
Introduction

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Much has been said – and written – about challenges faced by the existing international economic system, the policies that underlie it and the rules that govern it. A vast body of academic literature and policy papers has emerged, analysing both general and specific causes of, and possible solutions to, the current crisis of the system.

There are many issues that need to be addressed to make the system, built during the decades following the World War II, function well in the 21st century. Rapid developments in information and communication technologies, that have altered the way in which products are produced and traded, moving from ‘Made in’ a single country to ‘Made in the World’¹ and from physical to e-commerce; the ongoing environmental degradation, affecting food and energy security and, in the long-term, threatening the sustainability of life on the Earth; the rise of China as the world’s second largest economy, with its ‘state capitalism’², are but a few examples of ongoing developments the existing international economic system needs to find solid responses to. Policy makers have been looking for ways forward but seem to be locked in the status quo by different stakes of individual countries and little appetite for reaching consensus for worldwide agreements in general.³

It is however not just the difficulty with which the international economic law and policy adjust to new developments that have brought the system into the current crisis. It is the growing distrust in its ability to work for the benefit of all and not just those privileged or lucky ones. While benefits of economic globalisation are widely recognised, it is also clear that world-wide market liberalisation has led to growing inequality within countries, affecting manufacturing and low skilled workers most.⁴ Open markets have increased global competition and created downward pressure on those replaceable by cheaper workforce elsewhere in the world.⁵ In many countries, including advanced economies, this ‘long-predicted but seldom advertised’⁶ negative consequence of economic globalisation has not been addressed by adequate domestic policies ensuring that net gains from globalisation are distributed equally and that those profiting from open markets compensate those loosing from foreign competition.⁷

International (economic) organisations, such as the World Trade Organization (WTO), have been unwilling or unable to address the matter, merely advocating for but not facilitating adoption of appropriate domestic policies. As explained by Gregory Shaffer, ‘the trade establishment’s traditional approach’ has viewed the role of international trade agreements as combating protectionism, leaving the responsibility for adopting complementary redistribution policies to individual states.⁸ As mentioned, countries that have failed to do so have become ‘rich countries with poor people’.⁹

As a result, the existing international economic order has lost its blessing from the society even – or perhaps predominantly – in countries traditionally leading the way towards economic globalisation and international cooperation, with the United States (US) being the most prominent example.¹⁰ A divide between, on the one side, economic operators generally benefiting from and thus supportive of the system and, on the other side, the rest of the society has developed. The latter appears to no longer trust that the existing international but also national establishment can successfully address their concerns.

Given the crucial importance of trust for any social engagement,¹¹ increasing with the complexity of the system to be relied upon,¹² the erosion of popular trust in the international economic cooperation and regulation is worrying. No doubt – as we already witness – the most likely alternative to cooperation is confrontation, with all its distractive consequences.¹³

This special issue of the *International Journal of Public Law and Policy* is an attempt to contribute to the discussion about challenges faced by the international economic law and policy in times of popular distrust in its ability to address concerns that have fuelled economic nationalism and put benefits of international cooperation and regulation at doubt.

It is a result of an interdisciplinary initiative of the Institute for Globalization and International Regulation, based at the Faculty of Law of Maastricht University, The Netherlands, launched at the Annual *Ius Commune* Conference in late 2017 and followed up by a Collaborative Project Workshop in early 2018. The main aim of the initiative, carrying the name ‘Trust in Trade’, was to examine the theoretical framework for understanding trust in trade and exploring its application through various case studies in the fields of international trade, investment, business and human rights, intellectual property and taxation. The initiative brought together junior and senior academics from a number of European universities and gave rise to further research on this overarching topic, both on an institutional and on an individual level.

This special issue presents four specific papers that have resulted from this research. It starts off with a contribution by Jens Hillebrand Pohl, ‘Conceptualising the complexity-reducing role of societal trust in transnational economic regulation – towards an interdisciplinary research methodology’. The paper argues that the process of globalisation has yielded increasingly complex patterns of socio-economic behaviour as a result of growth in the diversity of behavioural strategies. As the paper explains, this is, in turn, a consequence of an increased diversity of economic actors interacting and competing within the context of globalisation. In that context, the paper considers the claim that societal trust serves the function of reducing social complexity and posits that examination of the interaction between trust and the notion of complexity may hold the key to a better understanding of the process of erosion of trust in the existing international economic legal order. Hence, the paper proposes an interdisciplinary research agenda aimed at exploring and investigating the proposition that an evolutionary interpretation of complexity in transnational economic relations may help to situate and explain that complexity. The overarching message is that this will allow understanding the practical importance of trust in transnational economic regulation, with the overall aim to identify policy choices that would simplify social complexity while at the same time stimulating desirable policy outcomes.

The two subsequent contributions to this special issue relate to the challenge faced by the current multilateral trade system with regard to its inability to meaningfully ensure mutual supportiveness between trade and sustainable development (TSD) in its all three dimensions (economic, social and environmental). The apparent popular distrust in trade liberalisation policies for not sufficiently addressing social costs of economic globalisation and the belief that they constrain rather than enable countries to pursue policies that do offer protection to the environment, human health, labour standards and other non-economic concerns is the premise the two papers are based on.

The contribution ‘Effective, justifiable, necessary: the panel’s assessment of Australia’s tobacco plain packaging measures’ by Elli Zachari concerns a high-profile dispute brought to the dispute settlement system of the WTO against Australia’s tobacco control legislation. Zachari analyses findings of the WTO panel in this dispute by zooming in on its interpretation and application of the concepts of ‘necessity’ and ‘justifiability’ in Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), respectively. As explained by Zachari, the two provisions reflect a balance between trade and non-trade values incorporated into WTO agreements and the concepts of necessity and justifiability distinguish permissible from prohibited trade restrictive measures advancing such non-trade values. Zachari finds that, while some of the panel’s intermediate findings may be questionable, especially with regard to the concept of ‘justifiability’ in Article 20 of the TRIPS Agreement, Australia’s successful defence in this dispute should be seen as a reaffirmation of the WTO’s capacity to adequately balance trade obligations with members’ right to regulate in pursuance of important societal objectives.

The third contribution to this special issue by Denise Prévost and Iveta Alexovičová considers whether, in the absence of consensus in the WTO to address the issue of labour standards in current negotiations and considering the lack of outcome in the negotiations on environmental issues that are part of the Doha Agenda, the incorporation of ‘TSD’ chapters in the European Union’s free trade agreements deliver on their promise of using the EU’s trade power to effectively promote the protection of the environment and improved working conditions in third countries. More specifically, in ‘Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union’s free trade agreements’, the authors examine the EU’s ‘promotional approach’ to compliance with TSD obligations, which is based on dialogue and cooperation, and argue that this approach holds greater promise for real improvements in labour and environmental standards than a sanctions-based enforcement system such as the one employed *inter alia* by the United States and Canada. Prévost and Alexovičová do posit, however, that the EU’s promotional approach regrettably is not yet supported by effective mechanisms for transparency, institutionalised dialogue and accountability, which are however needed to ensure effectiveness, and thereby gain the trust of civil society.

The fourth contribution to this issue entitled ‘Patent boxes and the erosion of trust in trade and in governance’ by Esperanza Buitrago Diaz moves from trade to the field of taxation. It discusses the topical and highly controversial practice of tax incentives used by countries to attract corporations to invest in their economies. The public exposure of such tax incentives practices in recent years has certainly contributed to the backlash against economic globalisation in developed states. The general public perception that

corporations eventually always find – and are even offered – a possibility not to pay (a fair amount of) taxes and, consequently, become increasingly wealthier at the expense of ordinary citizens, could not but erode trust in the fairness of the system. The present article considers a specific type of tax incentives referred to as patent boxes. Such incentives are said to encourage corporate research and development by providing for a very low corporate tax for revenues from patents, and/or other intellectual property rights, in contrast to the corporate tax that applies to other revenues. In her contribution, Diaz assesses whether soft-law measures adopted by G-20 and the Organization for Economic Cooperation and Development (OECD) in reaction to the criticisms on this type of tax incentives are appropriate and suitable to restore public trust while at the same time refraining from hindering innovation and entrepreneurship, which are to be the actual objectives of patent boxes. The article shows a number of difficulties and shortages related to the adopted measures and argue against a pure disciplinary tax approach to the problem. In her conclusions, Diaz pleads for further multidisciplinary, interdisciplinary and empirical research, which is needed in order to meet the challenge of encouraging the flows of knowledge and capital as well as for restoring public trust without sacrificing innovation.

In addition to the four contributions to this special issue, which resulted from research undertaken within the broader framework of the trust in trade initiative mentioned above, the issue also includes a review by James Claxton of a recent book on the topic of *China's International Investment Strategy – Bilateral, Regional, and Global Law and Policy*, edited by Julien Chaisse and published by Oxford University Press in February 2019. As the title of the book clearly indicates, the volume analyses China's policy towards foreign investment as reflected in its domestic laws and international treaties. Two defining elements of this book make the review a good fit within the overarching topic of this special issue: first, its focus on China; and second, its investigation on national and transnational regulation of foreign investment, which are both critical for restoring trust of all stakeholders in the existing international economic architecture. China's ever stronger economic and political power hardly need further commentary to a reader familiar or not with specificities of China's economic policies and their implications for the international economic legal order. Similarly, the controversy relating to the existing international framework for the promotion and protection of foreign investments has probably escaped attention of no interested reader. Calls for 'dealing with' both China and powerful foreign investors, and the protection offered to them by international rules, have dominated discussions in academia as well as in the world politics. The recent book on China's investment strategy, offered to the reader's attention in this special issue, is likely to become a welcome contribution to this discussion.

We hope that this special issue of the *International Journal of Public Law and Policy* will make a useful addition to the ongoing debate on some of the reasons underlying the popular distrust in the current system of international economic law and policy. This in full agreement with the statement of Steve Charnovitz that "If international economic law is inadequate, then the optimal response for nations is to work together internationally to rewrite conventional international law so that it better meets the needs of the world economy. Nationalist self-help actions cannot be a substitute for better international rules."¹⁴

Notes

- 1 This expression is used in Van den Bossche, P. and Zdouc, W. (2017) *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, 4th ed., p.12, Cambridge.
- 2 Charnovitz, S. (2019) ‘The missing legal strategy for the US-China trade war’, *International Economic Law and Policy Blog*, 23 May [online] <https://worldtradelaw.typepad.com/ielpblog/2019/05/the-missing-legal-strategy-for-the-us-china-trade-war.html> (accessed 13 June 2019).
- 3 While there is a bright example of a recently concluded global agreement, namely the Paris Agreement, the difficulties with which it came into being are widely known. In the area of international economic relations, less global success is detectable. For trade, WTO members have been unable to conclude the latest round of multilateral trade negotiations, known as the Doha Development Round, launched long 18 years ago. For foreign investment, to take another example, new treaties continue to be signed but they are predominantly bilateral or, at most, regional. Attempts to arrive at a modern multilateral investment treaty have not materialised and discussions on a multilateral reform of the investor-state dispute settlement system (including the establishment of a multilateral investment court, proposed by the European Union and Canada), conducted since 2017 under the auspices of UNCITRAL, are unlikely to be successful in the short or even medium term. As reported by the UNCITRAL Working Group III in April 2019: “there are fundamental differences in some of the reform solutions that were being proposed – some were more structural in nature, some involved reforms within the current system and some straddled that line.” – *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37th session (New York, 1–5 April 2019)*, Report by the United Nations Commission on International Trade Law to the General Assembly of the United Nations, A/CN.9/970, 9 April 2019, para. 80.
- 4 As reported in 2018, while inequality between countries has been reduced, the inequality within countries has increased almost everywhere in the world. The total growth captured by the world’s richest 1% was 27% compared to merely 12% total growth for the bottom 50% of the world’s population. This means that the top 1% of most wealthy individuals in the world secured twice as much growth as the bottom 50% individuals since 1980. Moreover, in 2016 the share of total national income earned by the top 10% richest was 37% in Europe, 41% in China, 46% in Russia, 47% in US-Canada, 55% in Sub-Saharan Africa, Brazil, and India, and 61% in the Middle East, the world’s most unequal region. The report shows that inequality has increased almost everywhere, be it at different speeds. – *World Inequality Report 2018*, Executive Summary, in particular pp.5–9 [online] <https://wir2018.wid.world/files/download/wir2018-summary-english.pdf> (accessed 13 June 2019).
- 5 It is not only trade but also – and in fact primarily – technological developments that lead to job displacements. – World Trade Organization, *World Trade Report 2017, Trade, Technology and Jobs*, pp.7–8 [online] https://www.wto.org/english/res_e/booksp_e/world_trade_report17_e.pdf (accessed 13 June 2019). Nonetheless, public attitude towards trade seems to be more antagonistic than towards technology. A brief but accurate account of this phenomenon is provided in Shaffer, G. (2019) ‘Retooling trade agreements for social inclusion’, in *Illinois Law Review*, Vol. 2019, No. 1, pp.1–44, on p.13.
- 6 Stiglitz, J. (2006) ‘Making globalization work’, *The Guardian*, 7 September [online] <https://www.theguardian.com/commentisfree/2006/sep/07/stiglitz> (accessed 13 June 2019).
- 7 An array of policies is of importance for addressing the inequality, including those relating to taxation, education, healthcare, job creation and training. Picking the most obvious policy, taxation, according to the OECD, since 1980s taxes that affect top earners have gone down and tax ‘benefits tend to be enjoyed disproportionately by high earners’. – OECD (2015) *Income Inequality: The Gap between Rich and Poor*, p.102, 15 December, <https://doi.org/10.1787/9789264246010-en>.
- 8 Shaffer, G. (2019) *Retooling Trade Agreements for Social Inclusion*, supra note 5. In this paper Shaffer argues that this traditional approach is called into question by “structural forces that empower capital against labor, on the one hand, and capital against government, on the other” (p.3). These forces make it difficult for labour to bargain successfully for its interests and for governments to adopt good social policies. Played off against each other by the

- empowered capital, governments must play together to counterweight it, according to Shaffer. He argues that international trade agreements must be redesigned so as to effectively enable countries to do so and adopt domestic social policies.
- 9 Stiglitz, J. (2006) *Making Globalization Work*, supra note 6. Importantly, it is not just people but also governments that got poorer. As shown in the *World Inequality Report 2018*, supra note 4, public wealth has dropped in all countries since the 1980s apart from those rich in oil that use sovereign wealth funds. According to the authors, this may be constraining government's ability to tackle rising inequality (pp.10–11). Coming to the same conclusion, Shaffer argues that technological developments and opened markets have enabled capital to become more efficient and profitable, empowering it against governments that either give away to the capital's demands (e.g., lower taxes) or risk losing it, and many jobs with it. – Shaffer, G. (2019) *Retrofitting Trade Agreements for Social Inclusion*, supra note 5, p.3. Such race to the 'tax bottom' cannot but result in lower revenues, leaving states themselves with less resources to finance social programs for those in need.
 - 10 In the United States, the backlash against economic globalisation manifested itself most notably in the election of Donald Trump to the office of US President. In his remarks to the United Nations General Assembly in September 2018, President Trump could hardly put it more bluntly: "We reject the ideology of globalism, and we embrace the doctrine of patriotism." – Remarks by President Trump to the 73rd Session of the United Nations General Assembly, 25 September 2018 [online] <https://news.un.org/en/story/2018/09/1020472> (accessed 13 June 2019). A similar trend is visible in Europe where we witness a rise of neo-nationalist sentiments across the continent, including in countries such as the UK, France, Italy, the Netherlands, Sweden, Austria but also Poland and Hungary. In the recent elections for the European Parliament, neo-nationalist parties obtained a substantial number of seats, although the gain was not as high as predicted. – See, for example, Huhtanen, T. (2019) *EU Elections: Populists Gained Votes – But Lost Initiative, Opinion*, in Euobserver, 28 May [online] <https://euobserver.com/opinion/145036> (accessed 13 June 2019). Some time ago, Swank and Betz argued that while it was not certain that a connection exists between labour market displacement and populist politics, it was clear that there were less problems with populism in universal welfare states that had been addressing such labour market developments. – Swank, D. and Betz, H.G. (2003) 'Globalization, the welfare state and right-wing populism in Western Europe', in *Socio-Economic Review*, May, Vol. 1, No. 2, pp.215–245.
 - 11 For works on the concept and role of trust in societal intercourse, see for example Möllerling, G. (2006) *Trust: Reason, Routine, Reflexivity*, Elsevier, Oxford; but also Kramer, R.M. and Cook, K.S. (Eds.) (2007) *Trust and Distrust in Organizations*, Russel Sage Foundation, New York; Cook, K.S. (Ed.) (2001) *Trust in Society*, Russel Sage Foundation, New York.
 - 12 See, for example, a well-known work of Luhmann, N. (1979) *Trust and Power – Two Works*, John Wiley, New York. In his contribution to this special issue 'Conceptualising the complexity-reducing role of societal trust in transnational economic regulation – towards an interdisciplinary research methodology', Hillenbrand-Pohl builds upon the Luhmann's theory, applying it to transnational economic relations.
 - 13 Roubini, N. (2019) 'Could the US-China trade row become a global cold war?', *The Guardian*, 20 May [online] <https://www.theguardian.com/business/2019/may/20/us-china-trade-war-donald-trump-xi-jinping> (accessed 13 June 2019). See also Allison, G. (2017) *Destined for War: Can America and China Escape Thucydides's Trap?*, Houghton Mifflin Harcourt, Boston, New York.
 - 14 Charnowitz, S. (2018) 'How American rejectionism undermines international economic law', in *Trade, Law and Development*, Vol. 10, No. 2, pp.226–269, on p.242.