Regulatory Challenges in International Economic Law: Convergence or Divergence?

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Welcome Address

Dear Colleagues:

On behalf of the University of Bern and the World Trade Institute, I am pleased and honoured to welcome you to Bern. I very much hope that you will enjoy the conference, and your stay in this town. Most of you know Geneva, the capital of world trade; this is Bern, the capital of Switzerland and where trade and economic policy and law is made for this country, with both feet on the ground.

I am impressed to see you all assembled in this lecture hall. After all, international economic law in academia is still a new and minority subject. For a long time, it was – with the exception of investment protection - not a recognised part of standard public international law, although trade was one of its main drivers in the real world, next to the law of the sea. Even today, many law students avoid the subject ignoring its contemporary and future relevance in the process of globalisation. SIEL plays an important role in enhancing the profile of the subject.

The Society is of particular importance today. The subject suffers, after the financial and debt crisis, from a post-depression syndrome. It is fragile, delicate and exposed to scepticism. Some doubt its legitimacy and prefer the prerogatives of domestic law in the pursuit of national interests. Multilateral negotiations are stalled both at the WTO and the IMF. Negotiations on mega regionals take place behind closed doors. They may lead to clashes with civil society and democratic participation. It is thus a good time to meet, to discuss, to encourage fellows and to be encouraged over the next two days through this rich programme. I hope you will return home enthusiastic and committed to building international economic law in its different facets.

Much has been achieved in the field of international trade. WTO law has emerged as the common law, informing RTAs and domestic law. Millions of transactions are based upon this common ground which is further refined by an impressive body of case law. Other areas are less integrated and scattered, and are gradually forming a common law and more transparency. I am speaking of investment protection turning away from rigid gold standards. We have hardly touched upon tax law apart from non-discrimination. Monetary law, finally, is hardly touched upon by the law on substance. *Terra Incognita* beyond the allocation of powers. Monetary policy is a matter of economics, and the question arises whether that is the end of it. Or can and should legal principles play a role in defining, for example, interest or exchange rates?

International economic law thus covers a wide range of subjects of diverging levels of legal development and integration. There are no clear-cut borders, and relations to other areas of public international law are at the focus of attention: human rights, environmental law or migration. It has increasingly become, in integrating different fields, a matter of balancing equally legitimate policy goals, and a constitutional approach can be observed in dispute settlement to this effect.

This brings me to the theme of this conference: *Regulatory Challenges: Convergence or Divergence?* Much more than traditional precepts of trade liberalisation, regulatory convergence is at the heart of negotiations and legal developments today. TTIP and TTP are current examples in point. To what extent should there be transatlantic and transpacific convergence, and to what extent should there be divergence and autonomy? The question points to key issues of regulatory theory in constitutional and international law in the pursuit of producing public goods at appropriate levels and fora:

* Vertically: it is matter of allocating powers among different levels of governance, in particular between nations and international law in defining policy space in what today we call multilevel governance. Such space may vary in accordance with levels of social and economic development and what can be called graduation.
* Horizontally: It is a matter of allocating powers between different bodies, in particular legislation, executive powers and the courts.

These allocations are broadly defined by the structure of norms and the constitutional relationship of international law and domestic law. Broadly texted norms delegate authority to interpretation and application, and strictly termed rules and prescriptions emphasise the predominance of legislation and treaty making. They are shaped by substance, but also processes and the different modes of legitimacy of the fora and institutions involved.

In is within this matrix that international economic law operates. It is about allocating powers on the basis of principles and defining policy space for domestic law. It is for such reasons that I prefer to use the term ‘regulation’ in trade, investment and monetary affairs, or in any other field. And I am very pleased that Professor Trebilcock will speak to us in the following Hudec Lecture. He and Rob Howse introduced the term in the first edition published in 1995 of “The Regulation of International Trade”.

Prior to the financial and debt crisis, the term regulation was perceived rather negatively: Anathema to liberalisation and deregulation, it stood for interventionism and red tape. Regulation, however, is a neutral term, essential to establish and frame markets, and applied to different degrees, commensurate with the political process. Regulation may be minimal or extensive, depending of the subject: it may be in domestic or in international law. It entails non-discrimination and market access, but also the pursuit of other and equally legitimate policy goals. Combating rent-seeking protectionism remains at the heart of international economic law, preventing and remedying state failures.

I stress the term regulation here also for communication purposes. I submit that with the established terminology mainly emphasising trade liberalization, core functions of international economic law are not properly depicted. People – students in particular – and the public at large cannot see the breath of it and turn away, fearing the effects of globalisation or deploring a one-sided emphasis on economic benefits. This is the image we carry. People talk about free trade in the WTO and protecting foreign direct investment, often allegedly at the expense of human rights and the poor. They are not sufficiently aware of the full breadth of the subject because key terms used do not sufficiently convey the message.

Using the terms of Trade Regulation, Investment Regulation or International Tax Regulation, Regulation of Monetary Affairs and so forth is more appropriate to depict the idea and need to balance different policy interests. It is more suited to describing what we are in fact doing: Harnessing globalisation (Pascal Lamy) and working on the building blocks of global law. In doing so, we should much more emphasise in public the importance of the lock, stock and barrel of what is held in common in international relations. On-going negotiations, of course, are of interest to the press and public discourse. But more important is enhanced awareness of what has been built and what this Society is all about.

The themes of the conference are widely defined and take into account diverging interests on the basis of papers accepted. But all will face regulatory challenges in allocating powers and policy space, and I hope that the conference may contribute to the evolution of common understanding.

Let me close by thanking up-front the organising committee, led by Meredith Kolsky Lewis, Colin Picker, Gabrielle Marceau, Federico Ortino, Galina Zukova and Lisa Toohey of SIEL and Christine Kreis, Margrit Vetter, Mira Burri, Rodrigo Polanco, Charlotte Sieber-Gasser, Alex Kistler and Christian Steiger of WTI for making all this possible. I also should like to thank the sponsors, academic institutions and law firms. They are important not only for funding, but even more so connecting academic and practical work in the field.

With this, I truly wish you a fruitful conference and stay in Bern.