

LAWYERS AND THE EMERGING WORLD CONSTITUTION

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I. INTRODUCTION: INTERNATIONAL TRADE AGREEMENTS – THE BUILDING BLOCKS OF A NEW WORLD CONSTITUTIONALISM

WE ARE IN THE MIDST of creating a constitution for the entire world. “Constitution” for present purposes means a canon of texts that:

- are accepted as being legally binding;
- provide a framework in which public authorities must operate;
- embody principles that are regarded by the public as stating core public values;
- are very difficult to change; and
- generate a body of interpretive decisions and commentary.

History teaches that agreements to promote economic integration are often the first steps in a much more ambitious program of constitution-building and social integration. Different societies often begin to unite in many dimensions by first becoming partners to economic unions. Later, the partners agree to common rules on matters such as human rights or social welfare. Eventually, the legal union helps to produce a society with a sense of common citizenship.

The United States federal constitution of 1787 was largely directed towards empowering the central government to promote free trade and commerce among the states. A bill of rights was attached to prevent this new federal government from becoming oppressive. Over the next centuries, the “more perfect” economic union contributed to human, social and political contact. Central institutions – the President, Congress, federal courts – acquired power over wider areas: social welfare, labour, the environment, and civil rights.

A “virtuous cycle” emerged. Economic integration, and its associated political and legal institutions, helped to create a greater sense of shared political and social identity among ordinary citizens. Through economic contact people increasingly became aware of people in other places, and began to better understand their conditions. Many people also began to object to having to engage in open economic competition with states

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whose mistreatment of their own population (e.g. slavery) seemed to offer an unfair competitive advantage. Public demand encouraged central institutions to assume a wider role in society: to address issues of human rights and social welfare. The broader mandate and active intervention of the central government helped to reinforce and deepen the sense of shared citizenship among Americans – and in turn legitimize the activism of the central government in new areas.

A similar story began in Canada almost one century after the creation of the United States. The founding constitution of Canada, in 1867, again conceived of the federal government as primarily an agent of economic integration. The central institutions of Canada eventually acquired a role like their counterparts in the United States. They participated in a virtuous circle similar to that of the United States, although the linguistic divide in Canada has ensured an enduring potential for fracture. It remains to be seen whether that Canadian identity will eventually be attenuated or disappear entirely as Canada participates in the building of a North America economic union – or eventually, a world economic union.

Almost a century after Canada was created, the European Union (EU) began as an economic union with respect to a limited economic sector – coal and steel. Its power over the economy expanded, as did the authority of central institutions over society generally. The citizens of the EU have already begun to acquire a sense of shared political identity and destiny.

The beginnings of a world constitution emerged after the Second World War. The two most visible pillars of that constitution were the central political organs of the United Nations.

The security council was given binding authority over matters of war and peace. It has exercised that power sparingly. A consensus of five major powers is needed to arrive at a decision. A big-power veto can block any resolution. It is still difficult to pass resolutions on sensitive matters that affect big powers or their friends, but it was even harder during the cold war.

The General Assembly of the United Nations was given the authority to chat about just about everything, but no power to legislate over the objections of any dissenters. The General Assembly has actually been quite influential in practice. Its resolutions are often important steps in developing legally binding international treaties.

The United Nations system, from the early stages, also included two

major economic agreements: the General Agreement on Trade and Tariffs (GATT) and the International Monetary Fund (IMF). These “specialized” agencies have ultimately proved as important as the Security Council and the General Assembly in developing a world constitution.

The GATT was the first step towards creating world-wide central institutions and norms to promote free trade and economic integration. The original GATT was limited in many ways. It was confined to trade in goods. It did not address the free movement of people, capital or services.

Many large or powerful states did not initially join, as their government did not want free markets – internally or among states. The GATT did not have powerful central institutions. The United States would not accept them. The GATT partners improvised a system in which policy had to be made by consensus. Dispute settling panels could look at issues, but could not make legally binding orders. A consensus was needed to accept a GATT panel report.

The IMF was created around the same time as the GATT. Its mandate included overseeing an international system that fixed the value of national currencies to a gold standard. Most currencies now float against each other. Perhaps some day IMF parties will agree to create some new global system of fixed exchange rates, or perhaps one confined to major currencies only. In the meantime, the IMF remains influential in another respect. It makes loans to countries that do not have the liquidity to meet their obligations. Stringent conditions are often attached.

In the meantime, the existence of the GATT system did have a positive effect on promoting economic exchange. It contributed to the beginnings of “globalization.”

No doubt other forces helped to promote greater economic and social integration in the world. One major factor concerned advances in the technologies of communication, including television, long distance telephony, faxes and now the internet. But the GATT system was responsible for massive reductions in the level of tariffs around the world, and with it, much freer trade in goods. Greater economic exchange tends to lead to increased human contact in many dimensions, along with the exchange of ideas of every kind – political, economic, cultural and moral.

In addition, the GATT system kept alive the idea that trade liberalization could be achieved through international agreements.

Over the years, bilateral and regional agreements, such as the United States-Canada Free Trade Agreement, would build on GATT ideas, and contribute new models and concepts that would eventually be incorporated into an improved global system.

Then in 1994, at the Uruguay Round of GATT negotiations, the World Trade Organization (WTO) was created. The WTO was designed to help administer the family of agreements that included the original GATT, and many associated agreements that had grown up around the GATT over the years. The 1994 set of agreements included some important new additions. Among them was the General Agreement on Trade in Services (GATS).

The new WTO system greatly enhanced the legalistic nature of the world trade system. It provided that a state could bring a dispute to a panel for a legally binding decision. An appellate body was established to hear and decide appeals from panels.

Centralized adjudicators have been a major force in promoting integration in federal states and regional unions.

The Supreme Court of the United States interpreted the constitution to allow for sweeping powers of the Congress at the expense of "state rights." The Court also had a powerful effect in establishing a nationwide minimum standard of human rights. The Court led the way in the desegregation of public schools, the protection of free speech, and restraining police tactics.

The Supreme Court of Canada has also in recent years tended to take an expansive view of the scope of federal authority over matters such as social spending and the environment. The Supreme Court of Canada has a powerful role as the final interpreter (for all practical purposes) of the Canadian Charter of Rights and Freedoms. Its decisions have had a major impact on government policy-making in many areas, at all levels of government.

The European Court of Justice (ECJ) has similarly adopted an expansive approach towards the powers of the central institutions of the European Union. The ECJ has established principles of fundamental importance, such as the duty of national courts to apply, and directly enforce, various EU legal norms.

Why do central courts tend to have such a powerful role in promoting economic and other forms of centralization? First of all, the courts can step in when other institutions are unable to achieve

consensus. The constitution of a union may require that there be unanimous agreement, or a supermajority, for political bodies to make various decisions in federal states or economic unions. A court can make a decision by majority vote. "Interpretation" can produce major changes where legislators or would-be constitutional amenders are paralyzed. A number of factors contribute to the ability of the courts to act as the cutting edge of central authority.

Secondly, central courts can often secure acceptance of decisions that would meet with fatal opposition if presented by an overtly political body. Many citizens believe that court decisions proceed on some objective basis of reasoning from a constitution which in turn is fundamentally just. Other citizens may believe that judges exercise a large measure of subjective judgment. They may believe that judges, in part, actually do make decisions on the basis of their own life experience and political values. But these same citizens may still believe in the ultimate authority of the courts. Someone has to have the last word, they might reason; better a group of people who are above the fray than those who are currently engaged in partisan politics.

The ability of courts to act as the cutting edge of legal integration is sometimes aided by the esoteric language of the courts. It can be difficult to mobilize opposition to decisions that are cast in terms that are inaccessible to most people.

While central courts tend to interpret the constitutions of economic and political unions in a way that is sympathetic to central authority, it is not always true. For example, prior to the American Civil War the Supreme Court tended to strongly support states rights, and especially the rights of the slave states. The general tendency, however, exists in Canada, the United States and the EU, and it requires some explanation.

One explanation is that politicians in the central governments tend to appoint the judges to central courts. These politicians will tend to appoint judges who are sympathetic to the value of central institutions. For example, United States judges are appointed by federal politicians, not state officials. Many politicians seek federal office in the first place because they already have a belief that the federal government should have a strong and active role in the nation's affairs. While other federal politicians may start off as being more sympathetic to "state rights," some of them may find that living and working in the central capital of a union modifies their views.

A similar process may affect the outlook of a judge who is appointed

to a central institution. A judge might be selected to serve in the first place partly because he is known to have some sympathy for central authority. Alternatively, a judge may have somewhat of a decentralist disposition to begin with, but may moderate his views once he has lived and worked at the centre. If you live and work in the capital of the EU, surrounded by EU politicians and EU technocrats, you might eventually turn into a real Eunthusiast.

Now that the world trade system has moved dramatically in favour of legalization – of making its norms legally binding and enforceable by independent adjudicators, we can expect a body of WTO case law to have a major role in developing a world-wide set of rules. History suggests it is quite possible that these adjudicators will tend to adopt an expansive view of the powers of the WTO and the extent to which WTO agreements constrain the exercise of state sovereignty.

With the legalization of the world trade system we are beginning to see the lawyerization of the world trade system.

What, if any, special skills or bad habits do lawyer bring to the building of the world constitution? Let me try to identify both the potential strengths and weaknesses of lawyers, as contributors to the building of the world constitution.

II. LAWYER TALK: LEGALESE OR LEGAL EASE?

AS INTERNATIONAL TRADE LAW has developed, governments and private participants with a stake in negotiations or litigation have increasingly turned to lawyers.

It may now be obvious that legal specialists play a front and centre role in trade negotiations. But this was not always the case. The language of treaties, including those involving economic matters, has often been negotiated by diplomats or bureaucrats who are not legal professionals.

Diplomats would tend not to bring to the negotiation table some objectionable linguistic tendencies of lawyers. They would not be inclined to use legal jargon. They would often try to keep the language of the agreement short and simple. It is easier to reach agreement if you avoid getting into too much detail. It is easier to reach agreement with diplomats from other states if you do not deploy technical terms from a technical subculture (that of lawyers) of your own state. Simple and straightforward language is more likely to survive translation into other

languages without provoking misunderstanding and confusion.

International agreements have, historically, tended to be reasonably concise and readable. Governments from states with highly developed legal cultures (like that of Canada and the United States) have, however, begun to draw more heavily on lawyers at the drafting stage.

The North American Free Trade Agreement (NAFTA) is an agreement that, to some extent, appears to bear the marks of lawyerization. It contains many provisions that are straightforward and clear. But it also contains some provisions that are crafted in high legalese: massive, abstract and convoluted sentences that are full of jargon and cross-references. It is not at all surprising that NAFTA contains passages written in that dialect. Two of three partners, Canada and the United States, are extremely lawyerized societies, and included a cadre of lawyers in their negotiating or drafting teams.

(After NAFTA, Canada turned its attention to creating an internal trade agreement. This agreement exhibits the Canadian knack for compromise. On the one hand, the language of the agreement is, if anything, even more legalistic than that of NAFTA. On the other hand, the agreement is not actually legally binding).

Dispute settling panels under the WTO system are beginning to produce a body of case law. The style of WTO opinions issued tends to be dry, lawyerly and technical. Those who write the decisions are no doubt anxious to demonstrate to governments and the wider public that their decisions are not based on subjective political values. Rather, the adjudicators involved are anxious to demonstrate that any conclusions they reach flow inexorably from the application of logic to the precise words of the trade provision at issue.

The tendency to seek legitimacy through technicality would exist even if only non-lawyers were involved as advocates and adjudicators. But the role of lawyers in arguing trade cases and in sitting on dispute panels might be reinforcing or increasing the extent to which trade decisions read like highly technical legal opinions.

It may be that legal esotericism can, in some ways, have a positive effect on legitimizing the emerging world constitution in the eyes of the world public.

As mentioned earlier, agreements or decisions that are hard to understand may be more difficult to criticize. A clear and concise opinion may in some ways be an easier target. Journalists and political critics can more easily read through it, identify its logical or factual

weaknesses, and respond with criticism and condemnation.

Furthermore, esotericism tends to increase the aura of authority of those on the inside. The implicit message that may be sent (or received, even if not intentionally sent) is: “you are not well enough acquainted with the mysteries of our craft to even understand what we are doing. You are in no position to criticize.” Legal agreements or judgments that are clear and simple may appear to be part of an exercise in which any reasonably intelligent person could participate. In a simple and clear text, it may be more obvious that the decision-maker has adopted a particular opinion on a matter of judgment that is open to dispute among reasonable people.

Therefore, I would not discount the possibility that technicality and legalism may, in some circumstances, help to make a course of conduct appear legitimate in the eyes of the public. In the long run, however, the cause of world constitutionalism will be better served by striving to create a system which is as linguistically and conceptually accessible as possible to ordinary people.

There are many harsh critics of the WTO system and other trade agreements. They can be highly influential.

For instance, in the late 1990s many states were considering the adoption of a Multilateral Agreement on Investment (MAI). It would have protected the rights of foreign investors against discriminatory or unreasonably harsh treatment by host states. The proponents of the MAI hoped it would eventually be adopted by countries throughout the world. However, final drafting and adopting of the MAI was blocked by the mobilization of advocacy groups on a world-wide basis. The critics were concerned, among other things, that the MAI would have unduly impaired the ability of states to regulate in the public interest.

Those who start off presumptively against trade agreements often have valid and useful observations about the merits of particular agreements or decisions. The criticism can talk government out of potential mistakes or encourage them to adopt agreements that address concerns in a constructive way. But it appears to me that some of the criticism has arisen from a genuine and understandable misunderstanding about what various agreements say or do. “Understandable” due to the often unnecessarily tortuous or vague texts of the agreements.

If trade liberalization agreements genuinely tend to benefit the societies to which they apply – and I believe that most of them do – then

it should be possible to demonstrate those benefits to an informed and questioning public. If an agreement is good it should be possible for public officials to candidly and clearly explain to the public what it purports to do, and what its advantages and disadvantages might be. Esotericism by those making trade agreements may lead some citizens to faith, acceptance, or at least resignation; but it will spur others to distrust or even paranoia.

An eagerness to make agreements and decisions accessible should also help to build a political environment in which a useful interchange of opinion occurs between government decision-makers and citizens. Private citizens and organizations have much information and insight to offer governments. Governments should try to facilitate a dialogue with citizens by agreements that are an accessible starting point for discussion.

Trade agreements tend to include various norms concerning “transparency.” This means that states commit to making their trade rules, and the administration of them, public and accessible to people from other states. If a state’s own trade rules are transparent, others will have greater confidence in trading with that state. They will know the rules in advance. They will not be afraid of hidden agendas, unpleasant surprises, of rules that will suddenly be “discovered” at the whim of local authorities. Logical consistency requires that the rules of world trade themselves be reasonably transparent. Linguistic or conceptual obscurity is not compatible with transparency.

The legal cultures with which I am most familiar – the United Kingdom, Canada and the United States – do have some tradition of using unnecessarily complex and inaccessible language. For a variety of reasons, many lawyers have persevered in this tradition. Sometimes lawyers use fancy jargon to make themselves appear to have greater expertise. Sometimes they genuinely believe that tried-and-tested terminology is the safest. If a complex technical formula has been widely used in practice, and perhaps taken up by the courts, a lawyer may feel that he is protecting the client’s interest by deploying it.

But the Anglo-American world has also seen the development of a “plain english movement.” Sometimes legislatures have commanded that certain consumer documents be written in a readily accessible way. It has proved possible to write the most challenging texts, including tax codes and company prospectuses, in a way that makes comprehension for the non-specialist reader much easier.

The use of the “plain english” style (in whatever language) tends to help the drafter as well as the potential reader. A highly technical approach to drafting may confuse the authors as well as the readers. If you are forced to write simply and clearly, you are also forced to think through matters with particular clarity and precision.

The techniques of “plain english” style drafting include some non-traditional techniques that might be quite useful in the international arena. It is often quite useful, in explaining a concept, to provide examples. Statutes could do so. So can international agreements. It may be useful to include charts, diagrams or mathematical formulas, rather than trying to confine a text to words only.

It is not always easy in practice, of course, to negotiate multilateral trade agreements that are as lucid and accessible as a particular drafter might wish. No state can dictate terms. The aim is to achieve consensus among negotiating states. Some negotiators may not find the plain language approach familiar or appealing. In many cases, achieving consensus may require leaving some provisions ambiguous or undefined. Or it may require that the parties leave the filling of details and the resolution of uncertainties to a later decision-making process (such as to adjudicators on trade dispute panels).

When lawyers draft they sometimes achieve results that are hard to understand because they have tried too hard to anticipate and provide for every possibility. In some contexts, the cause of understanding and trust is better served by a shorter agreement. Some scenarios may be both unlikely to happen and difficult to solve in advance of any event. Sometimes it is better to remain silent on them. Attempting to resolve all possibilities may stall negotiations or render any agreement that emerges too complicated.

In constructing trade agreements, however, drafters should generally try to spell out a reasonable level of detail. They should try to address those details in plain and simple language. But in trade treaties, it is generally undesirable to reach a paper “agreement” by settling on murky verbiage.

Addressing various possibilities is something at which lawyers should excel. It is something they are supposed to do when crafting legislation and commercial agreements. They also consider various hypothetical fact scenarios when litigating cases. Lawyers must think about a variety of factual conclusions that a judge or jury might draw, and consider how the legal conclusion would vary in each case. Legal

reasoning often consists of considering various hypothetical fact patterns, and trying to develop an interpretation of the law that would make sense across the lot of them.

The use of vague formulas can be helpful where there is a trusted body to spell out details as difficulties arise. That body might be a legislative body, an administrative agency, or a court. But in the world trade system there are no bodies, as of yet, that have the long track record needed to acquire such credibility. In the long run, dispute panels and the appellate body may come to be widely trusted. But it is still too early to expect sceptics of world trade agreements to trust such adjudicators to wisely sort out difficulties. A system might use legislative bodies to spell out details of founding agreements. The EU has a sophisticated set of legislative institutions to elaborate on the basic norms of its treaties. No counterpart institution presently exists in the world trade system.

In the current political climate, vague formulas can be counterproductive. They may help negotiators to reach initial agreements, but ratification may fail back at home. Those opposed to free trade in principle will have wide rein to propose “worst case” scenarios. Ordinary politicians and their constituents will not have adequate grounds for confidence about how an agreement will work in practice.

Spelling out the details may often include expressly addressing points that may appear obvious to those who negotiate agreements. It may be useful to expressly explain in the text of an agreement what issues it does *not* address, and what constraints it does *not* place on government freedom of action.

III. LAWYERS AND THE ARCHITECTURE OF THE WORLD TRADE SYSTEM

LAWYERS SHOULD ALSO HAVE some insight into the overall *architecture* of the world trade system. A constant challenge in domestic legal systems is to organize and consolidate developments. In Canada, for example, rules on the same topic, or related topics, may emerge from Parliament, provincial legislatures, municipalities, and administrative agencies. Adjudicators, including judges, may steadily pump out interpretations of the rules. Sometimes interpretations by different adjudicators vary or flatly contradict one another. How can the law be

simplified in form and coherent in content?

Lawyers are used to this challenge. In the Canadian system, we rely to some extent on one central interpreter, the Supreme Court of Canada, to sort things out. Its interpretations are considered binding on all lower courts. From time to time legislatures step in and try to pass a law that harmonizes and consolidates the decisions (in their jurisdictions) that have emerged from different courts and other bodies. Intergovernmental consultations often take place in Canada with the aim of harmonizing the statutes that govern particular areas of law.

There is no all-purpose legislature in the international legal system, nor is there a supreme court whose jurisdiction is accepted by all. Thus states try, from time to time, to consolidate and refine the international law in an area by agreeing upon a multilateral treaty that will be widely accepted. The Law of the Sea Treaty was one impressive exercise in drawing up a systematic statement of the law in a complicated and controversial area. Many of its provisions have come to be accepted as authoritative statements of the law even by states who have not been able to ratify the entire treaty.

After the GATT agreement was created in 1947, a proliferation of side agreements grew up around it. Different states agreed to various side-deals, including a code that defined what a “subsidy” is for the purposes of trade law. A great triumph of the Uruguay Round was that it canonized the same basic set of agreements. All states had to accept the whole package of agreements, or none of them. Every state was either in or out.

But the Uruguay Round by no means solved the problem of the growth of arrangements outside of the WTO. States continue to enter into bilateral and regional agreements like the NAFTA. A body of GATT/WTO case law is developing, and the decisions tend to be lengthy and complex. There are increasing – and proper – demands from the public that world economic integration be accompanied by common world norms to protect labour, the environment, human rights, and other values.

How can the world constitution be kept reasonably simple and compact? How can a canon of key texts be established? It is highly desirable that some set of core texts emerge. It is difficult for even developed countries to properly manage the negotiation, consultation, and litigation that arises from a profusion of different agreements. The time and attention of politicians and bureaucrats is a limited resource. It

can be practically impossible for developing states to manage the political and legal complexities arising out of a whole welter of complex agreements.

A substantial body of practice and case law can promote common understanding and confidence in a particular legal text. That body of interpretation cannot properly develop unless states are repeatedly addressing the same text.

If the same text or institution has a steady and recurring role, it may gain the confidence of the public, as well as that of politicians and bureaucrats. After a while, a text may acquire the authority that comes from long usage, wide familiarity, and the intrinsic appeal of its moral values. Religious communities are built around a canon of sacred documents. A particular text can also be the quasi-religious core of a political community; consider, for instance, the role that the United States constitution plays as a common focus of reverence in American civil society. In building a world civil society, it would be helpful to have a core of agreements that acquire a similar status.

In constructing the world constitution we should be trying to identify and repeatedly use a set of core documents. It is not necessary, for example, that every trade agreement create a new set of labour standards, and a new set of institutions to police those standards. There has long been an International Labour Organization (ILO). It has sponsored a long series of agreements, some of which can be identified as core. Bilateral and multilateral trade agreements could require parties to accept certain core ILO agreements, rather than establishing yet another set of standards and interpreters.

The Covenant on Civil and Political Rights, and its optional protocol (which gives individuals the right to bring complaints to an international panel) could be a core document in creating a common international standard of human rights.

To sum up, lawyers should not see their role as befogging international trade law with legalistic jargon and an uncontrolled proliferation of texts of all sorts. Rather, they should seek to bring elegance, order and simplicity to the world constitution that is now emerging.

IV. LAWYERS: BROAD HUMANISTS OR NARROW TECHNOCRATS?

LAWYERS ARE NOT UNIVERSALLY required to know much of anything besides how to be a lawyer. They are not required by professional certifying bodies to be knowledgeable about social sciences, such as economics or criminology. But there is a long tradition in North America of providing genuinely academic training for prospective lawyers. Some of the best law schools encourage students to be open to looking at level developments thoughtfully and from a wide variety of perspectives. Once in practice, lawyers are used to bringing into play experts from specialized disciplines. At their best, they have the perspectives of broad humanists, and are interested in learning what they can as well from the social sciences.

Precisely because they do not have their own expertise in other areas to begin with, lawyers may be especially good at making the best use of disciplines such as economics or sociology. Little or no knowledge whatsoever can be a useful thing. An empty mind can at least be an open mind. A lawyer is likely to find the jargon of other disciplines unfamiliar, and attempt to translate it into understandable terms for his own benefit and those he seeks to persuade. A lawyer who seeks information from an economist, for example, knows that he will have to explain that information to other non-specialists like himself, such as judges or jurors. A lawyer knows that experts are going to be cross-examined, and so should be able to look at imported expertise with a suitably critical eye.

Openness to the teachings of many disciplines should be allied to a sensitivity to the many dimensions of human welfare. Lawyers are constantly faced with “balancing” problems; situations in which one kind of norm (free speech promotes sound democratic decision making and the spiritual and intellectual growth of citizens) has to be balanced against competing considerations (free speech can damage reputations, intimidate the vulnerable, destroy intellectual property, and violate privacy). Lawyers are educated to be familiar with a broad variety of legal regimes – not only those that promote economic exchange, but also sophisticated bodies of law addressing human rights, labour-management relations, environmental protection and so on.

Let us now look at what a lawyer’s multidimensional perspective can accomplish in the context of building or operating trade regimes.

Even if the task at hand is negotiating or interpreting an agreement that seems to consist entirely of trade norms, there are still advantages to being able to look at a wide variety of perspectives. Economic science can help to evaluate whether a particular course of action is likely to contribute to economic development. Political science might have something to say about the manner in which institutions might best be organized and operated. History and sociology may shed some light on how legal rules can be integrated into the actual texture of society, rather than being empty platitudes.

Furthermore, even if a trade agreement consisted entirely of trade rules, the value of those rules cannot be determined in purely economic terms. The good and bad that is caused by trade rules takes place in many spheres of human welfare.

The case for free trade is badly undersold if it looks only at the positive effect of free trade on material prosperity. Free trade can be defended on many other grounds, such as:

- human freedom: Freedom of choice in economic matters is a human good as it is in other spheres. The freedom to choose among suppliers or employers enhances an individual's opportunity to exercise his creative talents or at least avoid various local tyrannies.
- clean government: Free trade rules can include discipline on government discretion in the disposition of economic benefits. States may be barred by trade rules from engaging in various subsidies or procurement programs that have typically been used to favour the friends of government;
- the spreading of cultural and technological ideas: As trade expands, so do human contacts, and with them, people are exposed to new ideas of all kinds from which they may benefit;
- peace: Economic interdependence can make it less attractive for states to go to war with each other.

World agreements tend to allow developing countries wide exemptions from free trade norms; but in doing so, they may actually cause these societies great harm. Integration into the rigours of the WTO system may be a necessary step to liberating people from the political and economic domination of local elites, including corrupt governments and businesses. Perhaps if the case for trade agreements were routinely made on a higher and wider plane, there would be less readiness to grant such "freedom" from WTO constraints to the countries that might benefit most from them.

The negative effects of trade liberalizing rules must also be evaluated on a variety of perspectives. In some circumstances, outside competitors may replace local economic bullies with even more arrogant foreign bullies. If free trade rules are implemented too quickly, the employment and social patterns of a society may be destabilized. People may suffer too much anxiety, dislocation, and there may be a backlash that causes a state to dissociate itself from the world market.

There are few, if any, real trade agreements that speak only of trade. Almost all of them say that the strict application of free trade rules must sometimes give way to other interests – such as the protection of human safety, human rights, or the environment. As just noted, this kind of “balancing” act is something that lawyers are familiar with. When they craft or interpret such provisions, lawyers can and should be willing to learn from those who have special knowledge or understanding.

In any event, it is increasingly rare that a trade deal will involve only overtly “trade” issues. At present, free trade agreements among states are often accompanied by agreements on issues like protecting labour, the environment, or human rights.

Liberalized or free trade norms have indeed been at the cutting edge of the development of the world constitution. Money talks and included in the audience are politicians. Big businesses are often leading and influential proponents of freer trade. Furthermore, liberalized trade seems to be perceived as a value that can be shared by different states, even if they have different values in many other respects. But those who are concerned about other values have increasingly seized the opportunity to attach their agendas to trade discussions. NAFTA, for example, includes side agreements on the environment and the protection of labour standards. At their best, lawyers can assist in making the world constitution multidimensional, balanced, and humane.

V. LAWYERS AND HARD REALITIES

ONE TEMPTATION OF LAWYERS might be called the legalistic fallacy. This is the belief that because a law is on the books, it is actually enforced and observed in practice. In building the world constitution, lawyers, as much as anyone else, must be aware that bookish dictates can be drastically different from social realities. States may sign written agreements, but lack either the will or capability to enforce them. The fact that a state has signed a convention to protect

intellectual property does not necessarily mean that it can, or will, do anything to control piracy. Perhaps the political leaders favour piracy as a short-cut to economic development. Or perhaps law enforcement officials are insufficient in number, expertise or incorruptibility.

Even in developed and legalistic societies, there may be a large gap between the law on the books and the law in reality. Canadians are notoriously deferential to authority; but (literally) uncounted Canadians avoid paying our value-added tax by engaging in unreported cash transactions. The possession of marijuana is illegal in Canada; yet in many areas, and in some venues (rock concerts) the police may have no interest in enforcing the law.

The major international trade agreements sometimes bespeak a knowledge of the legalistic fallacy. The framers of NAFTA recognized that it would be a major step forward in environmental protection if states, including Mexico, simply enforced the laws that were already on their domestic books. NAFTA calls for states to do so, rather than setting out its own set of environmental rules.

Trade law has recognized the concept of disguised barriers to trade and non-tariff barriers to trade; these concepts include the notion that a country's legal rules may appear to have an unbiased purpose, but still have the practical purpose or effect of discriminating against outsiders.

Many lawyers may also have a tendency to think in terms of a fairly simple and moralistic schematic. Something is bad; ban it; punish offenders; case closed, problem solved.

But social scientists know very well that in practice, banning alcohol or marijuana may have little effect on consumption. It may create opportunities and profits for illegal suppliers. The human cost to those punished, and to their families, may exceed the harm caused by the illegal practice to begin with.

Eliminating corruption in government is a noble objective; but draconian punishment may be ineffective, because it encourages those involved to become more ruthless in dealing with informers. Softer measures may work better. In some contexts, the best approach might be to amnesty civil servants for past offences, encourage them to report what the actual causes and techniques of corruption are, and then provide better psychic as well as material rewards for those who perform their jobs honestly.

If you want to protect endangered species, the obvious solution appears to be a total ban on hunting. But in some cases, it may work

better in practice to allow a limited and controlled hunt. You thereby keep alive a constituency of people who profit from the ongoing availability of the resource; the hunters can, to some extent, become friends of conservation, rather than seeing themselves as victims of environmental puritans.

Therefore, in working with trade regimes and world constitutionalism generally, lawyers have to think outside of the crime-and-punishment box. The law is the law, but so is the law of unintended consequences; legal regimes often have surprising and counterproductive consequences. We have to study reality with an open mind, and then react to it with creativity and imagination.

VI. LAWYERS CAN LEARN FROM THE SCIENTIFIC APPROACH OF OTHER DISCIPLINES, INCLUDING ECONOMICS

LAWYERS HAVE MUCH TO LEARN from the best of the social sciences, including economics. At their best, economists are able to look at policy-making in a manner that transcends ordinary intuitions, common sense, and routine ways of labelling things. They can look for unexpected connections and equivalencies. They can examine the system-wide and long-term effects of policies, not just their immediate and expected impact.

It may not be obvious, for example, that the structure of professional sports in North America is largely based on the subsidization of the rich by the poor. However, an economist would tend to look at the issue in system-wide terms. Professional athletes are making enormous amounts of money. Much of that money comes from ticket sales. Many ticket sales consist of sales to corporations. Corporations write off the cost of these tickets against their taxes; the tickets are viewed as a cost of doing business. (You have to wine, dine and entertain clients). Tax deductions can be viewed by economists as equivalent to public expenditures. A foregone tax has the equivalent economic effect of a cash payment by government.

Therefore, the government is spending money on big corporations and their senior executives and indirectly, on vastly overpaid professional athletes. A large part of that money comes from low and middle-income earners. Many of these people cannot themselves afford to attend games. Professional sports has become a big international business. No rational

approach to addressing it in international agreements can ignore the fact that the industry is largely supported by a regressive kind of subsidy. Governments take from the poor to give to the rich.

The perspective of the economist would be welcome with respect to a number of pressing problems concerning Canadian trade policy. Canadian governments have recently agreed, at least in the short run, to ban exports of bulk water. They want to make sure that they do not establish practices that cannot, under trade agreements, be terminated once commenced. It is unfortunate that our trade agreements, including NAFTA, have not spelled out very clearly what our long-term options are in this respect.

What should our policy be in the long run? The world is facing a water shortage, and exports might prove to be a great boon to Canada and to a water-starved world.

Some argue against water exports on a variety of bases. Some are concerned about whether we will have enough water for our own domestic or industrial use. Others argue that we should encourage all states to conserve water, rather than permit wasters to buy their way out of potential drought. Still others argue that water is sacred; the "stuff of life;" and that it is intrinsically wrong to treat it as just another commodity in the world marketplace.

However, an economist's analysis might identify and consider some challenging questions. Here in Manitoba we have wreaked massive alterations to the environment by damming rivers for hydro projects. Might not the outright export of water actually be less environmentally harmful and more economically productive than the export of electricity created by damming and diverting water? We might use water that we retain here in Canada for manufacturing or farming; but doing so might cause soil degradation and air pollution. Perhaps our own environment would be cleaner if we exported water and used the income to buy various products from other countries? Would an improved standard of living in Canada from water exports provide resources that could be used to improve the environment in other respects? Would an improved standard of living reduce Canada's export of talented people? What harms our society more: the outflow of water or of people?

This is not to say that adopting an economist's approach necessarily means we come down in favour of exporting water. A sound economic analysis would insist that we try to consider all the long-term consequences. Perhaps there are indeed negative long-term effects to

Canada's exporting bulk water. Perhaps doing so really only exacerbates the extent to which our export partners have failed to take proper steps to make efficient use of their existing water. Maybe we are just quenching bad habits in the short run, and setting the stage for a crisis that our exports cannot solve in the longer run.

The long-term answer as to the advisability of bulk water exports remains unknown. What is known, however, is that we should at least be prepared to investigate, with an open mind, the possibility that bulk water might be a renewable resource whose export would enhance the standard of material living and quality of life of Canadians. One important dimension of any responsible analysis would be to adopt the hard-minded, long-range and broad perspective of a skilled economist.

In trying to bring a more systematic and scientific approach to policy making, lawyers and everyone else involved would do well to keep in mind one simple distinction: between means and ends.

Let us now consider the elementary question of the value of material wealth. We Canadians sometimes pride ourselves in valuing things above money. While the United States may be moving steadily ahead of us in economic growth, we tell ourselves that we have values apart from materialism. We value a reasonable measure of economic equality, education, and health.

Policy-making should take into account a wide range of human values. But we should not lose sight of the extent to which material wealth is a means of achieving other human goods. In the hands of the government, money can buy a means to an ends, such as paying the costs of medical technologies that enhance health. It can buy equipment for scientific research that elevates the human spirit. It can be used to subsidize arts and culture. A family with a high income may be one in which parents have more time with their children, because both parents are not constantly scrambling to make ends meet. Those parents may be able to buy their children books, musical instruments, sports equipment – all kinds of things than can assist in enriching a heart, a mind, and a soul.

Building a sense of community and identity among Canadians can be a good thing. But we often confuse means and ends. In the interests of preserving a Canadian presence in the airline industry, we essentially ban foreign competition in our domestic air transport market. But what if that lack of competition produces a near-monopoly situation? What if the result of that near-monopoly is that air travel becomes too expensive

for many Canadians? Does it promote national unity to make it difficult or impossible for many people to visit with friends or relatives in a country as vast as ours? Do Canadians feel better about their country if they begin to look longingly at a United States airline market in which competition helps to keep prices low, choice ample, and service-providers obliging? Canadian unity would be better serviced by having low cost air transport available to Canadians, even if it is largely provided by foreign companies.

We tend to restrict foreign ownership in cultural industries. But we should be open to the idea that an influx of foreign investment might produce more activity in our cultural industries – more media coverage of public affairs, more opportunities for Canadians to make careers in cultural industries without leaving the country. This is not to say that an open door policy will always have the optimal effect on promoting cultural industries. However, we should try to define our objectives first, and then to try to figure out whether protectionism advances or hinders that objective. It is a mistake to start off with a presumption in favour of a particular regulatory choice (restrictions on foreign content, requirements of local content) rather than first defining the objective and then figuring out what best achieves it.

A final observation about the “scientific” approach to thinking about trade law and policy. We should be humble about the extent to which we can arrive at the correct choices by assembling data and thinking very hard about what to do about it. You cannot conduct a controlled experiment that teaches precisely how a policy choice will work in practice. You cannot always predict the practical impact rules have, or the ingenuity that will be shown in circumventing them.

World constitutionalists have much to learn from past experience with global agreements. Modest as it was in scope and enforceability, the experience with the GATT taught many lessons that were put to good use when the WTO system was put in place in 1994. Regional agreements like NAFTA can be excellent testing grounds for new ideas. It has been argued that states are the “laboratories” of American federalism; new ideas can be tested, and if successful, adopted in other states or at the federal level. The same goes for regional trade agreements. They can be the laboratories of world constitutionalism.

VII. LAWYERS ARE USED TO THINKING ABOUT VALUES IN AN IMPRESSIONIST MANNER. WE SHOULD BECOME MORE INTERESTED IN SYSTEMATIC AND QUANTITATIVE MEASURES OF HUMAN PROGRESS

THE DISCIPLINE OF ECONOMICS was created by thinkers who had a wide social and moral perspective – people like Adam Smith. The best economic thinking continues to be interested in the wide human impact of policies and does not confine itself to purely “money matters.” But as economics has strived to become a harder, more scientific discipline, its practitioners have sometimes detached themselves from softer, and mushier, considerations. It is relatively easier to measure Gross National Product than it is to measure other types of human good.

But the well-being of a society and its citizens depends on more than money. A society in which children tend to be raised by two loving parents is, in at least one dimension, wealthier than a society that is materially richer, but in which children tend to be raised in broken families or find that their parents are too busy making money to pay them much attention.

Lawyers tend not to speak of values in fuzzy, qualitative terms. We talk about “balancing” different social goods, such as the value of free speech versus the harm that is done by defamatory speech or pornography. We almost never make any kind of effort to look in an organized, let alone quantitative, way at different social goods.

Some economists still urge us to evaluate potential policies in many values of human dimension. In a book entitled *Development as Freedom*, Amartya Sen has recently proposed that we look at five kinds of capabilities that a society might provide:

- political freedom;
- economic opportunity;
- social opportunities (such as access to health care and education);
- transparency guarantees; and
- protective security (the social safety net).¹

The list is a vast improvement on simplistic tests such as national welfare. But there are still some items missing. There is no mention, for example, of assurances that individuals, and in particular children, will

¹ (New York: Knopf, 1999).

have access to long-term loving relationships. A society, and to some extent its government, can influence the extent to which children will tend to be raised by two parents, or at least by kind parents, rather than growing up in broken families, foster homes, orphanages, residential schools and so on.

It is not easy to measure how a society is doing in all these dimensions. But trade agreements could reasonably call for improved systems of public accounting. Governments take care to regularly publish reports on government incomes and expenditures, and have begun to do a better job of reporting governmental material assets as well as debt. But governments do not regularly publish reports on such items as “human capital” – the extent to which the society has healthy and educated citizens. Nor does it publish reports on how many children are living full-time with two or more adult caregivers. Such reports would be helpful in alerting governments to problems and potential solutions as they craft a world constitution.

Here in Manitoba, Canada, one of our biggest problems is the number of children who are being born with an avoidable congenital condition – fetal alcohol syndrome. It is caused by alcohol consumption, especially in high levels, by pregnant women. It inflicts terrible and lifelong misery on the children who are born with it; they may not be able to hear, see, or think properly. It probably contributes to crime rates in the long run, as victims sometimes find it difficult to conform to social norms. On a proper system of accounting for “human capital,” each child born with this condition would result in a major downgrading of our account. Perhaps the human capital accounts could include some measure of the average amount of taxes that a person will generate over a lifetime compared with their annual draw on public resources. We would then discover that fetal alcohol syndrome is spectacularly expensive. We might become much more imaginative and determined about finding solutions. Right now, the issue does not register anywhere in our public accounts.

The United Nations publishes an annual “quality of life” report in which Canada has finished in first place for a number of years. The grading system is arbitrary and incomplete. It places very little weight on material wealth beyond a certain minimum; yet one of the reasons Canadians are leaving for the United States is that they can achieve a higher standard of living. The grading system also fails to take into account such factors as the extent to which children live in stable

families. It includes no component based on surveys of how happy, fulfilled, or secure people feel.

Both domestic and international governing organizations should be making a greater effort to produce a decent system of public accounting. In the long run, the facts and figures should bear out that liberalized trade contributes to human betterment in many dimensions. To the extent that globalization and freer trade have some negative effects, we could be alert to the effects sooner, and modify the world constitutional system so as to better address them.

VIII. LAWYERS AND IMPARTIALITY

LAWYERS PAY GREAT ATTENTION to the issue of conflict of interest. Advocates must ensure that in both reality and appearance, they are dedicated advocates of their client's cause. In addition they expect those who choose between litigants to be above suspicion of material or ideological connections that cast their impartiality into doubt.

In Canada, much attention has been paid of late to the independence of the judiciary. The Supreme Court of Canada has been extremely attentive to the financial aspects of judicial independence. Not long ago the Court announced that there is a constitutional duty on the part of governments to establish independent salary commissions. These impartial panels would regularly recommend how much of a pay increase judges should receive. Governments were required to accept these recommendations absent any compelling reason to depart from them. According to the Supreme Court of Canada, litigants will fear for the impartiality of their provincial judges if their levels of remuneration are not safeguarded by such a system.

The traditional lawyerly attentiveness to conflict of interest, and the means of preventing it, might be a useful resource in designing and implementing trade agreements. In many areas of trade policy, such as disputes over the safety of genetically modified foods, the most pressing challenge is to find sources of scientific risk assessment that the public can actually trust.

Government officials and agencies operated by government, are distrusted because of a fear that governments will be influenced by pressures from powerful economic interests. The findings of scientists are sometimes distrusted because the researchers may be dependent on discretionary support from government or private sector donors who

have an economic interest in the findings.

To some extent there is a difference between the search for impartiality as between legal and scientific activities. In science, truth can often be tested in highly controlled experiments; in many contexts, the independent nature of the world will ultimately ensure an indisputable chastening for those who are mistaken or biased.

It is acknowledged that in some areas of science it is difficult or impossible to definitively prove or disprove certain theories that are held by responsible scientists. For instance, the colour a particular species of dinosaur was may forever involve some educated guesswork. An evolving theory of particle physics may be persuasive because of its mathematical beauty and comprehensiveness, but may not generate testable predictions. Much of science does, however, advance towards the truth despite the biases and frailties of scientists, precisely because there are objective and abiding truths about the nature of the world that can be tested with precision.

In law, where the right answer lies can inescapably be dependent on judgments that are not capable of being definitely proved or disproved. Much decision-making involves weighing and balancing competing facts, arguments, and precedents. There is no systematic, comprehensive, and agreed method for factoring all kinds of different considerations. Witnesses tell varying stories, precedents clash, and advocates propose different predictions of what the practical impact will be of one interpretation rather than another. The conclusion that a legal decision-maker reaches may necessarily depend to some extent on that individual's beliefs about how people act and think, how society tends to operate, or what moral values are more important than others in reaching a just decision.

But when scientists are involved in regulating, the gap between the kinds of judgment making narrows. A scientist/regulator may have to use his own beliefs and experience to make a judgment about whether a particular set of experiments amounts to "enough testing" to disprove the existence of a particular risk. Data that is gathered in the field may or may not be persuasive depending on whether a scientist trusts the honest and accuracy of those supplying the data. (If a drug encourages people to commit suicide, it may be very difficult in practice to determine this actuality. Those who have attempted suicide, or surviving family and friends of those who have committed suicide, may have many reasons to suppress the truth). If a risk only emerges when human

beings fail to follow prescribed procedures, a scientist may have to make some estimation regarding the likelihood of compliance in the real world.

Lawyers may have some useful experience and expertise at designing institutions and procedures that minimize the risk or perception that judgment calls that affect trade are being influenced by the material or ideological interests of the decision-makers. As mentioned earlier, one of the most important challenges facing the world trade regime is identifying or creating institutions that can credibly make judgment calls in areas such as food safety and environmental risk. A sceptical and anxious public in many parts of the world must be satisfied that decisions are not being distorted by material interest, patriotism, or ideology. The doctrines, institutions and techniques that constitutional and administrative lawyers have developed in other contexts may prove highly useful in meeting this challenge.

IX. THE SPECIAL ROLE OF ACADEMIC LAWYERS

WHETHER A LAWYER IS ACTING as an advocate or adjudicator, there are limitations on the extent to which he can give free reign to his imagination or intellect.

Lawyers have to espouse the causes their clients bring to them. Their own beliefs about facts or values may have to be suppressed. Lawyers must say what they have to say within the highly constricting confines of the rules of evidence and the rules of courtroom decorum.

When lawyers act as adjudicators, there are severe limits on the extent to which they engage in free inquiry. To begin with, adjudicators are not supposed to issue opinions whenever the spirit moves them. They must wait until an actual case arises for decision.

When a case does arise, the adjudicator must focus his attention on the factual and legal case presented by the parties. The adjudicator might wish that the contending parties had brought a different kind or volume of evidence, or that they had framed their cases differently than they did; but fairness requires that the adjudicator address the case that the parties have actually presented.

An adjudicator may know facts or believe arguments that simply have not been presented by the parties. If so, he may have to disregard them.

Adjudicators are expected to issue their opinions in a formal, definitive, and unrevisable format. Once the moving party has had writ, it must move on. An adjudicator cannot go back and change a decision

simply because, in the passage of time and light of later events, he has had some second thoughts.

Judges are bound by many stated and informal conventions with respect to tact. They may be required to take various rules and precedents as given, without questioning or challenging them on any basis. In Canada, judges have been excoriated by their peers for engaging in philosophical musing about whether various existing rules are actually just or necessary.

Legal academics are about the only legal experts who have the opportunity to engage in the free exploration of ideas. In building the world constitution, legal academics can play a valuable role as explainers, analysts, and critics. Their advice and warning can benefit both governments and their constituents.

In 1988, the core issue of the federal election was whether Canada should enter into a free trade agreement with the United States. The general public had to pass judgment on a complicated agreement. Politicians inevitably made claims for or against the agreement that were simplistic and self-serving. It would have been useful for the public to have had the benefit of a cadre of independent academics to enrich the public debate. Some economists did get involved. The legal academics were barely heard from. There were few such people actively working in the area. Since 1988, Canada has been at the forefront of building the world constitution. We have been influential participants at both GATT/WTO negotiations and in regional trade associations like NAFTA. We have promoted humanitarian conventions, including the creation of an international criminal tribunal. At every stage, there should be a lively debate in Canada about the benefits and drawbacks of each new deal. But there has not been a sufficiently numerous or active body of legal academics to have a major impact on the extent or quality of democratic debate.

It is not clear that the marketplace will bring forth such a cadre of independent experts. Governments, private companies, and advocacy groups will use lawyers as advocates for their causes, and sometimes pay them very well to do so. But there may not appear to be much of an immediate pay-off to any of the well-funded players in the game to subsidize a group of independent experts – and potential critics.

We will have to make the best use of the resources we have. An Asper Chair in International Business and Trade law has been created. Its occupants, present and future, should not be producing only their

own reflections, but trying to reach out to other members of the University community. There may not be many trade professors in Canada, but there are many law students who will be studying trade; let us encourage the best and brightest to contribute to scholarship in the area. Economists, political scientists, sociologists, historians, and management experts may have much to say about emerging issues as we build a world constitution. The Asper Chair can be a focus for trying to bring together expertise in other fields and applying it to current developments.

We can achieve an efficiency in another way: by focusing on developments that directly involve our own country. Few scholars outside of Canada are going to do so. Yet what we discover about Canadian issues should be of interest to readers throughout the world. We engage in trade of all kinds, and are at the forefront of trying to manage it through international agreement and institutions. We import and export, in large quantities, all of the key elements of a trade system: goods, services, capital, and people. We belong to a remarkable number of international organizations and forums that involve trade law: the WTO, the IMF, the OECD, NAFTA, the emerging free trade areas of the Pacific Rim and of the Americas. We watch and feel the impact of the most dominant economic power in the world, the United States, and are more familiar than any other foreign citizens with its politics and social fabric. But we are not Americans, and we still have a somewhat detached standpoint from which to evaluate American policy and influence. Within our society, we have sectors of enormous material wealth and areas of desperate poverty and human desolation. We think about political division and organization in the context of our federal system; the threat of Quebec separation and the emerging demands of First Nations people for political autonomy mean that we are entirely too experienced at reflecting about how to maintain unity while accommodating diversity. Any insight we can gain into our own challenges will almost inevitably be of interest to many who are beyond our borders.

The same independent, worldly and multi-dimensional approach should guide the occupants of the Asper Chair as they explore the world of international business. While that subject area has not been the subject of this particular essay, it is a key part of the mandate of the Asper Chair. We launched a trade law course as a permanent part of our law curriculum this year; some of the papers in this volume reflect

the best student efforts from that experience. This year we are, for the first time ever, providing a course in international business transactions. It is hoped that future volumes like this one will include wide-ranging explorations of cutting edge issues in the private law aspect of global law.

X. CONCLUSION

IN THIS, THE FIRST VOLUME of scholarship on current developments from the Asper Chair, the contributors have tried to provide a modest example of what can be done. We hope that future volumes will have many new contributors, from many fields.

Let me end where I began. A new world constitution is emerging. Will it be understood and devised by elites, or will the public have the opportunity to follow and debate each new development? I hope that governments will seek not only the consent of people, but their informed consent. Some of us in academia may welcome integrating developments, others may be resistant. But I hope all can agree that our task is to enrich the debate as best we can in light of the free movement of our intellect and conscience.