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BEYOND NORMAL TRADE LAW?

Robert Wai

What is normal trade law? The completion of the Uruguay Round in 1994 and the establishment of the World Trade Organization (WTO) seemed to mark the achievement of normal trade law, both in the sense of normalizing regulation of international trade relations by legal norms and institutions and in the sense of a normal content of trade law involving significant international convergence rather than sovereign diversity. Both of these senses of normal trade law now seem to be under pressure. The stalemate at the WTO, the turn to preferential agreements and the more recent return of belligerent sovereign unilateralism all suggest the need to interrogate again the legal context in which global trade and investment is embedded. Going forward, trade law may need to emphasize less convergent substantive concepts such as exceptions, differential treatment, interface and variable geometry. But this may also be the moment to rethink whether normal trade law involves a return to a more open role for international politics (including negotiation, threats and conflict), as well as a normal role for law better understood through the frames of transnational law and legal pluralism.

The Concept of Normal Trade

Defining normal trade in international economic relations was clearly a contested and negotiated task during the era of the General Agreement on Tariffs and Trade (GATT),

with relatively thin international-level trade regulation combined with plural varieties of domestic market regulation, including in socialist states. The contested nature of normal trade was strikingly exemplified by US–China trade relations before 2000, which were significantly framed around the annual political maneuvering to grant the presidential waiver that would allow for the formal status of normal trade relations with China under US trade law. Normal trade relations involved the continuation of the most favored nation (MFN) treatment already extended by the United States to most of its trading partners, including all of the WTO-GATT membership. A major change in the character of the trade relationship between two distinct national economies therefore was marked when Congress passed legislation to grant China permanent normal trade relations (PNTR) in anticipation of the accession of China to the WTO in 2001. Similarly, Russia gained PNTR in 2012. With these changes in the United States and in the extension of WTO membership to include almost the entire world of major trading states, trade relations were now governed by a similar set of substantive provisions, centered especially around the content of the Uruguay Round agreements. Most favored became normal; less than most favored, exceptional.

What became permanently normal with respect to China–US trade also reflected a more general turn associated with the completion of the Uruguay Round and the establishment of the WTO to a normal role for law in international trade relations. Normal international trade relations seemed to include an augmented role for law, in particular, for the public international law and institutions associated with trade treaties. The scale of the commitments in the Uruguay Round agreements, the strengthened institutional features

associated with the establishment of the WTO and the expanded scope of the WTO membership to include the most significant international trading states (particularly the accession of China and Russia) could be argued to have inaugurated a truly legalized set of world trade relations.

Viewed from 2018, the new normal trade law seems to be much less permanent in content and form. The content is now open to a critical contest in a variety of ways. And consequently, the attendant role and form of law in trade relations may vary. As in the relations between the United States and China, significant differences on substantive content may mean that legal agreements coexist with continuous negotiations and renegotiations through international politics.

Law's Role in Substantive Construction of the Normal Economy

Before turning to the issues related to the normal form and role of law in trade relations, it is important to see how the substantive content of normal trade relations has significantly moved away from any policy consensus on normal market regulation that emerged during the time of the Uruguay Round.

The turn toward legalized international trade relations came with more substantive constraints on sovereign autonomy with respect to the permitted range of institutional configurations (including sovereign laws and regulations from border measures, such as tariffs and quotas, to domestic measures, such as tax statutes, product regulations and intellectual property protections), and hence a new normal range for possible alternatives

in national institutional forms for economic production, regulation and distribution. This was generally consonant with, and maybe dependent on, the contemporary Washington Consensus about the best forms of economic governance.

Defining market normalcy through international trade law

In groundbreaking articles from the 1980s, Daniel Tarullo traced back the fundamental relation of trade laws to the definition of the normal economy.[1] For Tarullo, US and GATT trade remedy law illustrated the necessity of defining the "subsidy" against which countervailing duties would be imposed. Since then, 30 years of experience, including during the WTO era, have seemingly not changed scholarly assessment that "there is no natural, self-evident, objectively determinable baseline against which to identify and evaluate subsidies."[2] Efforts to define subsidies—for example, through porous or arbitrary concepts like specificity or the use of market comparators—quite transparently involve fundamentally contentious line drawing with respect to what is a normal market, and in particular, the acceptable and unacceptable roles of government in the economy.

With this critical insight about the constructed rather than naturally defined nature of the normal market, the content of the Uruguay Round agreements and preferential trade agreements (PTAs) of the 1990s— with increasing regulation of subsidies but also provisions to protect intellectual property rights and foreign investors, such as NAFTA

[1] Daniel Tarullo, "Beyond Normalcy in the Regulation of International Trade," *Harvard Law Review* 100 (1987): 546; Daniel Tarullo, "Logic, Myth and the International Economic Order," *Harvard International Law Journal* 26 (1985): 533.
[2] Andrew Lang, "Governing 'As If': Global Subsidies Regulation and the Benchmark Problem," *Current Legal Problems* 67 (2014): 135–68, at 147.

Chapter 11— seemed to amount to global-level discipline on states to normalize the neoliberal foundations of domestic markets in line with the Washington Consensus.[3] The resulting impact of international trade law in constraining the policy space for experimentation with a more diverse range of institutional configurations for national economic development and market construction has been critiqued powerfully by many states and also scholars in economics, law and other fields since the WTO moment.[4] Such critique has clearly affected beliefs about the normal content of trade law. The current understanding of normal trade may be changing with the revived emphasis on trade theories other than liberal free trade theory based on comparative advantage, including forms that were ascendant in the pre-WTO era of the GATT, such as theories of dependency, strategic trade[5] or competitive advantage.[6]

Normal trade law and the rise of the normal exception

Part of why the WTO seemed to mark the arrival of a new centrality of law in trade relations was that it seemed to deliver a central feature of legalization: the comprehensive legal regulation of a social field under general rules of general application with limited exceptions. The Uruguay Round agreements deepened general rules such as quota prohibition, tariff bindings and nondiscrimination with respect to domestic regulation, and reduced the scope of subjects of trade (such as textiles and clothing, agriculture,

[3] E.g., most recently, Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).
[4] E.g., Dani Rodrik, *Straight Talk on Trade* (Princeton, NJ: Princeton University Press, 2018).
[5] E.g., Paul Krugman, *Rethinking Trade Policy* (Cambridge, MA: MIT Press, 1990).
[6] E.g., Michael Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990).

subsidies, services, intellectual property) that were largely excluded from the GATT-era trade regime.

In contrast to that aspiration, the WTO experience since 1995, including in dispute settlement, has arguably demonstrated that the content of normal trade relations is defined as much by the exceptions as by the general rules. The meditations on the centrality of the state of exception as articulated by Carl Schmitt and Giorgio Agamben have been pronounced in international law, especially since 9/11.[7] The WTO ambition for general rules and limited exceptions now appear to be exceptional rather than normal.

That the WTO moment involved a thin legalization over an unresolved substantive dissensus, was evident almost immediately in WTO dispute settlement in cases involving the scope of the exceptions for various forms of social regulation, such as Article XX of the GATT 1994, Article XIV of the GATS and Articles 7, 8, 30 and 31 of the TRIPS. The WTO's increasing willingness to allow member states to justify trade-restricting regulation as having legitimate social policy purposes is an important part of the move to posit a "trade law after neoliberalism," even within the trade institutions.[8] The *US—Shrimp* cases, the *EC—Asbestos* sequence and the access-to-essential-medicines struggles all demonstrate that much of the terrain of normal law would be fought in the realm (and, in turn, the scope) of the exceptions. In this jurisprudence, Andrew Lang traces some of the technical forms through which policy dissensus about proper levels of

[7] E.g., Fleur Johns, "Guantanamo Bay and the Annihilation of the Exception," *European Journal of International Law* 16:4 (2005): 613.
[8] Andrew Lang, *World Trade Law after Neoliberalism* (Oxford: Oxford University Press, 2011), chapter 10, 313–53, especially 320–30.

regulation can be recognized through a more chastened approach at the WTO Dispute Settlement Body (DSB) involving techniques such as balancing analysis, greater and more prominent use of "deference" to national regulators and "proceduralization" in the sense of more oversight on procedural aspects of national regulations rather than on their substantive content.

The role of exceptions has perhaps been most evident in the continued and increased significance of realms of trade relations that overlap with national security. That recent US steel and aluminium tariffs were framed within domestic legislation oriented toward national security rather than safeguards is a sharp reminder of a wide domain of sovereign governmental policy with trade implications that remains almost exclusively outside of international trade law. Expansive treaty exceptions such as GATT Article XXI align with a more generally political and diplomatic consensus not to bring such disputes within the legalized domain of, for example, DSB dispute settlement. The significant trade restrictions that resulted from the post-9/11 security situation also were largely left to the domain of diplomacy, not to the world of the trade treaties. When such a large exception applies in a legal regime, the regime must see that the de facto trade disciplines (or regulatory pressures) sits largely without that law.

With the expanded prominence of exceptions, the Uruguay Round consensus appears in retrospect to be rife with gaps, contradictions and ambiguities. For example, the negotiations over new topics of the Uruguay Round clearly evidenced policy dissensus about key areas of increasing international economic significance, such as intellectual

property, investment and services. The Uruguay Round agreements used various strategies to balance the underlying dissensus, such as an agreement to leave the topic of investment measures to other contexts, including BITs. With respect to services, the GATS established a normal general framework, but largely a prospective one for the application of key provisions because of the reliance on specific commitments. The simultaneous need to achieve significant domestic reforms to permit full international competition in services, and to recognize that many services sectors involve areas of significant sovereign domestic regulatory concern, left the GATS not only with important exceptions like Article XIV, but also the to-be-negotiated extension of the specific commitments strategy. The significant and controversial provisions of TRIPS, including positive harmonization commitments on important subjects of domestic protection of IP holders' rights, also included important exceptions (such as the compulsory licensing provisions for patents of Article 31) and left many areas of significant concern to technology producers outside of the agreement. This sense that the international trade law contained in existing international trade agreements was incomplete with respect to core areas of trade relations seems to be evidenced by the United States' emphasis on taxation, data exclusivity, privacy restrictions, antipiracy and protection against technology transfer, including in current bilateral disputes with China but also as priorities in earlier PTA negotiations (such as for the Trans-Pacific Partnership). Similarly, the competitive successes of China's development model have disclosed for the United States but also other WTO members a significant lack of consensus with respect to the normal permitted range for subsidies and state-owned enterprises.

Trade remedy law as normal trade law

Parallel to and related to the rise of the normal exception, the more central form of normal trade law may be turning out to be trade remedy law. Trade remedy law has always seemed an uncomfortable and troubling "other" to tariff reduction and quota prohibitions, an alternative realm of international trade relations based on managed protectionism.

A significant number of recent high-profile trade disputes are being addressed mainly through trade remedy law. Trade remedy actions have become an important part of the current US administration's international trade policy with competitors and allies, whether China or Canada. They cover a wide array of sectors, from the traditional commodity and industrial sectors (such as softwood lumber and steel) to the leading innovation sectors (such as semiconductors, solar panels and civil aircraft).

While the GATT, the Uruguay Round agreements and various chapters of PTAs clearly address countervail and antidumping, it would be hard to argue that these were intended to be the center of normal trade law. But these regimes may be emerging as the most representative form of contemporary trade law.

The basic approach of permissive but managed protectionism as a response to the diverse sovereign views about the policy problems of subsidies and dumping could be seen as a complex form of transnational law. Permission for sovereign discretion to apply protective duties is tempered by multilateral requirements of both substantive elements

(e.g., determination of subsidy or dumping, and determination of injury to domestic industry caused by the subsidy or dumping) and procedural elements. The delicate task of adjudicating complaints at the multilateral level in turn raise the appropriate level of review of domestic determinations in trade remedy that recall the difficult issues of standards of review in administrative law. For all the resulting complexity and uncertainty, this mix of self-help domestic remedies paired with case-by-case oversight for some substantive and procedural requirements may in fact become the more typical form of normal trade law at the international level. In some ways, the DSB's approach in some of its later jurisprudence on national regulations under GATT Article III and Article XX, and under the WTO's SPS (Sanitary and Phytosanitary) and TBT (Technical Barriers to Trade) agreements, now resembles the approach to antidumping and countervail with respect to issues of proper standards of deference and procedural oversight.

Normal Trade Law as Interface

A turn to the trade remedy regime and the realm of exceptions as being normal trade law suggests that perhaps normal trade law is returning to what John Jackson, among others, considered trade law as an "interface." During the GATT era, Jackson used interface to conceptualize a trade law that sought to manage interactions between domestic orders even where the underlying policies implemented in each order were significantly diverse. Jackson turned to interface in dealing with a set of trade issues that seem to again be far more central to conflicts in current trade relations. For example, his book *The World Trading System* first references interface in a discussion of safeguards and adjustment

policies[9]. He turns to the concept again in the chapter on unfair trade, in particular when discussing the approach adopted with respect to dumping. Finally, it plays a prominent role in the chapter about nonmarket economies, although he also generalizes the underlying analysis to disagreements among market societies as to the proper role of state-owned enterprises. Elsewhere, Jackson observes that the concept of international trade law as an interface system in relation to differences of national systems, with respect to differences in national markets and institutions, could also operate with respect to issues such as distribution and human rights, where there clearly remains significant substantive pluralism among sovereign societies.[10]

Viewing the normal role of international trade law as interface seems especially relevant now for trade law. The interface function might make better sense of the stalled WTO negotiations, the many continuing exceptions and the resistance to deeper harmonization. It also provides an approach that international trade law can take with existing or new topics that impinge closely on regulation or distribution concerns, such as in services and internet regulation. The interface concept also expressly accommodates diverse development strategies at the national level. For example, Dani Rodrik has recently adopted this frame in advocating that the "purposes of international economic arrangements must be to lay down the traffic rules for managing the interface among national institutions."[11] For Rodrik, interface would provide sufficient international

[9] John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition (Cambridge, MA: MIT Press, 1997), 178–79.
[10] John Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), 230–33, at 226.
[11] Rodrik, *Straight Talk on Trade*, 225.

coordination but otherwise promote significant room for autonomy and diversity in the national venues that he considers the best locations for institutional experimentation in a policy environment that should be moving beyond the Washington Consensus.

What specifically would a normal trade law based on interface involve? The passages from Jackson are relatively undeveloped, but the techniques related to interface include practices of subsidiarity and the requirement of national treatment in relation to state-owned enterprises. In the most elaborated discussion, that of trade remedy law, interface involves a recognition of disagreement between trading partners about a policy problem (such as dumping), and both permission for a state to act to protect itself against some aspects of the problem as well as some international-level oversight of the substance and procedure for protection. Some other basic techniques found in the GATT and other trade agreements may fit well with the interface goal, including regulation based on negotiated commitments rather than minimum requirements (e.g., tariff bindings or specific commitments in services) and regulation premised on nondiscrimination rather than harmonization or prohibition. Within the Uruguay Round agreements, therefore, the core would be techniques such as negotiated tariff bindings, nondiscrimination principles or procedural commitments (as found in the GATT) with priority over tighter harmonization instruments, such as the TRIPS Agreement or the SPS or TBT agreements.

More generally, the articulation of trade law as interface could foster a broader consideration of the techniques of interaction among normative orders. The legal pluralist observation that plural normative orders coexist in the same temporal and spatial frame

invites further consideration of the nature of their interaction. The pluralist notion of interlegality recognizes the possibility that these normative orders can interact in relations of conflict or coordination, and in forms of both hierarchy and heterarchy. Heterarchy is much less emphasized in the legal literature, so much framed by statist legal centralism. But this ignores the many forms of intersystemic relation that need not be hierarchical. I have argued, for example, that private international law significantly relies on the conscious realization of the coexistence of parallel normative systems, in which there is no hierarchical relation but where parallel systems may nonetheless share concerns, including in their particular disputes with ties (whether of persons, subject matter, effects) to more than one normative system.[12] Conflict of law rules, then, are final decisions of institutions supreme within their own normative order, but that often take into account not just the existence but the content of these other normative orders. The application of a foreign law as governing law, a decision to decline jurisdiction, or the recognition and enforcement of a foreign judgment are not decisions based on hierarchical supremacy, but rather on varied transnational policy considerations, including efficiency, fairness and comity.

Normal Trade Law as Less Law or as Transnational Law

What is the role of law if substantive dissensus has increased about the normal form of the underlying domestic economies, notably with respect to the role of the state? As the discussion of interface above suggests, legal form might track substance, and in the trade

[12] Robert Wai, "Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for the Relationship among the Plural Orders of Transnational Social Regulation," in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Christian Joerges and Ernst-Ulrich Petersmann, eds. (Oxford: Hart Publishing, 2006), 229–62.

law context, this might involve a reorientation of the role and form of law in normal trade relations.

Normal trade order without/with less law

One view on normal trade law is that the emphasis on international law and legalism overstates the degree to which trade relations were fully legalized and the extent to which they really need to be.

Scholarship on enforcement in international law that criticizes legal centralism and instead looks to the wider forms of institutions and of cooperation and coordination is of this vein. Joel Trachtman, for example, emphasizes the range of alternative institutional forms for international economic law based on the insights of the new institutional economics, contract theory and game theory.[13] In work developed from the new institutional economics, the potential contribution of state institutions to trust and cooperation is identified, but alternative institutional arrangements are also emphasized, ranging from vertical integration to more horizontal solutions like moral suasion, deposits or hostages, sunk costs, incentives of future business or continued relations.[14]

In the context of international economic relations, the emphasis on institutional solutions, including nonstate solutions, together with awareness of game theory and strategic

[13] Joel Trachtman, *The Economic Structure of International Law* (Cambridge, MA: Harvard University Press, 2008).
[14] For a discussion of this literature, see Robert Wai, "Enforcement in the Shadows of Transnational Economic Law," in *The Transformation of Enforcement: European Economic Law in a Global Perspective*, Hans-Wolfgang Micklitz and Andrea Wechsler, eds. (Oxford: Hart Publishing, 2016), 15–46.

negotiations, clearly has a relationship to the work of the "limits" school of international law.[15] The renewed emphasis on hard bargaining, diplomacy and interstate politics associated with the current US administration may be seen as simply a more assertive and express adoption of this perspective that involves a more limited role for formal law in international trade relations. The emphasis on constant negotiations and dealing may not provide much certainty, but some claim that this kind of international trade policy can still achieve sufficiently orderly international trade relations. Whether formal legal instruments play more or less of a role is contingent on the distribution of power and interests at play. In this way, international trade relations would be like the ranchers in Shasta County: there can be tolerable order without law.[16]

Normal trade law still as law but as transnational economic law

If normal trade relations include such a variable and contingent role for law, it may be better to discard the notion that there is any normal trade law at all. However, this in turn seems to be a fantasy account of order not in accord with the existence of many legal instruments and significant deployment of various forms of law. Finding the normal role of law in trade may therefore require a broader sense of the legal orders that help structure not just particular legal claims but also the political and economic bargaining of trade relations.

[15] Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).
[16] Robert Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994).

Such an account of normal trade law would need to encompass a broader realm of relevant legal orders than simply public international law. In particular, normal trade law will involve a turn to transnational law and global legal pluralism.

Philip Jessup, of course, is most identified with this move against the centralism of public international law towards a frame of transnational law that includes "all law which regulates actions or events that transcend national frontiers."[17] The forms of transnational law include domestic and international law, public and private law, and different forms of nonstate law and practice. Many examples in Jessup's 1956 lectures relate to cross-border economic relations, and the transnational approach has been influential in the study of the laws of international business transactions.[18]

The move to transnational law is consistent with older traditions of international trade law, where the emphasis was very much away from public international law instruments and toward the plural forms of law relevant to international transactions, including domestic public and private law, but also nonstate forms such as the *lex mercatoria*. In the move to establish international trade regulation as a distinct area of international law, the origins of the field of international trade in this more plural and transnational setting were deemphasized. Normal trade law should now perhaps be reconceived again as transnational economic law, involving a plural set of state and nonstate orders including but not limited to public international trade law.[19]

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[17] Philip Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956), 2.
[18] Detlev Vagts, *Transnational Business Problems* (Mineola, NY: Foundation Press, 1986).
[19] E.g., Wai, *supra* note 14, at 17-19; more generally, Terence Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (New York: Cambridge University Press, 2015).

Normal trade law would clearly include international trade treaties but only as part of a plural and transnational context that relied on a significant backdrop of transnationalism in economic law. The task would be to foreground all the legal regimes that are relevant to cross-border economic activity. This would include not just international trade and investment treaties but also other substantive areas of public international law (such as the regimes related to carriage of goods or arbitration, or the environment). As important, normal trade law would include private law and nonstate private ordering such as the *lex mercatoria*. It would also examine more kinds of national public law, such as tax, privacy or competition law. Normal trade law analyses would consider the full range of relevant transnational law and ask about their significance in tempering the rise/fall of the multilateral or regional/bilateral trade treaties. Chris Brummer's recent work on minilateralism in international financial law demonstrates a similar view, seeing normal regulation in this area as much less dependent on formal international law treaties and multilateral institutions, instead deploying a mix of "minilateral" alliances, national laws, soft law, as well as political negotiations.[20] Such an account of financial law may be a more realistic account of contemporary trade law as well: the form of the law of international finance may in fact be the form of trade law's future, not vice versa, as might have seemed the case at the WTO moment.

Understanding normal trade law as transnational law would also make more sense of the current emphasis in international trade on the variable geometry of plurilateral and

[20] Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering Are Reforming Economic Statecraft* (New York: Cambridge University Press, 2014).

preferential agreements among subsets of trading states.[21] From a transnational law perspective, the existence of a variable blend of multilateral and preferential agreements is hardly a radical change. Periods of significant international trade have occurred when a variety of preferential arrangements existed, such as the mix of imperial preferences and bilateral commercial treaties during the 19th century. Obviously the GATT period was seriously restricted in its coverage of states and subject matter and coexisted with a variety of other forms of trade preferences, including managed trade arrangements such as voluntary export restraint agreements. Most generally, many of the sovereign parties to international treaties themselves reflect variable forms of economic integration, such that the level and form of integration is varied and dynamic, for example, not just within the European Union (EU) but also within federal states such as the United States or Canada.

Finally, a transnational law sense of normal trade law would also recognize that a significant source of de facto legal regulation would be the extraterritorial effects (intended or not) of national laws. For example, competitive conditions in many domestic markets are effectively being constituted by policies and actions under the competition law of foreign jurisdictions. For many foreign consumers, the most relevant forms of market and consumer regulation of technology giants have been occurring through EU laws such as the General Data Protection Regulation (GDPR), fines imposed on Qualcomm and Google related to anticompetitive practices and decisions like the European Court of Justice's *Costeja* decision on the right to be forgotten. This transnational law perspective on normal trade law would not be simply the triumph of

[21] Thomas Cottier, "The Common Law of International Trade and the Future of the World Trade Organization," *Journal of International Economic Law* 18 (2015): 3–20.

domestic unilateralism over international law. Instead, national law would operate in conjunction and interaction with international law instruments, as well as with both an awareness of and in combined effect with the domestic laws of other states.

Trade law is still present, just in more than the normal places.