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Edited by Meredith Kolsky Lewis and Susy Frankel

Excerpt

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## Introduction

The multiplicity of commitments resulting from the World Trade Organization (WTO), free trade agreements (FTAs), bilateral investment treaties and other agreements has increasingly complicated the nature of national obligations. The World Bank and IMF further impinge on national autonomy by imposing a variety of conditions on loans and other forms of funding. All of these treaty obligations impact on governments' ability to exercise complete autonomy in the establishing and administering of national policy objectives. In particular, the rules and decisions arising from these international agreements and financial institutions result in limitations on countries' ability to make a wide range of regulatory decisions, including those relating to health, environment, immigration and other issues of national importance. Until relatively recently, these types of regulatory matters were regarded as policies almost exclusively to be determined by sovereign nations. At the same time that international agreements pose constraints on national regulatory autonomy, there remains considerable national autonomy in relation to how to comply with the variety of obligations the agreements impose. This tension between international cooperation and autonomy to act in the national interest is the core theme running through this collection.

The complex interplay between international economic law and national autonomy presents such a variety of interesting legal issues that we decided to make this the theme of the inaugural conference of the New Zealand Centre of International Economic Law (NZCIEL). The conference, held in December 2007 in Wellington, New Zealand, featured presentations addressing the theme through a wide range of international economic law lenses, including but not limited to international trade, intellectual property, international investment and international development. The chapters comprising this volume are based on the papers and presentations delivered at that conference. Reflecting the diverse nature of the conference, our contributors hail from institutions based in eight countries and on four continents. The contributions reflect not only

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the diversity of view that comes from different cultural backgrounds, but a wide range of substantive expertise. The thirteen chapters delve into the theme of international economic law and national autonomy from different substantive and philosophical perspectives. Coverage ranges from the WTO to the World Bank to international investment law. Within the WTO, submissions address topics that span across the goods, services and intellectual property pillars of the organisation, and approaches ranging from theoretical critique to detailed treaty interpretation.

The contributions featured here are organized into four parts: International economic law: conceptions of convergence and divergence; WTO treaty interpretation: implications and consequences; Responding to international economic law commitments; and Transformations in international economic law.

In the opening part, Professor Robert Howse builds on his keynote address to the conference by exploring 'The end of the globalization debate: continued'. The core theme in this chapter is that even the anti-globalists have gone global and that the debate is not so much about globalization as a good or evil, but rather how countries have worked with globalization to achieve their national interests. Professor Howse's chapter brings together many of the themes running through the rest of the volume, as he explores concepts of integration and fragmentation, and ultimately responds to the national autonomy question posed by the conference, by determining that the answer is neither convergence nor divergence. Associate Professor Yuka Fukunaga examines the theoretical bases behind proposals to reduce the 'democratic deficit' and 'economic bias' associated with global economic institutions (GEIs) such as the WTO, World Bank and IMF in 'Global economic institutions and the autonomy of development policy: a pluralist approach'. Associate Professor Fukunaga critiques these assumptions, and goes on to propose an alternate, pluralist approach to the global legal order. Lastly, Dr Jason Beckett provides a theoretical challenge to recent scholarship in his contribution, 'Fragmentation, openness and hegemony: adjudication and the WTO', critiquing the assumptions and theoretical underpinnings of much of the contemporary writing on fragmentation and coherence.

In Part II, the authors address diverse aspects of WTO treaty interpretation and the resulting implications for national autonomy. In 'Demanding perfection: private food standards and the SPS Agreement', Dr Tracey Epps focuses on the interplay between WTO rules on the one hand and the setting of food and other product standards by private entities on the other. She cautions that private food safety standards have the potential

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Excerpt

[More information](#)

## INTRODUCTION

3

to undermine the SPS Agreement's trade liberalization and transparency objectives, among other concerns. Professor Susy Frankel discusses the structure and objectives of the TRIPS Agreement that require Members of the WTO to enact minimum standards of intellectual property protection into their domestic law in her chapter, 'Eroding national autonomy from the TRIPS Agreement'. She argues that national autonomy is a structural feature of the TRIPS Agreement, and of many other international intellectual property agreements, but that the parties to the TRIPS Agreement choose to reduce that autonomy by negotiating more detailed intellectual property protection in other international fora. In 'The WTO and RTAs: a "bottom-up" interpretation of RTAs' autonomy over WTO law', Dr Alberta Fabbriotti proffers a novel, bottom-up approach to interpreting Article XXIV of the General Agreement on Tariffs and Trade (GATT), contending that RTAs could be argued to have autonomy over WTO law in the form of tacit acceptance of an international custom, instead of simply as non-compliant behaviour in the context of the WTO legal regime. Part II concludes with Dr Henning Grosse Ruse-Khan's chapter "Gambling" with sovereignty: complying with international obligations or upholding national autonomy', which uses the dispute between the United States and Antigua over the supply of online gambling services to explore the apparent conflict between complying with recommendations of the WTO Dispute Settlement Body and maintaining national autonomy over local regulations. The chapter uses the gambling case to analyse the efficiency of the dispute settlement system through examination of compliance issues implicated by the dispute.

Part III highlights how countries have responded to or should respond to certain international economic law obligations and frameworks, and the effects and implications of these responses. Meredith Kolsky Lewis's chapter, 'Safety standards and indigenous products: what role for traditional knowledge?', addresses whether the SPS Agreement provides WTO Members with too much regulatory autonomy in the context of restrictions on trade in indigenous products with a long history of traditional use. She suggests that the concept of traditional knowledge could be extended from its usual intellectual property context to assist in developing a more balanced framework for assessing the safety of indigenous products. Dr Rafael Leal-Arcas examines the issue of immigration policy in the context of the General Agreement on Trade in Services in his chapter, 'The GATS and temporary migration policy'. He discusses the dichotomy whereby Mode 4 (temporary migration) of the GATS is currently subject to strict domestic regulations and limitations within the

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[More information](#)

European Union, yet it is simultaneously widely recognized within the EU that immigration is a necessary element to enhancing competitiveness in a knowledge-based society. Finally, Dr Pinar Artiran's chapter, 'A different approach to the external trade requirement of GATT Article XXIV: assessing "other regulations of commerce" in the context of EU enlargement and its heightened regulatory standards', identifies interpretive difficulties within GATT Article XXIV and the tensions these introduce into the relationship between multilateralism and regional integration.

The book concludes in Part IV with three authors who identify transformative patterns in international economic law. Ko-Yung Tung utilizes his expertise as former Vice President and General Counsel of the World Bank to assess the ways in which globalization has fundamentally transformed foreign investments, and to demonstrate the tension between international norms and domestic regulatory issues, in 'Foreign investors vs sovereign states: towards a global framework, BIT by BIT'. Professor Jane Kelsey delivers the type of critique for which she is best known, in her chapter 'How "trade in services" transforms the regulation of temporary migration for remittances in poor countries'. Professor Kelsey argues that the WTO General Agreement on Trade in Services (GATS) has effected a regulatory transformation whereby services have been transformed from their previous – primarily social – dimension, into a form of commodity that is exchanged in international markets, with negative effects for temporary migrant workers. Last but not least, in 'Reconceptualising international investment law: bringing the public interest into private business', Kate Miles argues that international investment law is out of step with other areas of international law in that it has been far slower to incorporate societal considerations such as the public interest, and proposes procedural and substantive steps to rectify this disconnect.

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## PART I

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### International economic law: conceptions of convergence and divergence

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## 1

## The end of the globalization debate: continued

ROBERT HOWSE

## I Introduction

This brief essay pursues a line of argument that I deployed in a review article in the *Harvard Law Review*,<sup>1</sup> discussing several important recent books about globalization.<sup>2</sup> The thesis is that there is no longer a meaningful or important debate for or against globalization because the anti-globalizers have themselves gone global. In various sites of global law and policy-making, including those at the interstices of the global and local (as will be explained), the anti-globalizers actually found processes and institutions where, unlike the case with the 'state' in many instances, they could air their criticisms of policies and express their values as global values. Despite the continuing rhetoric and polemics regarding the promotion of globalization, there is no longer an anti-globalization 'side' in the debate, coherently representing the position that the territorial nation-state is and should remain the locus of control over economic activity and that it should retain a monopoly on legitimate governance. Today the protesters who march against 'globalization' are not marching in favor of the 'state'. Instead, they are, mostly, advocating a set of values and causes that transcend state boundaries and that require global action. Anthony Giddens anticipated, at the beginning of this century, that the debate would re-focus as a debate *about* globalization, rather than *whether* globalization should take place (as I learned after writing

<sup>1</sup> R. Howse, 'The End of the Globalization Debate: A Review Essay', *Harvard Law Review*, 121 (2008) 1528.

<sup>2</sup> These are R. Abdelal, *Capital Rules: The Construction of Global Finance* (Harvard University Press, 2007); J. Bhagwati, *In Defense of Globalization*, 2nd edn (Oxford University Press, 2007); J. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York, W. W. Norton & Company, 2006); S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006); J. Stiglitz, *Making Globalization Work* (New York, W. W. Norton & Company, 2006).

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[More information](#)

my Harvard essay). In an interview in 2000, he suggested that the second globalization debate would be:

about what globalization is, what its consequences are, and what kind of framework we can develop for the world to accommodate it. It's plainly had a lot of positive developments in producing a more interdependent world. We have to learn to harness those things, and we have to shift away from the kinds of political positions that were dominant for the last few years, and we have to produce a politics which allows us to create an inclusive society locally, nationally, and globally, and to harness these processes for the betterment of human beings.<sup>3</sup>

## II The origins of the anti-globalization movement and the original globalization debate

A wide range of meanings of globalization is reflected in a recent definition by the philosopher Jurgen Habermas: 'by "globalization" is meant the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism.'<sup>4</sup> (However, Habermas leaves out of his definition the globalization of *law*: this reflects the general assumption, quite likely incorrect, or at least too simplistic, that the law's role is to *react* to globalization as a given force and that law has not itself been an element in that force.)<sup>5</sup>

In much popular discourse, globalization is considerably more than something that explains and begs to be explained at the same time: it is a magnet for a range of deeply felt hopes and fears, and still produces intense polemics 'for' and 'against'. Many of us, though, can feel *both* a sense of loss and disorientation from the collapse or erosion of familiar structures, fixed within the territorial nation-state model of human organization, *and* exhilaration at the new possibilities of connectedness and human flourishing. This complex or ambivalent reaction may be a good starting point for a more reflective take on globalization, one that does not try simply to

<sup>3</sup> 'The Second Globalization Debate: A Talk With Anthony Giddens', *Edge*, (30 January 2000), available at [www.edge.org/3rd\\_culture/giddens/giddens\\_index.html](http://www.edge.org/3rd_culture/giddens/giddens_index.html) (accessed 11 August 2009).

<sup>4</sup> J. Habermas, *The Divided West* (Cambridge, Polity Press, 2006), p. 175.

<sup>5</sup> For a complex and subtle view on the relation of globalization to law, see S. Cassese, 'The Globalization of Law', *New York Journal of International Law and Politics*, 37 (2005) 973.

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soar above the passions and the polemics, rather to see, in Tocqueville's image, not differently than the parties in the debate, but farther.

At least a decade before the end of the Cold War, the old struggle between right and left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had, significantly, yielded to a new attitude: the center-left, especially its elite elements, embraced many of the center-right critiques of the post-war regulatory and welfare state as inefficient, wasteful and dependency-inducing. As well, the center-left shifted away from support for trade protectionism and capital controls as instruments of progressive governance that ensured the state's ability to maintain a stable and fair social contract with business, labor and the disadvantaged.<sup>6</sup> The center-left sought to pursue traditional progressive values through a more economically liberal (in the sense of pro-free-market) approach to governance of the economy.<sup>7</sup> The regulatory reforms of the Carter administration in the United States, the agenda of New Labour under Tony Blair in the United Kingdom and the restructurings of the welfare state in the Netherlands and Denmark are examples of cases where a basically progressive political movement or national political culture turned towards the market as understood by the economic right, but claimed to hold to progressive values all the same.<sup>8</sup>

The End of the Cold War – often referred to as the death of communism – seemed to consecrate the notion that the ideological struggle about the relationship between state and market was over: both domestically and globally, market liberalism had triumphed. Of course, the regulatory and welfare state remained, but debate about its future direction could no longer be inspired by sources or approaches at odds with the idea of a large sphere of (mostly) free play for markets, domestic and global. The most explicit, and some would say simplistic, articulation of this triumph of market liberalism was Francis Fukuyama's 'end of history' idea, which suggested that, after the Cold War, states were left with no rationally defensive alternative to (what was largely) the American variant of global capitalism.<sup>9</sup> As is well summarized by

<sup>6</sup> See generally R. Howse, J. Robert, S. Prichard and M. J. Trebilcock, 'Smaller or Smarter Government?', *University of Toronto Law Journal*, 40 (1990) 305.

<sup>7</sup> See, for example, the various contributions in J. LeGrand and P. Robinson (eds.), *Privatization and the Welfare State* (London, Allen and Unwin, 1984), especially, D. Donnison, 'The Progressive Potential of Privatization', p. 45.

<sup>8</sup> See R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', *American Journal of International Law*, 96 (2002) 94, pp. 101–2.

<sup>9</sup> F. Fukuyama, 'The End of History?', *The National Interest* (Summer 1989).



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Frieden in *Global Capitalism*, there was an extraordinary new consensus in favor of economic liberalization and open markets:

Between 1979 and 1985 the advanced industrial countries turned from the conflict and confusion of the 1970s to financial orthodoxy and economic integration. Starting around 1985, the developing countries left fifty years of import substitution behind and moved aggressively to export, open their markets, privatize, and deregulate. The socialist economies (other than China and Vietnam) came last, after 1990, but they gave up central planning and moved to war capitalism at speeds varying from rapid to breakneck.<sup>10</sup>

Frieden rightly emphasizes that domestic economic liberalism was inextricably intertwined with openness to globalization.

The complex domestic and global forces that led to a shift within the political center, and indeed the center-left, towards market liberalism were such as to elude a single 'site' or institutional or party setting, in which a movement could unite those discontented with or skeptical of such a shift. In these circumstances, the discontents had to coalesce as a new counterculture, inspired by and adapted from that of the 60s protest movements.<sup>11</sup> Since the center-left that betrayed them at least claimed to share their progressive values, the discontents could not make the center-left governments and their advisers and political base the explicit target; plunging into the complexity of the domestic debates over the redesign of the regulatory and welfare state did not work for the discontents; they found that they were alienated – part of an older progressive culture (even if some were younger in years) at odds with the newer technocratic, pragmatic policy culture of the center-left, the latter being more internationalist than nationalist, more inspired by sophisticated managerial and economic ideas than by traditions of worker solidarity and civil protest, more awed and impressed than worried by technology and the increasing velocity, mobility and mutability of modern life. The discontents were deprived of a clear enemy 'within' against which to unite; and, as suggested, they were awkward in inserting themselves into complex and technical debates about governance of the modern economy. Being at odds with the ascendant center-left policy culture, it

<sup>10</sup> Frieden, *supra*, note 2, p. 378.

<sup>11</sup> E. Yuen, 'Introduction' in E. Yuen, G. Katsiaficas and D. B. Rose (eds.), *The Battle of Seattle: The New Challenge to Capitalist Globalization* (New York, Soft Skull Press, 2001), p. 7.

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is understandable that they chose 'globalization' as the target. It could be seen as an impersonal and distant force (allowing one to forget the origins of many of the discontents in conflicts within the progressive movement and center-left parties themselves) and at another level a set of choices by a technocratic elite within secretive and clubbish networks, public and private – an elite with a supposedly coherent market-liberal ideology and an indifference to, if not contempt for, democracy as grassroots politics.<sup>12</sup>

The anti-globalization movement understood itself as defending the traditional (progressive regulatory and social welfare) state against 'globalization'.<sup>13</sup> And there, thus, arose a great and intense debate about whether 'globalization' was good or bad, inevitable or resistible in relation to the ideal of the progressive democratic state. This debate (which was both fueled and frustrated at the same time by the deep ambiguity about what globalization was – a kind of diabolical external force or a set of contestable choices by detestable people) is now, for better or worse, over.

*Why the globalization debate is over (or, at least,  
the first globalization debate)<sup>14</sup>*

There are at least six reasons why 'globalization vs. anti-globalization' turns out not to capture what is at stake.

First of all, the state itself has been reshaped in important ways, partly due to globalization alone and partly for other reasons. Strengthening of the executive power in relation to the legislative is one dimension of this, but even within the executive there is a redistribution of power between different ministries. As Saskia Sassen observes, power has been redistributed within the state towards the executive and, within the executive, towards those agencies most congenial to economic liberal values and agendas (finance ministries) and away from those traditionally responsive to progressive constituencies such as labor ministries.<sup>15</sup> As she

<sup>12</sup> For a look at globalization from the more traditional anti-globalization perspective, see, for example, H. Veltmeyer (ed.), *Globalization and Antiglobalization – Dynamics of Change in the New World Order* (Burlington, VT, Ashgate Publishing Limited, 2004). For an anti-globalization perspective on the Seattle Protests, see Yuen et al., *supra*, note 11.

<sup>13</sup> For a clear illustration of such an understanding, see, for example, M. Barlow and B. Campbell, *Take Back the Nation* (Toronto, Key Porter Books, 1992).

<sup>14</sup> See Howse, 'The End of the Globalization Debate: A Review Essay', *supra*, note 1.

<sup>15</sup> Sassen, *supra*, note 2, p. 168ff.