

Editorial

Editorial: Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System; Authors of *EJIL* – Customer Care; In this Issue

Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System

The international trading system is not just about trade in which the only calculus of its worth and importance can be measured in the growth (or otherwise) of aggregate welfare, economically speaking. Since trade, in goods and services, is the principal modality of transnational intercourse, the international trading system and the legal system which undergirds it, reflects and constitutes the concomitant principal *modus operandi* of peacetime international relations. It is based on a respect for multilateralism and the rule of (international) law. That *modus operandi* radiates into other spheres of international cooperation, contributing ultimately to stability and peace. For some, on both right and left, it greases, too, the wheels of ‘globalism’, ‘the reign of capital’ (‘capitalism’ as an expression is somewhat out of fashion) and I have even seen the spectre of ‘international financiers’ being resurrected. But be as it may your view of these assorted alleged vices or virtues, I think there is a broad consensus that one should be careful not to throw the baby – multilateralism and the rule of law – out with whatever dirty bathwater within the system is not to your liking.

However, it is just this that is unfolding in front of our eyes. In trying to redress what he believes are ‘horrible’ terms of trade to which his country, the USA, had given its consent and enshrined in binding international legal instruments, Mr. T. and his crew seem almost more interested in throwing the baby out than cleansing what he considers is the dirty bath water.

Thus, for example, the WTO dispute settlement system is slowly being asphyxiated by an American strategy of blocking appointments to the Appellate Body – the *de facto* World Trade Court. The by now infamous imposition of tariffs on certain steel products and the threats of doing likewise on trade in automobiles (there will be no Mercedes Benzes on 5th Avenue! – not such a bad outcome if it means their replacement by the ever fresh Fiat 500) is illustrative. In both cases the formal justification offered is ‘national security’. This is a black lie if ever there was one. Yes, legal terms, like beauty, are often as elastic as the beholder wishes them to be. And with that reasoning just about any weakening of the trading position of a state may be reducible to

a threat to national security. I will not waste my and your time in explaining that this is not what the national security clause is about, though I feel some compassion for the young lawyers in the American government service who were required to write learned disquisitions and briefs trying to justify this legal construct. We all know what it is really about.

I will take some of my and your time to assert that pursuing these measures and the strategy behind them not only does violence to the international system but almost certainly will not benefit the economy and the aggregate welfare of the United States. In addition, it is further eroding the credibility of the United States as a reliable interlocutor when the agreements and treaties entered into by one administration are cast aside with the flimsiest of legal excuses by a subsequent one.

But there is an interesting ‘little’ inflection to the usage of national security. Those affected by the American measures, and especially those with some economic powder in their kegs such as the European Union, have threatened retaliation and by now, I expect, will have already started the process. And why should they not? But they have cast their retaliation as sitting within the legal framework of the WTO. This, I believe, is the White Lie in our story.

At the heart of the WTO Dispute Settlement system is Article 23, which provides as follows.

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
2. In such cases, Members shall:
 - (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
 - (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
 - (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

On its face, then, it would seem that the EU would and should be precluded from retaliating until such time as a violation by the USA has been established through the normal dispute settlement procedures and the appropriate countermeasures indicated. And yet, as we have all heard there is talk of retaliation with only a very short delay – 30 days and 60 days and 90 days are apparently being counted – etc. From all that

can be garnered the EU is planning to use the exceptional regime for countermeasures under the Agreement on Safeguard. That regime indeed provides that in the face of a Member of the WTO resorting to the Safeguard regime and introducing new tariffs and the like, if certain conditions are not met, the 'victim' states may adopt countermeasures which circumvent the strictures of Article 23 (the Safeguard regime is very short and fairly straightforward and thus comprehensible to non-specialists. Take a look: https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm).

The only problem is that the United States has not invoked the Safeguard regime as justification for its measures with the various triggers specified therein, but instead has invoked national security for which there is no regime of expedited countermeasures and which, on its face, is subject to Article 23 DSU.

I understand the European manoeuvre. In the face of the patent bad faith utilization of national security as a means of upending legal commitments which the United States had previously undertaken they are resorting to the most immediate and expeditious means of retaliation. What's a little white lie in the face of a big black one? But be your moral and political judgment as it may be, the legally minded among you will and should feel queasy and everyone, including the most hardened IR realists, cannot but notice and be concerned by the corrupting spiral of bad faith and illegality into which everyone is sucked once the plug is pulled on multilateral legality.

The uninitiated may be tempted, therefore, to ask why the EU would not take the legal Kings Road and follow Article 23, putting in motion the full dispute settlement process of the WTO. Have we not been reading for a couple of decades now thousands of pages, hundreds of articles, dozens of books all extolling the juridification of the WTO with its effective system of dispute settlement?

The uncomfortable truth is that from its inception the WTO system has suffered from a profound Original Sin (or sins) rooted in its conception as a system of interstate dispute settlement rather than a system designed to ensure compliance. The unfolding kerfuffle over steel and cars and the reactions thereto only serve to bring into sharper relief than usual the systemic design flaw of the aptly named Dispute Settlement Understanding of the WTO.

Let me outline, then, these systemic flaws. The departure point is that for the most part states, as such, do not trade. The highest volume of trade in both goods and services is carried out by individual traders, more often than not small and big corporations. When there is a violation by the regulatory regime of a state of international trade law, such as imposing an illegal tariff or a discriminatory tax or non-tariff-barrier, the economic consequences will be suffered directly by the traders and the consumers of their product. They will, of course, be reflected in the trade statistic of the state, but the state as such is not the victim of the violation, it is individuals.

And yet, unlike investment regimes, the individuals harmed most directly have no direct standing to seek redress under the WTO DSU regime. They must enlist their (or some) government to initiate the process, which is intergovernmental. The 'barriers to entry' by harmed individuals into this process are huge. So many stars have to align for a violation to translate into a procedure under the DSU that in reality the WTO dispute settlement system deals with a fraction of all real and alleged violations. You have a better chance with a one-armed bandit at a Las Vegas or Macao casino.

But the true Original Sin, the one for which the WTO is no legal paradise, is the fact that under the system the remedy for a violation is the cessation of such. With no more. You may be thinking, for not more than a minute, ‘what’s wrong with that?’ Is that not what compliance is all about? It is not what it is *all* about. As distinct from the classic regime of state responsibility where *restitutio in integrum* is the driving norm and the specialized regimes of say, the European Union and the investment world, the economic damage suffered as a result of the violation is not restituted. As a method of dispute settlement among states it is easy to see why this may be extolled. A state allegedly violates. Authoritative legal bodies, rather than a unilateral determination by the allegedly victim state, will decide through judicial proceedings whether in fact such violation took place, and then the offending state, if all goes well, will bring the violation to an end. And if it does not, there are possibilities for judicially controlled countermeasures.

Now let’s add one more crucial element – the time factor. On paper, if you work your way through the DSU it would seem to aim at guaranteeing a swift process, measured in months. In reality it can take years. The consultations and negotiations leading to the formation of a Panel can drag on somewhat. The proceedings before such quite often exceed the prescribed time. Then there is the almost inevitable appeal and the proceedings before the Appellate Body. Even if a violation is established by a Panel and confirmed by the Appellate Body, the matter does not end there and then. The violative state has a period, of about a year, to comply. Then the extent to which it has or has not can, and often does, become a matter for dispute which will have to go before a Compliance Panel. Even if it is confirmed that the offending state has not adequately complied, the matter does not end there. A further proceedings might be needed to establish the contours of the countermeasures. Take a look at the Internet Gambling saga where the United States, found in violation, dragged the procedure through all its stages. And all through this saga the violation continued. Not months, but years.

In traditional proceedings, international, transnational and domestic, as long as the violation continues, damages accumulate and these will be reflected in the eventual remedy prescribed. A legal actor who persists in a violation throughout dispute settlement will pay a heavy price for that if the case goes against that actor. The very fact that, if found in violation, a remedy will include compensation for damage suffered is the bedrock of compliance incentives. And I do not even mention the denial of justice towards those who in reality suffered the consequences of the violation.

Now back to the WTO. Imagine the following hypothetical scenario. State A complains to state B, alleging a violation of a WTO obligation. State B has every incentive (or at least no disincentive) to play it out. When all is said and done, eventually, very eventually, they can smile and bring the violation to an end. Why, we asked, is the EU not taking the Kings Road and following Article 23 and the normal dispute settlement procedure? Mr. T.’s tariffs on steel and maybe even automobiles will be in place. Huge damage, some of it irreparable, will be incurred. After years of litigation, winning all the way, the Americans will say Oops, and, perhaps even a new administration, will remove the offending ‘national security’ tariffs. If you are new to this field you might be incredulous. Take a look at the aforementioned internet gambling saga.

So we have a black lie, a white lie and a very imperfect system even at the best of times, shown at its weakest when it would be most needed. Investment arbitration (not without *its* systemic problems) may, in some respects, look appealing. And certainly the idea, promoted by many, including *The Economist* (which should know better), to resolve the issues of investor-state dispute settlement by adopting a system similar to the WTO trade dispute settlement, should be aborted before birth. The investment regime needs very serious retooling. But let's take the best, not the worst, from the international trading regimes.

Authors of *EJIL* – Customer Care

Try as hard as we may, it often takes months to get a publishing decision from *EJIL*. The bottleneck is, in most cases, the peer review process of which you have read my laments on more than one occasion. Let me say straight away that peer reviewing is a fundamental and immensely valuable part of journal publishing. It not only helps us in our publication decisions but our authors receive constructive comments, which enable them to improve their articles and for which they are, without exception, grateful. We, in turn, are incredibly grateful to our colleagues in the international law community who regularly or irregularly take on the somewhat thankless task of peer reviewing (though perhaps seeing a significantly improved piece in print does provide a measure of thanks).

As important and valuable as peer reviewing is, the process is often as unpredictable as the weather in spring. It might take weeks before we manage to assemble the peer reviewers (we get many refusals; and potential peer reviewers do not always reply instantly to our request) and then, as you know from your own experience, good intentions come up against the realities of academic life – one constant of which is always to be late in submitting something promised. Have you not sometimes thought that the flows of our professional life resemble managing a perennial overdraft in the bank?

We have revised our procedure in one small but critical sense which, we hope, will be welcomed by our authors. As I have explained on more than one occasion, the first step in considering a manuscript is a careful read by the 'in-house' editorial team, who decide whether or not the submission should be sent to peer review. As I have also explained more than once, there can be many reasons apart from quality that may underlie a decision not to send out to peer review. *EJIL* is a general interest IL journal and we build our issues with the aim of appealing to a wide readership. Each article we publish means the rejection of another article which could be of similar intrinsic quality. For example, we may not wish to publish in one year five articles on, say, customary law, or proportionality, or investment arbitration, even if each of the five would be of publishable quality.

Henceforth we undertake to inform our authors within six weeks of the date of submission at most, barring complications, about the screening decision. If we decline to publish, the author will then be able to submit it elsewhere in a timely fashion. If it is a positive decision the author will know that his or her submission is in the peer review process. We assure you that we do our best to expedite the process but sometimes speed is the enemy of quality, and thus we exhort a measure of patience. But

that patience will be well rewarded if you publish in *EJIL* as your article will be read, downloaded and cited for many years to come.

In this Issue

This issue of *EJIL* opens with a selection of articles that share a focus on human rights. *Itamar Mann* analyses the infamous trope of ‘legal black holes’ and deploys it to examine the ignominious failure to end mass drownings of migrants and refugees. In his view, the apparent rightlessness of maritime migrants is fundamentally different from other forms of rightlessness since it is not brought about by a violation of international law but is rather created by and deeply entrenched in it.

Following, *Leora Bilsky* and *Rachel Klagsbrun* focus on another form of egregious rightlessness: genocide. While the original conception of this crime was essentially cultural, the Genocide Convention does not reflect this. The authors examine the factors that led to the exclusion of cultural genocide from the Convention and outline its countermeasure – cultural restitution.

David Kosař and *Jan Petrov* shift the perspective from open wounds and scars of international law to issues of compliance. Using the Czech Republic as an object of analysis, they present valuable insights on factors determining compliance and non-compliance with international human rights rulings as well as variable levels of their implementation.

Devika Hovell concludes this section by focusing on the fundamental question of universal jurisdiction. She strips away the often obfuscating technical aspects of jurisdiction to reach the very essence of this concept by examining both its sources as well as its legal-political dimensions.

The next section features the second instalment of our four-part symposium on International Law and the First World War. The articles in this issue explore ideas surrounding belligerency and neutrality. *Stephen Neff* focuses on economic warfare, elucidating the most salient features of the blockade policies of the Allied powers and analysing their implications for maritime neutrality. *Andrew Norris* offers a complementary view on neutrality with the peculiar case of the British Steamer *Appam*, which was captured by the German belligerent and conveyed to the USA, at that time neutral. He traces the diplomatic encounters and legal sparring that resulted from this incident and outlines the development of the law of maritime neutrality and prizes.

Roaming Charges in this issue brings alive one of the most important moments of European Union legal history.

In our Focus on Investment Arbitration *Gus van Harten* provides an empirical analysis of interpretive discretion in investor–state dispute settlement (ISDS), unveiling which arbitrators were most responsible for expanding or constraining the compensatory promise of investor-state dispute settlement for foreign investors over its first one and a half decades. *Malcolm Langford* and *Daniel Behn* scrutinize whether investment treaty arbitrators have responded to the prevalent ‘legitimacy crisis’ of international investment agreements. Drawing upon a newly created investment treaty database they analyse the extent and causes of a shift in treaty-based arbitration outcomes,

finding that arbitrators are conditionally reflexive and that some states are more equal than others.

In the following section the focus shifts to the geography of human rights. *Tilmann Altwicker* shows that a transnational interpretation of core concepts in international human rights law would allow the still predominantly state-centred field to accommodate cross-border challenges. *Barbara Oomen* and *Moritz Baumgärtel* investigate and evaluate the role of local authorities in the realization of international law, finding that they hold important potential to address some of the very pressing challenges to international human rights law today.

For the Last Page *Ela Kotkowska* explores ideas of place and belonging in 'A Migrant Song'.

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