilseeds), L/5142 and L/5161 (1981) unadopted; Japan – Restraints on imports of manufactured tobacco, L/5149, adopted on 11 June 1981, BISD 28S/100; EEC – United Kingdom application of EEC directives to imports of poultry from the United States, L/5155, adopted on 11 June 1981, BISD 28S/90; United States – Imports of certain automotive spring assemblies (Section 337), L/5333, adopted on 26 May 1983, BISD 30S/107; and Canada – Administration of the Foreign Investment Review Act (FIRA), L/5504, adopted on 7 February 1984, BISD 30S/140.

the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade other than the strengthening of some of the procedural rules for the formation of customs unions and free trade areas.

The theme of Part IV is "Dispute settlement procedures," in which Jackson indulges his passion for discussing what is seen as the central enforcement mechanism of the GATT/WTO rules and disciplines. The first of these essays, in Chapter 8, reproduces a few sections of his 1978 article on the Domestic International Sales Corporation (DISC) case.[7] It serves as a poignant reminder of the complexity of dealing with international economic issues that revolve around trade and territorial tax practices, which can be construed as subsidies. Only brief excerpts from Jackson's highly critical discussion of the logic and reasoning of the panel are reproduced here but it is enough to raise two fundamental questions. What measures can a government reasonably take, directly or indirectly, to boost exports? Where should the line be drawn between those governmental measures, which are taken for legitimate policy purposes and those which are so predatory as to be insupportable in the international trading system?

For Jackson the DISC case is the case, *non-pareil*, in demonstrating the weaknesses of the GATT dispute resolution with respect to 'rule-application-interpretation procedures' (p. 116). Yet, it is Jackson's perceptive comment that there may be certain disputes which are so inextricably bound up with the need for "rule-making" rather than "rule-applying" that they are non-justiciable. This issue, while not uncommon in national government practice is not so readily grasped at the international level and merits serious consideration. Indeed the more recent WTO complaint brought by the European Communities against the United States, over the inconsistency of the latter's special tax treatment for 'Foreign Sales Corporations' (FSCs)[8] as being inconsistent with GATT/WTO national treatment and disciplines on subsidies, demonstrates that not all the lessons of the DISC case have been learnt and that there is still a need to consider some serious rule-formation in this area. It is also worth recalling that, besides obvious fiscal incentives, a variety of investment incentives remain largely unaddressed in the WTO context and are open to challenges of WTO inconsistency in the same way as territorial tax policies.

The next essay in Chapter 9, which was originally published in the 1994 Festschrift for Professor Henry Schermers, Professor Emeritus at Leiden University, is a medley of reflections by Jackson on the character of the GATT dispute settlement system – its historical antecedents, its central

7. United States – Income tax legislation (DISC), GATT Doc. L/4422 of 12 November 1976, BISD 23S/98; Income tax practices maintained by Belgium, GATT Doc. L/4424, BISD 23S/127; Income tax practices maintained by France, GATT Docs. L/4423, BISD 23S/114, and Income tax practices maintained by the Netherlands, L/4425, BISD 23S/137.
8. United States – Tax Treatment for "Foreign Sales Corporations" (FSC), Report of the Appellate Body, WT/DS108/AB/R and Report of the Panel, WT/DS108/R, adopted on 20 March 2000.

policy controversy ('rule-orientated' approach *versus* 'power-orientated' approach), and its many weaknesses, including the possibility for the losing party to block the adoption of the panel report. But it is to the legal meaning and status of GATT panel reports in international and domestic law, to which Jackson turns his attention. He offers a range of possibilities for construing the legal meaning of a panel report, which vary from being merely recommendatory, to having precedential value, to providing a definitive interpretation of GATT law.

The fourth essay, at Chapter 11, addresses the same topic that Jackson took up in Chapter 9, but this time from a WTO point of view. Logically speaking, it would have been better to place it immediately after the essay on the legal meaning of a GATT panel report. In this Chapter, Jackson answers the Austinian critique of Judy Bello that the legal effect of an adopted WTO panel decision, or Appellate Body ruling, is diminished by a lack of force to implement it at the international level. Jackson's reproach is to place Ms. Bello's remarks under the category of "misunderstanding" and to set the record straight. He does so by locating international trade law within the broader context of international legal norms that persist in the field of public international law. For him, it is not a narrow, domestically-orientated assessment that results in a choice between 'compensating' with trade, or other measures, or obeying the law, by bringing infringing domestic legislation and practices into conformity with the recommendations of the panel. Instead, an adopted WTO dispute settlement report establishes an international legal obligation upon the WTO Member in question to carry out the recommendations of the panel, or the findings contained in the Appellate Body ruling, which is binding in international law. Presumably the subsequent breach of an international legal obligation will give rise to a duty for that WTO Member to make reparation and to restore the *status quo ante* – the balance of rights and duties between it and its treaty partners – although Jackson does not discuss the relevant issues of state responsibility in such circumstances.

By contrast, the topic of the essay in Chapter 10 is an exercise in examining the principle of "sovereignty" in an "interdependent" world – two concepts with which Jackson is very familiar from his earlier writings. This chapter represents the highly acclaimed *American Journal of International Law* article, which Jackson co-authored with Steven P. Croley in 1996. In that article, Jackson and Croley analyse the standard of review and deference to national government decisions by WTO panels and Appellate Body. This essay is excellent for its thoroughness; the examination of the illustrative case law of GATT panels on the matter; the negotiating context for the inclusion of *Chevron*-like constraining language in Article 17.6 (ii) of the WTO Agreement on Antidumping, with its roots in judicial review of regulatory decisions in American administrative law; and the legal and policy considerations of applying *Chevron*-type deference and interpretative authority specifically in GATT/WTO proceedings and more generally in international law. Their critique of the

intellectual underpinnings for using this deferential standard of review in WTO context is exemplary and has echoed in at least one WTO panel report.[9]

The final essay in this Part, at Chapter 13, is one of the few forward-looking pieces in the collection, even though the first dozen or so pages contain a retrospective view of the history of the GATT/WTO in the matter of dispute settlement and a brief survey of the experience of the first years of the WTO dispute settlement system. While it is clear that general international law is much more relevant in settling disputes than when Jackson originally wrote this essay in 1998, some of the difficulties which WTO Members have recently encountered in the implementation of adopted dispute settlement reports, conform Articles 21, 22 and 23 DSU, had not yet surfaced. Had they done so, I do not think that Jackson would have been quite so optimistic about the new dispute settlement system, choosing perhaps to put this issue into the category of 'emerging problems.' On another point, he concedes that the new dispute settlement system could raise constitutional problems for the WTO if the burden of formulating new rules through interpretation continues to fall to constituent parts of Dispute Settlement Body. Similarly, the 'consensus' technique, used in reaching decisions at the WTO, remains unreformed. (Jackson pleads for a "Luxembourg Accords" type formula, in seeking a solution to the impasse that often results from the consensus process.[10] Under this compromise formula, leading WTO Members would be restrained from blocking consensus in certain circumstances and under certain conditions.)

Part V embraces a different theme: "GATT, international treaties, and national laws and constitutions." The six essays presented here concentrate on the inter-relationship of GATT/WTO treaties, and their ancillary and related instruments, to national laws as a means to understanding the jurisprudential context of IEL. It opens in Chapter 14 with Jackson's 1967 essay in the *Michigan Law Review* concerning the relationship between GATT law and the domestic law of the United States. This is an extremely well researched and documented account of US constitutional law in the matter of implementing international trade law obligations. While the major part of the essay deals with the question of whether GATT has any domestic law effect in the United States and, if so, how that is achieved (through proclamation), the remainder of the essay covers the scope of that domestic law effect, in relation to both federal and state law.

An historically interesting account, I feel that this long essay may only be of limited interest to most readers, in contrast to the next essay in

9. Korea referred to it extensively in its rebuttal arguments in United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Report of the Panel, WT/DS99/R, adopted on 19 March 1999, at 4.66–4.70.

10 . For one analysis of the 'Luxembourg Accords' formula and consensus decision-making, *see* M.E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 Northwestern JIL & Business Studies 653–680 (1996/97).

Chapter 15 which offers some comparisons between the United States and the European Economic Community (EEC) approaches, to what Jackson terms the "constitutional problems of economic interdependence." In his introduction to Part V, Jackson makes no claims for a detailed or systematic overview of implementing the major GATT MTNs, since this can be found in other published works to which he has contributed over time. Nevertheless, the broader, contextual approach to treaty making which Jackson chooses to apply does not serve him well. The comparative analysis which Jackson offers in his analysis of US-EEC trade relations, which he wrote for the *Common Market Law Review* in 1979, while on study leave at the European Commission, disappoints in its superficiality. He uses the United States constitutional and legal model for managing international trade relations as the measure for assessing the degree of success by other nations in implementing GATT law. This trend continues in other essays to be found in Part V, for example, in Chapter 16, which offers some perspectives on the jurisprudence of international trade, by means of a costs/benefit analysis of US legal procedures involved in regulating imports. This is followed by an examination of the effect of treaties in US domestic law in Chapter 17 and a policy analysis of the status of treaties in domestic legal systems in Chapter 18.

In the latter two instances, Jackson moves away from reflecting on pure international trade law and policy to a more general consideration of the relationship between international and domestic law. Chapter 17 is based on Jackson's contribution to the 1987 study, undertaken by the United Kingdom National Committee of Comparative Law, on *The Effects of Treaties in Domestic Law*. His essay focuses on the United States and is organised in two parts: the effect of treaties in US domestic law and the interpretation of international agreements by US domestic courts. It is a thorough and balanced appreciation of the issues involved in treaty implementation in a municipal legal system, with a particularly good section on the approaches of US courts to the issue of 'self-execution' of international norms, with 'intent' being critical for direct application. The direct applicability, or self-executing, nature of treaty norms as norms of domestic law, without any further act of transformation, is also taken up in Chapter 18. Jackson begins with a preliminary excursus into the doctrines of monism and dualism, followed by a brief examination of the practice in the matter of treaty application in the United Kingdom, the Netherlands, the United States and the European Community. He then digresses into various policy approaches that support/oppose direct application, before moving on to consider who makes the final decision about applicability and whether a directly applied treaty can have a higher hierarchical status than other national laws.

The final Chapter in this part, Chapter 19, is based on Jackson's contribution to the 1995 Festschrift volume for Professor Louis Henkin, and is a meditation on the concept of sovereignty and its specific treatment in the policy debate surrounding the United States' implementation

of the Uruguay Round Agreements in 1994. For Jackson, the term sovereignty in current policy debates is about "the allocation of power among different levels of different human institutions, mostly governmental" (p. 369) and he readily takes up the gauntlet which Henkin lays down to 'decompose' the '**S**' word.

Part VI introduces the last theme of the book as "The Uruguay Round and beyond: perspectives and conclusions." In Chapter 20 of this part Jackson posits two possible assessments of the WTO, as a watershed innovation or a cautious small step forward, then decides that it encompasses both. There is nothing in this chapter that cannot be found in *The World Trading System*. Jackson's appraisal is preceded by the usual suspects – an overview of the institutional and legal structure of the WTO, a review of its decision-making processes, the GATT/WTO dispute settlement system and the search for coherence in international economic policy making that arises as a result of the WTO finally taking its place alongside its Bretton Woods partners, the IMF and World Bank. It is only in the concluding pages that he dwells on the future prospects of the WTO. Some of the issues that Jackson believes should be addressed include: 'governance' to prevent abuse of power, the continuing effectiveness of the dispute settlement system, the decision-making and voting procedures of the organisation, the need for an internal (policy) steering group, drawn from the ranks of WTO Members, to guide and advise the Director-General, the integration of new and emerging subjects into the WTO, the problem in enhancing public understanding of the organisation and whether there should be another complicated, cumbersome MTN like the Uruguay Round in the future.

Chapter 21 takes up one of the enduring policy debates of our time – the opposing policies of free trade and protection of the environment. What ensues is a careful analysis by Jackson of the debate from a wholly free trade perspective rather than an environmental one. Thus, he relates the objectives of trade rules to environmental policy, corrals national government environmental regulations pertaining to product standards under GATT national treatment rules, and subjects governmental environmental measures to justification under one of the exceptions of Article XX GATT. Jackson insists that to allow governments to defend unilateral trade measures aimed at protecting the global environment, on the basis of process/production methods (PPMs) would be to open "a Pandora's box of problems" for the GATT in relation to other social clause issues. He also considers it necessary to examine subsidy rules and issues of export competitiveness so that environmental exceptions, or rules, can be designed around them and to take account of the institutional deficiencies of the GATT in dealing with environmental issues at the institutional and dispute settlement level.

Finally, Chapter 22 brings us back to the issues presented in Chapter 1, with further sections of the opening essay on global economics and IEL, and a step back into the fold of trans-nationalism in order to consider

"the regulation of economic behavior which crosses national borders" (p. 450). It closes with a brief consideration of some traditional economic concepts concerning the role of market failure, government action, and asymmetries of information with suggestions as to how these concepts are affected by globalization and the legal rules of international institutions. The ensuing discussion in these closing stages is fragmented and repeats much of what has been said before by Jackson in other contexts but concludes with a number of general questions pertaining to the international effect (of trade) on national markets and different principles for managing interdependence.

There are some shortcomings in this volume. They are to be found in the preponderance of historical data and repetition, particularly with respect to the 'birth defects' of the GATT, which litter the text. Moreover, Jackson's admirable treatment of treaty norms, particularly when discussing their effect and status in domestic law, is not matched by his treatment of IEL in relation to other areas of general international law, for example a review of the changing group of actors, or stakeholders, that people his IEL landscape, or the more contentious areas of overlapping subject matter jurisdiction in the regulation of international trade and the international protection of the environment.

Jackson writes in a flowing, often animated and always descriptive style. The balance among the different themes and the essays in each part is generally good, albeit that some sections contain more complex and interesting argumentation, especially the essays in Part V which concentrate on the reception of international legal norms into the domestic legal order.

This book arrives at a critical juncture in the development of international economic relations where scholars, government officials and practitioners are being challenged to re-consider the boundaries of IEL in the light of the GATT/WTO developments. Indeed, the very existence of an organisation like the WTO, cast in the 'Bretton Woods' mould, challenges modern notions about the role and functioning of international institutions at the turn of the century. Jackson succeeds in capturing some of those turbulent moments, including the turn away from bilateralism and multilateralism toward a new regulatory era in international economic relations although his prospective research agenda does not fully acknowledge this. *The Jurisprudence of GATT & the WTO* is a timely reminder of our need to become better acquainted with the origins and development of this perplexing international economic institution, within the wider context of general international law, including the law of international institutions treaty law and practice.

In summary, this is a useful collection for the academic, government official, or practising lawyer seeking to learn more about the law and policy framework of the GATT/WTO trading system and the underlying institutional checks and balances in that system. Jackson does not leave us empty-handed. In good academic tradition, he suggests some future

directions for IEL scholarship, including the exploration of modalities of international action, or co-operation, with the possibility of designing institutions for that purpose. He proposes that an inventory of co-operative approaches be drawn up, under topic headings of 'unilateral', 'bilateral,' 'regional' and 'multilateral' even though the parameters should probably be drawn more broadly. Jackson resorts to his belief in the need to manage interdependence and proposes that a number of techniques – harmonisation, reciprocity and interface – could usefully be explored in order to achieve this. It is left to us, his readers, to take up the challenge that Jackson sets us, to reflect on his proposed agenda for future scholarship and policy making and to acquit ourselves of the task at hand.

*Mary E. Footer**

International Organisations before National Courts, by August Reinisch, Cambridge University Press, Cambridge, 2000, ISBN 0-521-65326-6, 449 pp., incl. Index and Bibliography, USD 90.00/GBP 60.00.

This study was submitted as a *Habilitationsschrift* to the Law Faculty of the University of Vienna in 1997. Its publication in 2000 came after the close of the UN Decade on International Law, during which time several important monographs on the law of international organisations dealt with general principles[1] or with particular problem areas.[2]

The book by August Reinisch book stands out in several ways. It is the first contemporary study investigating in an empirical way how national courts 'react' to disputes involving International Organisations. It provides an in-depth analysis of the various types of reasoning presented by national courts when they have to decide whether or not they will hear such cases. This publication is a timely one, as this type of domestic litigation is bound to increase as a result of the unprecedented proliferation of institutional and operational activities by International Organisations.

The selection of the raw material is current up to the spring of 1998 and is also comprehensive although, of course, a claim of exhaustive treatment

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* Amsterdam Center for International Law, Faculty of Law, University of Amsterdam; and GLODIS/Department of International Law, Erasmus University Rotterdam.

1. H. Schermers & N. Blokker, International Institutional law: Unity within Diversity, 3rd revised edition (1995); C.F. Amerasinghe, Principles of the Institutional Law of International Organizations (1996).
2. P. Bekker, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal status and Immunities (1994); S. Muller, International Organizations and their Host States: Aspects of their Legal Relationship (1995); P. Klein, La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens (1998).

would ignore the limited accessibility of judicial opinions (p. 17, note 75). The analysis also comprises relevant case-law from arbitration, regional human rights institutions, administrative tribunals, and the International Court of Justice. The case-law is perfectly imbedded in the applicable international and domestic legal instruments.

The first and largest part (pp. 35–229) of this well-documented monograph is based on a primarily 'phenomenological approach' (p. 1) and consists of a thorough descriptive analysis of how national judges behave in settling disputes involving international organisations. Reinisch skilfully depicts the variety of techniques resorted to by national judges in order to refrain from deciding such cases. The term "avoidance" is used in a non-evaluative fashion as the focus is on the descriptive analysis of the legal reasons underlying this strategy (p. 35, note 1). Although immunity is "certainly the doctrinal and jurisprudential centrepiece" of the relationship between international organisations and national courts (p. 36), it will serve as a method of last resort, while other, neutral doctrines and "not necessarily international law-related" (p. 37) concepts are used.

"[T]he most radical method available to national courts to avoid adjudication" (p. 38) is not to recognise an international organisation as a legal person under domestic law, thus rendering it unable to be a party in legal proceedings. The question of the domestic legal personality of an international organisation is decisively dependent on the incorporation and applicability of international rules into and within the national legal order (pp. 42–43). Although "an expansive interpretation of the implied powers doctrine" (p. 59) has mitigated the theoretical divide on the legal grounds for international legal personality of international organisations, Reinisch is correct in pointing out that the constitutive view on the conferment of a far broader domestic legal personality rests on firm ground (p. 62). When this avoidance technique rarely enters the actual case-law, the arguments raised appear artificial (pp. 38 and 70).

Domestic courts may still avoid adjudication when they consider acts not to be attributable to an international organisation, because of the functionally limited scope of a domestic personality that in the large number of cases is already qualified on the international level (pp. 70–71 and 75). The justified expectations and good faith of third parties are protected as in the practice of international organisations "irregular acts have rarely been deemed null or void" (p. 80).

National judges have been very reluctant to use this avoidance technique. In contrast, the political questions and the act of state doctrines have been used as "prudential rules of judicial self-restraint" (p. 84), although frequently under the concept of non-justiciability. Although sharing common roots (p. 86), the concepts of acts of state and of immunity are different in their respective forms, operation and effect (p. 88). Case-law provides some authority that the acts of state doctrine could also be applicable to international organisations (pp. 90–92).

In some cases a political question (or a closely related doctrine) was

used to justify adherence to immunity decisions made by the executive (pp. 92–96), but apparently it never provided the exclusive ground for abstention (p. 98). Domestic courts may also invoke the lack of adjudicative power as a primary tool for avoidance. This approach could be based on the public law nature of the case or the fact that the dispute involved subjects of international law and sometimes the absence of an applicable norm giving it competence (pp. 109–124). Respect for an alternative exclusively competent forum could also be used (pp. 103–109). So-called tax-payer suits might lead to avoidance by reason of the case or controversy requirement, while judges may use their discretion to prevent harassing lawsuits and mock trials (pp. 124–127).

The most frequently used avoidance technique lies in domestic courts according immunity to international organisations (pp. 127–168). Both on the level of its sources and with regard to its consequences, immunity of jurisdiction has a dual nature (p. 127). Disputes concerning the scope of jurisdictional immunity as a result of a decision which normally rests solely with the forum state (pp. 134 and 129) are issues of public international law. Although the obligation to grant immunity is an obligation of result, under many national legal systems domestic courts have to respect the immunity of International Organisations *ex officio* and that appears to be the best solution (pp. 137–138).

The functional immunity of international organisations may protect them from every form of legal process under their constituent instrument and general privileges and immunities treaties. Given, however, the absence of any clear court practice in this respect, no customary obligation for non-members has emerged (p. 157). Generally courts interpret immunity from every form of legal process as requiring absolute immunity (pp. 157–162) whereas in the case of restrictive or functional immunity avoidance may result from a wide interpretation (pp. 163–167).

National judges actively seeking to uphold jurisdiction have certainly proven to be as creative as their counterparts, wanting to avoid involvement in the majority of cases concerning disputes involving international organisations. While national judges have not frequently used non-qualification as an international organisation in order to assert jurisdiction, they have regularly rejected the argument of delegation of immunity put forward by private parties claiming to be acting on behalf of an international organisation (pp. 170–175). Only in exceptional cases has the recognition of an international organisation as a legal person under domestic law given rise to a serious legal issue.

Under the involvement strategy, three main avenues are available to national judges with regard to immunity. The most straightforward approach of denying immunity altogether operates at three different levels. A national judge can deny the international applicability of immunity instruments, the domestic applicability of international law, or the existence of a potential customary rule in the absence of conventional immunity provisions (pp. 177–182). As the applicable law in the forum

state in most cases provides for some degree of immunity, restricting its scope would precede judicial involvement, and here a relative immunity standard equal to the one enjoyed by states leaves domestic courts with less "interpretative freedom" than in the case of functional immunity (p. 185). Domestic courts may narrow down the scope of immunity by either applying a reservation to absolute immunity provisions, by interpreting absolute immunity as restrictive immunity based on the assumption of an implicit *renvoi* to state immunity, or by approximating restrictive immunity to functional immunity by shifting the *iure imperii* characterisation to a functional criterion (pp. 186–194). Courts have also raised the existence of a customary standard of restrictive immunity in the absence of any express rules (pp. 194–197) or they have to decide whether implicit exceptions deriving from customary international law can be read into a treaty text (pp. 203–205).

Although in a number of cases employment disputes and lease contracts have been regarded as covered by functional immunity (pp. 206–212), jurisdiction was asserted by qualifying activities as falling outside the scope of a very strict standard of functional immunity (pp. 212–214). In spite of the doctrinal controversy over whether an advance express waiver of immunity is legally possible at all, domestic courts have sometimes regarded an advance waiver as one that has indeed been made in a particular case. Provisions for arbitration, choice of law, and choice of forum clauses have been interpreted as implicit waivers (pp. 214–229).

While in Part I Reinisch describes the various legal approaches taken by national judges to avoid or assert jurisdiction over disputes involving international organisations, in Part II he discusses the policy issues *pro* and *contra* such adjudication (pp. 233–313). A detailed analysis of the *rationale* for both judicial abstention (pp. 233–251) and judicial assertion (pp. 252–313) addresses both the functional need for immunity and the position of third parties and it is coupled with preliminary assessments in anticipation of Part III of his study.

The paramount rationale of securing the independence of international organisations and guaranteeing their functioning focuses on a hostile domestic environment, the lack of familiarity with the issues or the harassment aspects because of the costs of the lawsuits (pp. 233–238). Other sorts of *rationale* include the relative weakness of international organisations, the need for member states to channel their exercise of influence on the International Organisation through its "internal law," and the equality of member states (pp. 238–242). The need to secure uniformity in dispute settlement, the concept of derived or delegated sovereignty, the lack of territory, immunity as an inherent quality of international legal personality, precedent, and prestige are further arguments put forward in favour of judicial abstention.

The first reason for asserting jurisdiction is the contextual argument (p. 252), making sense of immunity qualifications calling for a restrictive approach to immunity (pp. 252–254). One material policy ground

addresses the interests of international organisations by enhancing their creditworthiness (pp. 255–258).

Human rights concerns and constitutional guarantees of fairness are other material policy grounds calling for the enhanced judicial protection of third parties which may be potentially affected, through restricting immunity in cases of commercial activities (pp. 263–265) and alternative dispute settlement in case of immunity (pp. 265–266); otherwise the unjustifiable privilege of immunity could lead to a denial of justice (pp. 263–265). While arbitral decisions involving international organisations are very rarely rendered in practice, Administrative Tribunals occupy a prominent place as alternative *fora*. Some of them have extended their jurisdiction to an aggrieved employee who would have no other recourse against the organisation in order to avoid a denial of justice (pp. 272–274).

Although the conventional obligation for international organisations to provide alternative dispute settlement procedures should be distinguished from their actual availability as individuals can normally not rely on the relevant provisions, the option of diplomatic protection is, however, a rather questionable guarantee of fairness to individuals. When measuring the scope of immunity, the question whether the rule of law is sufficiently guaranteed by the availability of alternative dispute settlement mechanisms should be duly taken into account (pp. 275–278). The availability of judicial assistance to safeguard interests and rights can be regarded as a public good sought by both private parties and international organisations (p. 252).

Access to court *vis-à-vis* the forum State has become a fundamental right, making apparent the contradiction with restricted access in case immunity has been granted to international organisations (p. 282), and this calls for a dynamic interpretation of human rights texts (pp. 282–285). While under the accepted case law of the European Commission on Human Rights and of the Human Rights Committee the decisions of international organisations cannot in principle lead to a violation by member states as they do not involve the exercise of national jurisdiction (pp. 301–302), constitutional courts have made it clear that the lack of an effective remedy against acts of an international organisation might constitute a violation of constitutional guarantees in case of transfer of sovereign powers (pp. 290–299).

Reinisch rightly points out that in the balancing approach required by the case-law of the European Convention organs, the legitimate interests of individuals to have their civil rights determined by an independent court may outweigh the justifiable concern of international organisations to function freely and independently (p. 304).

Discussing the decision of the European Commission on Human Rights in the cases of Beer and Regan *v.* Germany and Waite and Kennedy *v.* Germany and in which the Commission found no violation of Article 6(1) as long as an equivalent legal protection was available, Reinisch rightly points out that "a dynamic interpretation of human rights texts [by] taking

the equivalent legal protection requirement seriously could have resulted in a different finding" (pp. 285 and 305). Unfortunately he had to confirm his assessment after the unanimous judgement of 18 February 1999 in which the European Court of Human Rights "regarded immunity from jurisdiction granted for the purpose of ensuring the proper functioning of international organisations as serving a legitimate objective and found that the concomitant limitation of the applicants' rights of access to court was not so disproportionate as to impair the essence of their 'right to court' because they did have alternative means of redress."[3] Although no violation was found, both cases "may have laid the basis for a change of the traditional view on jurisdictional immunity" (p. 312) "without necessarily opening the door to unilateral interference in an international organization's internal affairs. In the end, an international organization should establish its immunity by providing truly equivalent protection."[4]

In these and similar cases the prior exhaustion of the available internal remedies within an international organisation eventually leading to an inadmissibility ruling would probably compel domestic and international courts to undertake a thorough examination of the equivalent protection requirement instead of assuming that there would be no practical problem. Such a sequence of procedures would have the additional advantage of underlining the delineation of the respective responsibilities of the various judicial and quasi-judicial actors involved. The applicant would still be able to request a competent human rights court to examine whether this degree of access *limited to a preliminary issue* was sufficient to secure the applicant's right of access to court.[5] The Court would then have an opportunity to establish whether the rights guaranteed by a convention were theoretical or illusory instead of practical and effective.[6]

The fundamental question raised in Part III (pp. 317–393) is whether national courts do provide an appropriate forum for disputes involving international organisations. Reinisch identifies trends in the case-law which could modify the presently predominant immunity concept with a more flexible principle exempting certain types of disputes from domestic adjudication (p. 4): how should domestic courts approach such disputes and whether and under what conditions should they use their adjudicative power or abstain from doing so (p. 317)? This issue is not only embedded in the broader framework of the accountability of international organisations but is also one of two consequential obstacles, the other being the lack of *locus standi* of international organisations before international courts.

In the quest for an alternative forum arising from a constitutionalist

3. A. Reinisch, 93 American JIL 933 and 938 (1999) (Note).
4. *Id.*, at 938.
5. Waite & Kennedy *v.* Germany, Application No. 26083/94, Judgement 18 February 1999, para. 59.
6. *Id.*, para. 67.

approach to this category of international actors, a delicate balance has to be found between the protection of the independence and functioning of an international organisation against undue interference and the right of access to court for employees, those rendering services and persons suffering harm by tortious behaviour in terms of foreseeability, alternative remedies and fairness (pp. 324–327). Although absolute immunity would undoubtedly provide an effective and protective remedy for the international organisation it would not survive the proportionality test. Reinisch analyses the *rationale* and scope of a functional immunity standard in a surgical way. While the concept of immunity for those acts intrinsically related to the core of the tasks of an international organisation would justify exemption for the category of "instrumental" activities, a strict functional necessity concept approach rather relates to a selection of privileges and immunities than to the scope of jurisdictional immunity (pp. 330–342).

An attempt both in doctrine and in case law to equate functional immunity with restrictive sovereign immunity is confronted with the fact that one cannot draw a simple parallel between functional and *iure imperii* acts (p. 359). The principle *ne impediatur officia* as the *rationale* for diplomatic and consular immunity could be transferred to international organisations within the context of a result-oriented immunity standard focusing simultaneously on both the anticipated consequences of denying immunity (p. 365) and the availability, appropriateness, and fairness of alternative means of judicial or quasi-judicial dispute settlement in a specific situation (pp. 366–368).

A negative outcome of this evaluation would compel domestic courts to engage in vicarious dispute settlement in order to satisfy the legitimate interests of private claimants in a judicial forum (p. 369). It can indeed never be considered functionally necessary for international organisations to deprive private parties dealing with the organisation of all forms of judicial protection.[7]

Reinisch convincingly puts forward the idea that in the regulatory aspects, for example, of employment law an exemption from the substantive legal rules by extending privileges may be fairer to international organisations and third parties than a procedural impediment to their enforcement (p. 372). The traditional immunity thinking might thus be replaced by a lack of jurisdiction doctrine based on material reasons (p. 373). Because of the materially analogous character of the same category of rules of States, constitutional law (for instance disputes between members and organs) and administrative law *sensu stricto* (employment issues governed by staff Rules and Regulations) could be viewed as being unsuitable for domestic adjudication (p. 377), except in cases where a decision or an action of an international organisation would

7. Muller, *supra* note 2, at 271.

violate fundamental human rights.[8] Immunity granted to and covering the official activities of an organisation does indeed not extend to unlawful acts (p. 207, note 208).

In the absence of an alternative forum guaranteeing a fair procedure, the individual's interest in having access to court for disputes concerning personal services rendered to international organisations within or outside a regular employment relationship should prevail (pp. 383–385). Unless specific choice of forum clauses are applicable, national courts should decide disputes arising from the provision of movable and immovable property (p. 386). Domestic courts also provide an appropriate forum for disputes concerning damage caused which is incidental to international organisations carrying out their official functions (p. 388). In both contractual and tort claims the absence of a proper contract and tort law of international organisations presents an additional reason in favour of domestic adjudication.

A proportionate functional immunity standard and a lack of jurisdiction approach do not obscure the fact that international organisations do not merit immunity from suit for a large number of ordinary *iure gestionis* acts performed in their dealings with private parties (p. 361). If need be, the independent functioning of an international organisation should be protected retroactively on the international level between the International Organisation and the forum state.

The results of the extensive research conducted by Reinisch are particularly instructive and relevant as the potential role of domestic courts in disputes involving international organisations constitutes one of the crucial elements in putting into place the remedial part of a comprehensive and balanced accountability regime for international organisations.[9] The model proposed by Reinisch, which is based upon a combination of a lack of jurisdiction in some areas and adjudication in others, could strike the delicate balance to be achieved in any remedial regime *vis-à-vis* international organisations provided the future development of the practice of both international organisations and domestic courts corroborate Reinisch's premises. The more controversial an action by an international organisation is, the greater is the claim to both jurisdictional immunity and the need for the adequate protection of third parties.[10]

August Reinisch has to be congratulated for his successful attempt to combine elements of topical legal reasoning with strict systematic standards in classifying the types and rationales of judicial responses (pp. xi and 23–24). Prior to the analysis of the case-law relevant legal issues are presented in a succinct and clear way. In spite of the complexity of the

8. That would be in line with, for instance, the 1997 decision of the Inter-American Commission on Human Rights in the Gustavo Carranza case.
9. *See* K. Wellens, Remedies Against International Organisations: A Preliminary Inquiry (forthcoming).
10. Bekker, *supra* note 2, at 116.

position of international organisations before national courts the study is written in an eloquent and compelling style. This monograph will not only be "a useful companion for the practitioner" (p. xi) but it will more generally remain the leading authority in this field for years to come.

*Karel Wellens**

* Professor, Katholic University of Nijmegen, The Netherlands.

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